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OF
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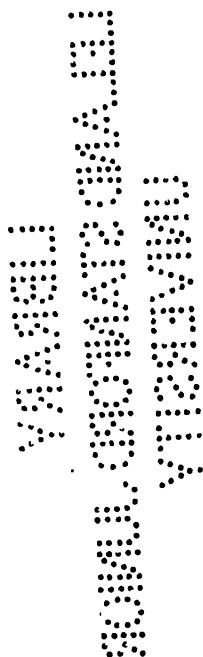
IN
THE HOUSE OF LORDS, THE PRIVY COUNCIL,
THE COURT OF APPEAL,
THE CHANCERY DIVISION, THE KING'S BENCH DIVISION, THE
PROBATE, DIVORCE, AND ADMIRALTY DIVISION,
THE KING'S BENCH DIVISION IN BANKRUPTCY,
THE COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED,
AND THE RAILWAY AND CANAL COMMISSION COURT

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- tion of 300*l.* paid by the debtor's solicitors' own cheque. On the previous day the debtor had given his solicitors, to whom he owed 328*l.*, a charge of 628*l.* on certain property. The solicitor for the respondent company stated that he understood that the money was not the debtor's, but was provided by his friends. Held, that the money in question never formed part of the debtor's general assets, having been advanced by his solicitors out of their own money impressed with a trust for the purpose of being applied towards the discharge of the debtor's indebtedness to the respondent bank. (*Re Drucker; Ex parte The Trustees v. Birmingham District and Counties Banking Company Limited.*) 785
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Removal of action from inferior court—Common law right—Liverpool Court of Passage.—At common law a writ of *certiorari* issues as of right to remove an action from an inferior court to the High Court. The Act 5 Vict. c. lli., s. 2, and the Liverpool Court of Passage Act 1893, s. 5, do not take away this right, but the former Act merely imposes on its exercise the condition that recognisances shall be given unless the judge dispenses with them. The application for the writ is in time, within sect. 3 of the former Act, if it be made within one month of the delivery of the statement of claim. (*Edwards v. Corporation of Liverpool.*) ... 627

CHARITY.

Charitable trust—Voluntary association—Inn of Chancery—Clifford's-inn—Right of members to divide property.—By a deed made in 1618 the premises known as Clifford's-inn were conveyed to certain members of the Society of Clifford's-inn, in consideration of 800*l.*, as trustees to the intent and purpose that the premises should for ever remain and keep the same usual and ancient name of Clifford's-inn, and should for ever thereafter be continued and employed as an Inn of Chancery for the furtherance of the practisers and students of the common laws of the realm, and for the good of the gentlemen of that society, and for the benefit of the Commonwealth as aforesaid, and not otherwise, nor for any other use, intent, or purpose. The Society of Clifford's-inn was a voluntary independent unincorporated society, governed by a council of its members and making its own regulations respecting the election or admission, rights, privileges, payments, obligations, and conduct of its members, and the management of its property; and no person had a right to claim admission as a member. The society did not, in modern times, provide any instruction or education. Held, that the property was not vested in the trustees as private property for the benefit of the members, but was subject to a trust for charitable purposes. (*Smith and others v. Kerr and others.*) ... 477

COAL MINE.

Rules—Enforcement by agent—Breach—Inspector of mines—Dismissal of information—"Person aggrieved."—M., an agent of a coal mine, appointed a duly qualified manager and under-manager. Owing to the negligence of such manager and under-manager, a breach of sect. 49, r. 1, of the Coal Mines Regula-

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tion Act 1887 was committed, but such breach was an occasional irregularity and not one which had been continuous. The justices found that M. had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager, who knew the rules and whose duty it was to carry them out, and that the breach was in no way caused by M. omitting to enforce the rules. They therefore dismissed the information preferred against him under sect. 49. Held, that they were right. An information having been dismissed, the justices on the application of the informant stated a case which purported to be stated under the Summary Jurisdiction Act 1879 only. On an objection taken that the informant was not a "person aggrieved" within sect. 33 of that Act: Held, that it could not be assumed that, because the Act of 1879 was only referred to, the case was not stated under both that Act and the Summary Jurisdiction Act 1887; and, further, that, under the Act of 1887, a person who was a party to the proceedings could apply for a case to be stated. (*Stokes, app. v. Mitcheson, resp.*)... 767

COLONIAL LAW.

Ceylon, law of—Practice—Appeal—Point not raised in court below—Validity of will.—The respondents, the next of kin of a testator, presented a petition for the revocation of the probate of his will on the ground that he was not of sound mind, and that the will was obtained by undue influence. The court of first instance decided in their favour. The executrix appealed, and the Court of Appeal held the will good so far as regarded the personal estate of the testator, but invalid so far as regarded his real estate, which was considerable. No such point had been raised at the trial, at which the will was attacked and defended as a whole. The executrix appealed, but there was no cross-appeal by the next of kin. Held, that the course taken by the Court of Appeal was not correct according to the rule laid down by the House of Lords in *The Tasmania* (63 L.T. Rep. 1; 15 App. Cas. 223), that a Court of Appeal ought only to decide in favour of an appellant on a ground put forward for the first time on the hearing of the appeal if it be satisfied that it has before it beyond all doubt all the facts bearing upon the new contention as completely as if it had been raised at the trial, but, in the absence of a cross-appeal by the next of kin, the decision must be affirmed, but without costs. (*Karunaratne v. Ferdinandus and others.*) ... 329

Hong Kong, law of—Statute of Limitations (Ordinance No. 13 of 1864)—Administrator—Right to sue—Vesting of intestate's property in registrar of court.—H., who carried on business in partnership with the appellants, died intestate in 1880. In 1886 a will was produced, and probate was granted to the executor named therein. In 1896 the probate was revoked on the ground that the alleged will was a forgery. In 1897 letters of administration were granted to the respondent, and in 1899 he brought an action against the appellants for an account. Held, that the Statute of Limitations only began to run from the grant of letters of administration in 1897, and that the action was not barred. By Ordinance No. 8 of 1860 and Ordinance No. 9 of 1870 the property of intestates is vested in the registrar of the Supreme Court until administration is granted, and he is given power to get in and protect the estate, but no power to sue is conferred upon him. Held, that no right of action accrued to the registrar on the death of the intestate which would make the statute run from that date. (*Chan Kit San and another v. Ho Fung Hang*) ... 245

Lower Canada, law of—Law of Quebec—Railway company—Statutory powers—Liability for damage—Fire caused by sparks from engine.—Where a company or corporation is empowered by statute to do a certain thing, they are not liable for damage caused in carrying out their statutory powers in the absence of negligence; and in this

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- respect there is no difference between the law of the Province of Quebec and that of England; and, therefore, Held, that a railway company was not liable for damage resulting from a fire caused by sparks from an engine running on their line in the absence of evidence of negligence in the construction or use of such engine. Their liability is not affected by sect. 92 of the Canadian Railway Act 1888, which refers only to compensation for damage under that Act or the special Act of the company. (Canadian Pacific Railway Company v. Roy.) ... 127
- Natal, law of—Fraud—*Actio doli*—Roman-Dutch law—Prescription.—Where a contract is induced by fraud, and the same fraud operates to deprive the plaintiff of other remedies, an action for deceit will lie by the Roman law, and by the Roman-Dutch law of Natal such action need not be brought within two years. *Semble*, that by the Roman-Dutch law of Natal an *actio doli* will lie in any case of fraud, even though other remedies are open to the plaintiff. (Douglas v. Sander and Co.) ... 633
- New South Wales, law of—Land and Income Tax Assessment Act 1895—Deductions.—A lessee of Crown lands in New South Wales is not entitled to deduct from the taxable amount of his income "a sum representing the fair rental value of the said leasehold premises and improvements thereon" for the current year, as being a "loss, outgoing, or expense actually incurred in the production of his income" within sect. 28, sub-sect. (i.), of the Land and Income Tax Assessment Act 1895. (Commissioners of Taxation v. Antill.) ... 783
- New South Wales, law of—Lands used in connection with charitable purposes—Exemption.—Glebe lands were in part let on building leases, and the remainder were waste lands, not physically occupied or used for any purposes. The rents received for the portions let were applied by the respondents, as trustees, for charitable purposes connected with a church. Held, that the lands were not "occupied or used exclusively for or in connection with . . . public charitable purposes," or a church, within the meaning of sect. 11, sub-sect. (v.), of the Land and Income Tax Assessment Act of 1895 so as to be exempt from land tax. (Commissioners of Taxation v. Trustees of St. Mark's Glebe.) ... 629
- New Zealand, law of—Public Works Act 1894—Land taken for public purposes—Compensation—Omission to challenge amount of claim—Power of court to grant relief.—Under the New Zealand Public Works Act 1894 (58 Vict. No. 42), if land is required for public purposes, the Governor may, after the preliminary requirements of the Act have been complied with, declare by proclamation that the land is taken for the public work therein named, and the land thereupon becomes absolutely vested in the local authority. Any person claiming compensation may serve a notice of the claim upon the local authority, and "if the respondent does not, within sixty days after receiving such claim, give notice in writing to the claimant that he does not admit it the claimant may file a copy of his claim . . . in the Supreme Court; and such claim when so filed shall be deemed to be, and shall have the effect of, an award filed in the Supreme Court, and may be enforced in the manner provided": (sect. 44). In a case in which the local authority had by inadvertence omitted to challenge a claim within the period prescribed by the Act: Held, that the court had no power to give them relief against the statutory consequences of such omission. (Mayor of Wellington v. Johnston and another; Same v. Lloyd and another.) ... 538
- COMPANY.
- Actual and estimated losses of capital—Preference shareholders having no votes—Balances to credit of profit and loss accounts—Whether available for restoration of such losses or for payment of dividends to such shareholders.—Preference shareholders created by special resolution claimed dividends and arrears of dividends on their shares out of profits of the company in the years 1898-1900. The profit for 1898 had been carried to reserve or carried forward. That for 1899 had been carried forward pending the decision on an application for reduction of capital, which was refused on the ground that these sums were applicable to make good the loss of capital, partly actual and partly estimated, which the company alleged had been sustained. The profit for 1900 was provisionally carried forward. Held, (1), on the construction of the articles and special resolutions, that the resolutions did not alter the articles, and that these conferred no further rights than a priority in the payment of dividends; (2), that there were no profits out of which payment could be made. That that depended on the circumstances of each case, the nature of the company, and the evidence of competent witnesses. Fixed capital might in some cases be sunk, while circulating capital must be kept up. That the actual loss was of this kind, and, as to the estimated loss, the plaintiffs had failed to show that it was fixed capital which in a company of this nature might be sunk. In no case had the court compelled directors to pay dividends when they had expressed an opinion that the state of the accounts did not admit of such payment. That the action failed therefore, and would be dismissed with costs. (Bond v. Barrow Hematite Steel Company Limited.) ... 10
- Articles of association—Capital—Minimum subscription—Mistake—Rectification by court—Jurisdiction.—Under its ordinary jurisdiction to rectify written instruments the court has no power to rectify a mistake in the articles of association of a company which have been executed by the seven signatories to the memorandum, although no one else has come in under the articles and no shares have been allotted. The proper mode of rectifying a mistake is by sect. 50 of the Companies Act 1862, which has only a statutory effect. (Evans v. Chapman.) ... 381
- Debentures—Charge on "all property and effects"—Goodwill—Appointment of receiver and manager—Jurisdiction.—Debentures issued by a limited company charged "all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever both present and future." There was no express mention of goodwill or business in the charge. Upon motion to appoint a receiver and manager of the business and undertaking of the company: Held, that the words "property and effects" were sufficient to cover goodwill and that the court had therefore jurisdiction to appoint a receiver and manager of the business. (Re Leas Hotel Company Limited; Salter v. Leas Hotel Company Limited.) ... 182
- Debentures—One series—Two separate issues—Registration—Creation.—On the 1st Sept. 1900 the seal of the S. G. Company was affixed to each of a series of twenty debentures. On the 24th Sept. 1900 ten of these debentures were issued, and the remaining ten on the 5th Jan. 1901. Held, that these debentures were not required to be registered under sect. 14 of the Companies Act 1900. (Re Spiral Globe Limited; Watson v. Spiral Globe Limited.) ... 499
- Debentures—Registration—Extension of time after winding-up.—The directors of the company, which was incorporated in 1898, in November of that year passed a resolution that the sum of £5000/ should be raised by the issue of fifty-five debentures of 100/ each, to rank *pari passu* and charged upon the whole of the company's property and assets, including its uncalled capital. Before the 1st Jan. 1901 (when the Companies Act 1900 came into operation) fifty of the debentures were issued, and in July 1901 the company issued the remaining five debentures to the applicant. These debentures were not registered. A solicitor consulted by the applicant advised him that, as the resolution was passed before the commencement of the Act nothing required to be registered under the Act. In Oct. 1901 the company resolved or

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- a voluntary winding-up. In Nov. 1901 the applicant applied under sect. 15 of the Act for an order extending the time for registering the debentures under sect. 14. The value of the company's assets was stated to be about 5030*l.*, but certain costs had to be provided for, and there were many unsecured creditors. Held, that the omission to register was due to a "sufficient cause" within sect. 15 of the Act of 1900; that if an order for extension of time was made, it would contain the words saving the rights of parties acquired prior to actual registration as in *Re Joplin Brewery Company Limited* (85 L. T. Rep. 411; (1902) 1 Ch. 79), that an order in such a form after winding-up would be useless, and that the application must be refused. (*Re S. Abrahams and Sons Limited.*) ... 290
- Directors—Agreement as to voting—*Ultra vires*.**—A brewer converted his business into a company, and at his death a large part of his property consisted of shares in the brewery company. On his death his executors required money, and approached G., who insisted upon the appointment of independent directors. By an agreement dated the 26th July 1898 the four executors agreed with G. to take all steps and do all things within their power which might be required for obtaining the election of A. G. and T. W. as directors, and at all times thereafter to vote for and not against their re-election as directors upon their retirement by rotation, and not to vote for their removal. The majority of the shares stood in the names of the executors. On the re-election of directors some of the executors voted on a show of hands against the re-election of W. A motion was made for an injunction to restrain the executors, their proxies, and agents, from voting at a poll to be taken on the 28th Jan. 1902 against the resolution for the re-election of W. as a director or from otherwise voting contrary to the agreement of the 26th July 1898. One of the executors was willing to vote in accordance with the agreement, but the other three submitted (1) that the agreement was *ultra vires*, and a delegation of their powers as executors; (2) that such an agreement was inconsistent with their duty as directors of the company, and ought not to be enforced; (3) that if the injunction was granted W. would be a director for three years, although a different decision might be arrived at when the action was tried. Held, (1) that the agreement did not postpone the realisation of the shares, and that it was within the powers of the executors; (2) that it was not inconsistent with their duty as directors; (3) that as W. agreed to give an undertaking to retire if the court at the trial so directed, the injunction must be granted. (*Greenwell v. Porter.*) ... 220
- Directors—Remuneration—Appointment of directors as receivers and managers at salary.**—Two of the directors of a railway company were appointed, in a debenture-holder's action, receivers and managers of the railway undertaking of the company at a salary. Held, that in the winding-up of the company each was entitled to prove for the whole of his remuneration as a director under the articles. (*Re South-Western of Venezuela (Barquisimeto) Railway Company Limited.*) ... 321
- Directors' remuneration—Power of directors to postpone payment—Construction of articles of association.**—The articles of association of a limited company provided that the directors should be allowed to receive as a remuneration for their services, and there should be allowed to them out of the funds of the company, the sum of 200*l.* per annum each, to be exclusive of the remuneration of any managing director, "and to be paid at such times as they may determine." Held, that a resolution of the board of directors was a condition precedent to the right of any one of them to claim any remuneration. (*Caridad Copper Mining Company Limited v. Swallow.*) ... 699
- Illegality—Unregistered association of more than twenty members—Right to maintain action.**—The trustees of an unregistered association of more than twenty persons formed for mutual insurance against death and accident sued the late treasurer for moneys of the society which he had converted to his own use. Held, that the society was not rendered illegal by the Companies Act 1862 for want of registration, and that the plaintiffs were not precluded from maintaining the action by reason of non-registration under that Act or the Friendly Societies Act 1896. (*Marrs and others v. Thompson.*) ... 759
- Memorandum of association—Primary object—*Ultra vires*—Injunction.**—A company was incorporated with the object of acquiring and taking over as a going concern the undertaking, assets, and liabilities of a gold mining company in Mysore. The memorandum contained clauses giving the company power to acquire property and concessions, to promote a company to take over property and concessions, and to take the purchase money in shares of any company so promoted. A clause provided "that the objects specified in each paragraph of this clause shall be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company." The company proposed to acquire a gold-mining property on the west coast of Africa, and a shareholder applied for an injunction to restrain the company from so doing. Held, that the primary object of the company was to take over the undertaking in Mysore, and that the proposed course was *ultra vires*, and must be restrained by injunction. (*Stephens v. Mysore Reefs (Kangundy) Company Limited.*) ... 221
- Name—New company proposed to be registered under similar name — Injunction.**—Aerators Limited was a company established for the purpose of working a certain patent for the instantaneous automatic aeration of liquids. The defendants were the signatories to the memorandum and articles of association of a proposed new company to be known as Automatic Aerator Patents Limited. The plaintiff company moved for an injunction to restrain the defendants from registering that title as being calculated to deceive, and rested their case largely on the fact that "Aerators" was generally known as a company that possessed the principle of instantaneous automatic aeration—that was the plaintiff company—and that the adoption of that word by the defendants was, therefore, calculated to deceive. The defendants contended that the system they proposed to adopt was entirely different from that of the plaintiffs, and could not be confused with their patent. Held, that there was no evidence of probability of deception, and that the action was, therefore, an attempt to monopolise a word in ordinary use, and must be dismissed with costs. (*Aerators Limited v. Tollit.*) ... 631
- Practice—Debentures ranking *pari passu*—Omission to register part of issue—Extension of time—Protection of creditors—Rights of debenture holders *inter se*—Form of order.**—Where a company resolved to issue a certain amount of debentures to rank *pari passu*, and a part only were issued before the Companies Act 1900 came into force, and the remainder were issued afterwards, but were not registered in due time, the court extended the time for registration under sect. 15 of the Act, and directed that the order should contain such provisions as were necessary to make both sets of debentures *inter se* rank *pari passu*. Form of order. Whether the rights of any creditor who has not actually issued execution ought to displace the rights of those debenture-holders whose debentures were not registered until after his debt had accrued, *quære*. (*Re J. C. Johnson and Co. Limited.*) ... 791
- Reduction of capital—Cancellation of lost capital.**—Losses to be borne in proportion to capital paid up —Different amounts paid up on same class of shares—Other shares not proposed to be affected. —The capital of a company was 1,000,000*l.*, consisting of 2000 deferred shares of 1*l.* each issued to the subscribers to the memorandum as fully paid, and 99,800 ordinary shares of 10*l.* each, of which

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- 37,712 had been issued, 1123 to the vendors as paid up to the amount of £l. and 36,589 to other persons as paid up to the amount of 2l. The articles provided that if the company be wound-up and the assets be insufficient to repay the paid-up capital, the assets should be distributed so that the losses should be borne in proportion to the capital paid up or which ought to have been paid up at the commencement of the winding-up. The company now petitioned to reduce the ordinary shares to 8l. 10s. each, credited with 3l. 10s. where 5l. had been paid, and 10s. where 2l. had been paid, the deferred shares to be unaffected. This was opposed by certain shareholders. Held, that the duty of the court was to see that the losses were divided between the different classes of shares in the same manner as in a winding-up; that the articles provided that in such winding-up losses must be borne in proportion to the amount of capital paid up; that the proposed reduction was not in accordance with this principle, and must therefore be refused. (*Re Credit Assurance and Guarantee Corporation.*) ... 650
- Reduction of capital—Scheme to increase capital—Illegality.**—A company desirous of extinguishing its deferred shares petitioned the court for a reduction of its capital by the amount of its deferred shares, pursuant to a scheme supported by all the shareholders for increasing its ordinary share capital and allotting to each deferred shareholder 100 ordinary shares for each deferred share. The petition was supported by all the shareholders and there were no creditors, the only debts of the company being for its current expenses. Held, that, according to the case of *British and American Trustee and Finance Corporation v. Cuper* (70 L. T. Rep. 882; (1894) A. C. 399), the court must look at the scheme as a whole, which involved not reduction, but increase of capital and was illegal; and the petition was refused. (*Re Development Company of Central and West Africa Limited.*) ... 323
- Register of shareholders—Trustee in bankruptcy of member—Form of share certificate—Memorandum of claim to lien—Right of trustee to registration and certificate.**—P., the trustee in bankruptcy of N., applied to be placed on the register of members of W. K. and Son Limited, in respect of 4000 ordinary shares of that company numbered 1 to 4000 inclusive, in the place of N., in whose name the shares were standing. The company did not decline to register him, but claimed the right to enter upon the register in respect of the 4000 shares a memorandum, similar to a memorandum which they proposed to insert in the new certificate to be granted, to the following effect: "The shares comprised in this certificate are a portion of 10,000 shares numbered 1 to 10,000 inclusive, on all of which the company claim a lien under the company's articles of association for the debts, liabilities, and engagements of the said "P. "to the company." The certificate they proposed to give was in the ordinary form; it certified that P. was the registered holder of the shares in question, "in the above-named company subject to the memorandum and articles of association thereof, and that for each of the said shares the full amount of 1l. has been paid up." Then followed a memorandum that "no transfer of any portion of the shares comprised in this certificate will be registered until the certificate has been delivered at the company's office," and then to the effect above set out. P. contended that he was entitled to be entered on the register and to have a certificate, without the addition of the special memorandum proposed by the company. Held, that it being in no way necessary for the protection of the company that this special memorandum should be put upon the register of shareholders, or that a certificate should be issued in this special form, the register ought to be rectified as proposed by striking out any reference to the specific claim on the register, and that the certificate ought to follow the form of the register. (*Re W. Key and Son Limited.*) ... 374
- Shares—Blank transfer—Registration—Articles of association—Prior equitable title.**—H. C. I. held certain shares in a company in trust for his wife, L. E. I., and, without her consent or knowledge, executed a blank transfer of the shares, and gave the same to G. J. H. as security for a loan. On the 23rd Nov. 1901 G. J. H. sent the transfer, which he had filled in with his own name, and the certificate of the shares, to the offices of the company for registration. On the 26th Nov. the managing director of the company saw H. C. I., who said that G. J. H. had no right to transfer the shares, and asked for postponement of the registration. On the 27th Nov. a meeting of the directors was held, and these circumstances mentioned to the directors; but the transfer was not registered. On the same day L. E. I. commenced an action for an injunction to restrain the registration. The articles of association of the company provided that every instrument of transfer should be left at the office for registration accompanied by the certificate of the shares to be transferred, and such other evidence as the company might require to prove the title of the transferor to his right to transfer the shares. Held, that G. J. H. had not on the 27th Nov. a "present, absolute, and unconditional" right to the registration of the transfer, and that therefore the prior equitable title of L. E. I. must prevail. (*Ireland v. Hart.*) ... 385
- Shares—Signatory—Misrepresentation by promotor—Agreement to take shares—Rescission.**—A subscriber to the memorandum of association of a company cannot obtain rescission of the contract by him to take shares on the ground of misrepresentations made to him by a promotor of the company. (*Re Metals Constituents Limited.*) ... 291
- Shares—Surrender to company—Invalidity—Release of shareholders' liability—Rectification of register—Lapse of time.**—Since *Trevor v. Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409) a surrender of its shares to a company which has the effect of reducing its capital can only be supported under circumstances which would justify a forfeiture of the shares. In 1893 certain directors of the defendant company surrendered shares to the company, in each of which the sum of 1l. was still unpaid, the company releasing the directors from all further liability in respect of them. In 1900 the directors commenced an action, claiming a declaration that the surrender was *ultra vires* and inoperative; and also that the register of shareholders might be rectified by inserting the names of the plaintiffs as shareholders in respect of the shares surrendered by them. The surrendered shares had not been reissued or in any way dealt with by the company. Held, that the transaction was a purchase of its own shares by the company within *Trevor v. Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409), and the surrender was therefore void. Held also, that sect. 35 of the Companies Act 1862 did not apply, and that the plaintiffs never having ceased to be legal owners of the shares, their names must be restored to the register of shareholders. (*Bellerby v. Rowland and Marwood's Steamship Company Limited.*) ... 671
- WINDING-UP.**
- Examination of witness—Presence of solicitor of witness—Refusal to undertake not to disclose evidence—Privilege as to documents.**—At the examination of a witness, under sect. 115 of the Companies Act 1862, the registrar has the right, in a proper case, to require an undertaking from the solicitor of the witness to treat the whole matter as private; to use the information obtained from the witness's answers for the purposes of re-examination only; and to communicate such information to no other person or persons whatsoever except his counsel. In the course of the examination of a solicitor, upon the application of the liquidator of a company, under sect. 115 of the Companies Act 1862, the witness claimed privilege as to certain documents in his possession alleged to belong to the liquidator; and he declined to answer questions as to from whom he received

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the same. Held, that the claim of privilege was properly made, and that the witness need not produce the documents. (*Re London and Northern Bank Limited; Ex parte Haddock.*) ... 430

Profits of last year of working—No dividend declared before winding-up—Surplus assets—Previous loss of capital—Rights of preference shareholders.—By the memorandum of association of C.'s Oil Company Limited it was provided (the capital being divided into preference and ordinary shares) that the preference shareholders should be entitled to a fixed cumulative preferential dividend of 5 per cent. per annum on the capital paid up thereon, subject to the company's articles of association, which provided that "in the event of the winding-up of the company the surplus assets shall be distributed between the holders of preference and ordinary shares according to the amount paid up thereon"; "that the profits of the company from time to time available for dividend shall ... be applicable: First, to the payment of the fixed cumulative preferential dividend on the preference shares in the ordinary capital. Secondly, the surplus shall be applicable to the payment of dividends on the other shares in proportion to the capital paid up thereon, but the whole or any part thereof may be carried to reserve or otherwise dealt with as the directors, with the sanction of the company in general meeting, may from time to time determine"; that the company in general meeting might declare a dividend to be paid to the members; that no dividend should be payable except out of the profits arising from the business of the company; and that if the company should be wound-up and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should, subject to the earlier provision as to distribution, be distributed so that as nearly as might be the losses should be borne by contributories in proportion to the capital paid up, or which ought to have been paid up, on the shares in respect of which they were contributories at the commencement of the winding-up. But this clause was to be without prejudice to the rights of holders of shares issued upon special conditions. The assets of the company, exclusive of the profits made in the last year of its working, had been sold to an agent for a new company. No profits had been previously made since the year 1896 (except about 25% in the year 1899), and no dividend had been paid to the preference shareholders; and at the date of the contract for sale there was a debit of over 4000% standing in the books of the company for such losses. The preference shareholders now contended that the amount of the profits of the last year's working should be distributed among them as dividend. Held, that, no dividend having been recommended by the directors or declared by the company in general meeting, the preference shareholders' claim failed, and those profits must be divided as capital among all the shareholders rateably. (*Re Crichton's Oil Company Limited.*)... 787

CONSPIRACY.

Joint indictment—Plea of guilty by one defendant—Acquittal of co-defendant—Withdrawal of plea of guilty—Practice—Stating case notwithstanding plea of guilty.—One person cannot be convicted of conspiracy by himself. If on a joint indictment for conspiracy one defendant pleads "guilty," but his co-defendants plead "not guilty" and are acquitted, the defendant who pleaded guilty must be allowed to withdraw his plea and must also be acquitted. The court has jurisdiction to consider a case stated where a defendant has pleaded guilty. (*Rex v. Plummer.*) ... 836

CONTRACT.

Building contract—Penalties—Building owner to make allowances for delay—Final decision—Default by building owner—Exclusive jurisdiction of building owner.—By a building contract certain matters causing delay and "other causes beyond

the contractor's control" were to be submitted to the board of directors of the owners of the building, who were to "adjudicate thereon and make due allowance therefor if necessary, and their decision shall be final." Held, that the exclusive jurisdiction of the board did not extend to delay caused by interference by the building owners or their architect with the conduct of the works, by default in not giving the contractors possession of the premises, and in not providing plans and drawings in due time; and so, such interference and defaults being made out, the building owners could not recover penalties. (*Wells v. Army and Navy Co-operative Society Limited.*) ... 764

Building ship—Delay—Allowances—Circumstances beyond builders' control.—A contract for building a ship provided that due allowance should be made for delays through certain causes "or other circumstances beyond the builders' control." It was within the contemplation of the parties that the ship should be commenced as soon as a suitable berth became vacant, and the first berth which became vacant was one in which another ship was being built, and delay was caused in the completion of this ship by the same kind of causes which were provided for in the contract relating to the ship in question. Held, that allowances were properly made for delay in building the ship in the contract owing to the delay in completing the former vessel. (*Re An Arbitration between Lockie and Craggs and Son.*) ... 388.

Sale of goods—Stipulation—Condition precedent.—"Specification to be given at the beginning of May"—Delay—Repudiation.—The defendants agreed to sell and deliver to the plaintiffs 1000 tons of iron. By the sale note it was provided: "Delivered . . . cost and freight Japan, direct port, specification to be given in the beginning of May. Time of shipping May and June from Antwerp." It was known by both parties that the specification had to be sent from Japan, and, in fact, the specification was given in various parts between the 12th and 15th May. All the iron could be manufactured by the defendants in eight days, and opportunities of shipment in May and June were frequent from Antwerp to Japan. Held, that "specification to be given in the beginning of May" was not a condition precedent, a breach of which entitled the defendants to repudiate the contract, but that, even if it was, the giving of a specification between May 12 and 15 was sufficient compliance. Whether or not a term of a contract is a condition precedent, must be collected from the provisions of the instrument creating the contract and the circumstances legally admissible in evidence with reference to which it is to be construed. (*Kidston and Co. v. Monceau Ironworks Company.*) ... 556

Setting aside—Undue pressure—Deed executed under undue pressure—Right to set aside—Wrongful dismissal.—In an action for balance of salary and for wrongful dismissal brought by the plaintiff, who had been engaged by the defendants as manager of their music-hall, the defendants set up as a bar to the claim an arrangement which was come to in the course of a discussion in which the plaintiff was asked to explain some alleged irregularities in his accounts, and which arrangement was embodied in a deed executed by the plaintiff under which he was to send in his resignation and was to accept in settlement of cross claims between him and the defendants a certain sum for salary, and was to sign the deed of release. The plaintiff replied that he was induced to execute the deed by the defendants' threat unlawfully to imprison him, and that he executed it when overwhelmed by the threat, and that he gave no real or free consent to its execution. The jury having negatived the threats by the defendants of criminal proceedings or imprisonment, but having found that the plaintiff was induced to make the agreement by undue pressure exercised by the defendants to force him to make it: Held, that the undue

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pressure so found was not sufficient in law to entitle the plaintiff to set aside the arrangement or the deed which embodied it, and to fall back upon his original claims; and, further, that as the plaintiff had tendered his resignation, which was accepted, there was no wrongful dismissal. (*Barnes v. Richards and others.*) ... 231
(See VENDOR AND PURCHASER.)

COPYRIGHT.

Artistic production—Toys—Models of soldiers—Stamping proprietor's name on models—Date of publication.—Metal models of mounted yeomen produced and sold as toys are, where there is evidence that they are anatomically and technically correct and display artistic skill and merit on the part of the producer, within the protection of the Sculpture Copyright Act 1814. The proviso in sect. 1 as to stamping such models with the proprietor's name is satisfied by the insertion of the name of one of the partners of the firm of proprietors, if he himself be the producer of the model. The effect of the requirement in the same proviso as to the date of publication is that the date must not be misleading; and the insertion of a date upon the cast a few days earlier than the absolute date of putting forth and publication is no contravention of the proviso. (*Britain and others v. Hanks Brothers and Co.*) ... 765

Book—Infringement—Commentator—Originality—Common sources of information—Injunction.—The plaintiffs were the registered proprietors of the copyright in an annotated edition of one of Shakespeare's plays, edited by T. P., and published in 1893. In March 1900 the defendants G. and Sons published an annotated edition of the same play, edited by the defendant F. M. The plaintiffs alleged that the book published by the defendants G. and Sons was a colourable imitation of the plaintiffs' book, and an infringement of their copyright therein in respect to general arrangement, sketches of character, literary notes, and quotations. Held, that the plaintiffs' book was a subject-matter of copyright; that the use which the defendant F. M. had made of the plaintiffs' book was illegitimate and an infringement of their copyright therein; and that therefore they were entitled to an injunction. (*Moffatt and Paige Limited v. George Gill and Sons Limited and Francis Marshall.*) ... 465

Infringement—Injunction—"Print or cause to be printed"—Agent.—The plaintiffs were the proprietors and publishers of a directory of merchants, manufacturers, and shippers. The defendant G. published a book entitled *L.'s Diary for Merchants, Shippers, and Foreign Buyers*, which contained a list of colonial and foreign importers and also of export commission merchants. The words "Printed at L.'s Royal Exchange, London," appeared on the title-page. An arrangement had been entered into between G. and L.'s by which it was arranged that the book should be published in connection with L.'s, that they should print it, and should receive a subsidy for the use of their name together with certain commission. L.'s wrote to their agents requesting them to give certain information required for the book. L.'s began the printing, but finding they could not complete it in time it was arranged that G. should get some of it done elsewhere. It appeared that certain lists in the part not printed by L.'s were compiled by copying the names and particulars contained in the plaintiffs' directory. The plaintiffs brought an action for an injunction restraining G. and L.'s from publishing any book containing these lists. G. did not appear, and L.'s had never sold any copies of the book and had no intention of doing so. Held, that there was no partnership between G. and L.'s, and the work done by the printer under G.'s orders could not be considered as work done by an agent of L.'s; and, therefore, L.'s had neither printed or "caused" the pirated portion to be printed within sect. 15 of the Copyright Act 1842, and were not liable

under that section. (*Kelly's Directories Limited v. Gavin and Lloyd's.*) ... 393

COSTS.

Conveyancing—Taxation—Solicitor mortgagee—Negotiation fee.—A solicitor practising alone and not in partnership, acting for a client desirous of selling property mortgaged to a bank, advanced out of his own moneys to his client the sum required to pay off the mortgage on the property, which was then reconveyed to the client, who executed a mortgage of the property to the solicitor to secure his advance. In his bill of costs delivered to his client the solicitor charged the scale fee for negotiating the loan, which fee was disallowed on taxation on the ground that the solicitor making the advance could not negotiate with himself. On a summons by the solicitor to vary the taxing master's certificate: Held, that sect. 2 of the Mortgagees' Legal Costs Act 1895 expressly provides for such a case, and entitles a solicitor practising alone to charge the scale fee for negotiating a loan to his client where the solicitor himself advances the sum secured by the mortgage. (*Re Norris.*) ... 46

Lease—Underlease—Forfeiture of lease—Vesting of property in underlessee—Inquiry.—Where a lease became forfeited by virtue of a proviso contained therein, and the court, acting under sect. 4 of the Conveyancing and Law of Property Act 1892, made an order vesting the property in the underlessee, the underlessee was ordered to pay the costs of the inquiry that was necessary to determine the new rent. (*Ewart v. Fryer.*) ... 676
(See CROWN—PRACTICE.)

COUNSEL.

Counsel retained in action—Authority to compromise—Agreement to refer to arbitration—Express limitation of authority—Counsel exceeding his authority—Application by client to set aside—Order to refer.—Counsel retained in an action has an apparent general authority to agree to an order referring the matters in dispute in the action to arbitration, and the client is bound by such an agreement although contrary to his express limitation of his counsel's authority, if that limitation of authority was not made known to the other party; and the court will not set aside the order to refer on the application of the client. (*Neale v. Gordon-Lennox.*) ... 574

COUNTY COURT.

Practice—Costs—Judge's discretion as to costs—Power to order successful defendant to pay plaintiff's costs.—A County Court judge has no power, under sect. 113 of the County Courts Act 1888 or otherwise, to order a successful defendant to pay the plaintiff's costs. (*Andrew v. Grove.*) ... 729

Practice—Costs—Remitted action—Payment by defendant to plaintiff out of court—Claim reduced below 20l.—An action of contract being brought in the High Court for over 20l., was remitted to the County Court. After the order to remit, but before the record was lodged with the registrar of the County Court, the defendants paid to the plaintiffs personally several sums which reduced the amount due on the contract to a sum less than 20l. The plaintiffs in their particulars gave credit for these sums and obtained judgment for the balance due. Held (Darling, J. dissenting), that the plaintiffs were entitled to costs on the footing of their having recovered over 20l. in the action, and that sect. 116 of the County Courts Act did not apply. (*Pearce and others v. Bolton and Sharp.*) 530.

CRIMINAL LAW.

Evidence—Admissibility—Statement of affairs in bankruptcy—Compulsory examination—Misappropriation by trustee.—The statement of affairs made by a bankrupt in compliance with sect. 16 of the Bankruptcy Act 1883 and rule 217 is not a statement made in a compulsory examination within

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| the meaning of sect 27 (2) of the Bankruptcy Act 1890. It is therefore admissible in evidence against a bankrupt charged with appropriating trust moneys to his own use. (<i>Rex v. Pike</i> .) | 205 | of any offence punishable on indictment or summary conviction. On the trial of a person charged with an offence under this section, the proper practice is to prove the convictions as part of the case for the prosecution. If the defendant having claimed to be tried by a jury is indicted, the fact of the previous conviction is to be disclosed to the jury. (<i>Rex v. Penfold and Edwards</i> .) | 204 |
| Fraudulent misappropriation of funds—Evidence.—The appellant, a director of a banking company, opened a "trust account" irregularly, and without the consent of the board, and had from time to time considerable overdrafts on the account. The bank stopped payment, and at that time a large sum was due from the appellant on such overdrafts, but he was solvent at the time such overdrafts were made. Held, that under the circumstances there was no evidence of fraudulent misappropriation of the funds of the bank. (<i>Nelson v. The King</i> .) | 164 | CROWN. | |
| Larceny—Fish taken at sea—Possession of owner of smack—Skipper of smack.—Fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny. A., who was employed as skipper of a smack used for trawling outside territorial waters, during the course of a fishing voyage put into port, sold the fish he had taken, and appropriated the proceeds to his own use. Held, that he was properly convicted of larceny. (<i>Rex v. William Mallison</i> .) | 600 | Costs— <i>Mandamus</i> —Prerogative writ of—Right and liability of Crown to costs—Jurisdiction of court to give costs to or against Crown on argument of rule for <i>mandamus</i> .—The court has no jurisdiction to give costs either to or against the Crown, when the Crown appears upon the argument of a rule for a prerogative writ of <i>mandamus</i> . The rule of the common law that the Crown "never paid nor received costs" has not been altered with regard to the prerogative writ of <i>mandamus</i> , either by the Act 1 Will. 4, c. 21, s. 6, or by the existing rules of the Supreme Court. (<i>Rex v. Archbishop of Canterbury; Re Gore; Ex parte Cobham and Garbett, No. 2</i> .) | 450 |
| Practice—Evidence—Cross-examination of prisoner by co-defendant—Evidence of person charged.—A person charged with an offence is made, by the Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1, a competent witness for the defence. The effect of this is to make him, if he gives evidence, an ordinary witness in the case, and therefore liable to be cross-examined on behalf of a person jointly indicted with him. (<i>Rex v. Frederick Walter Hadwen and Alfred Ingham</i> .) | 601 | Intestate— <i>Bona vacantia</i> —Domicil— <i>Mobilia sequuntur personam</i> —International law.—Petition by the Treasury Solicitor, as administrator of the personal estate of a domiciled Austrian who died intestate in 1883 without leaving a widow or next of kin, for payment out of court of a sum of Consols belonging to the intestate. The Crown claimed the property as <i>bona vacantia</i> . The Austrian Government claimed the property, relying on the maxim <i>Mobilia sequuntur personam</i> . Held, that the Crown took the property as <i>bona vacantia</i> in exercise of its sovereign right; the maxim <i>Mobilia sequuntur personam</i> did not apply, as there was no <i>persona</i> . (<i>Re Barnett's Trusts</i> .) | 346 |
| Practice—Evidence for jury—Leave to appeal.—In a criminal case where there is evidence for the jury in support of a conviction the Judicial Committee will not give leave to appeal. (<i>Ex parte Aldred</i> .) | 163 | CRUELTY TO ANIMALS. | |
| Practice—Pleading—Indictment—Necessary averment—Negating proviso—Married woman—Larceny by wife of husband's goods.—Where a statute by which an offence is created contains a proviso which affords a defence to proceedings taken in respect of the offence, it is not necessary for the prosecution to negative the proviso, unless the proviso is in the nature of an exception so incorporated, directly or by reference, with the enacting clause that the enacting clause cannot be read without the qualification introduced by the proviso. A married woman was charged on an indictment with larceny of her husband's goods. It was not alleged in the indictment that she was the wife of the prosecutor, nor that the goods were taken by her when leaving or deserting her husband. It was objected that the indictment was bad because it did not allege circumstances which showed that the case did not come within the proviso to sect. 12 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75)—applied to wives by sect 16—which enacts that no criminal proceedings shall be taken unless under the circumstances mentioned. Held, on a case stated, that as the proviso to sect. 12 affords a defence merely, stating circumstances which may be pleaded in answer to an indictment founded on the section, it is not necessary that these circumstances should be negated in the indictment. (<i>Rex v. James</i> .) | 202 | Horse—Working in an unfit state—Guilty knowledge.—The appellant, who was charged with causing two horses to be worked in an unfit state, carried on business in London, and the two horses in question were under the charge of one L. at a farm at C., where the appellant resided. He was practically always away, and did not see the horses above once a fortnight, they being under the entire management of L. There was some evidence that the appellant knew that the horses had been out of condition at some time, but no evidence was given as to the date when that was, or how long it was before the alleged improper working. There was no evidence that the appellant had interfered with L., had given any order for the horses to be worked, or knew of their condition on the day in question. On the 2nd May 1901 the horses were being worked in an unfit state. The justices convicted the appellant. Held, that there was a failure on the part of the prosecution to give any evidence of guilty knowledge with regard to the offence in question. (<i>Greenwood, app. v. Backhouse, resp.</i>) | 566 |
| Practice—Procedure—Evidence—Ingredients of offence—Previous conviction—Claim to be tried by jury—Trial by jury.—Every ingredient of an offence charged in an indictment must be proved before the jury. By sect. 7 of the Prevention of Crimes Act 1871 a person who has been convicted on an indictment for a crime is guilty of an offence under that Act if (<i>inter alia</i>) he is found in any place under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission | | CUSTOMS. | |
| | | (See <i>REVENUE</i> .) | |
| | | DEED OF ARRANGEMENT. | |
| | | Fraudulent conveyance—Registration—Affidavit—Exclusion of creditor from operation of deed—Omission of creditor's name and address in affidavit on registration—Validity of deed.—A deed of arrangement is not necessarily void under sect. 5 of the Deeds of Arrangement Act 1887 merely by reason of the intentional omission of the name and address of a particular creditor in the affidavit required upon the registration of the deed under sect. 6, sub-sect. 1, of the Act, and because it reserves some benefit to the debtor. A deed of arrangement, being an assignment by a debtor of his property to a trustee for the benefit of creditors, is not necessarily void under 13 Eliz. c. 5 by reason only of the intentional exclusion of a particular creditor from the operation of the | |

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deed. (*Maskelyne and Cooke v. Smith; Palmer, Claimant.*) ... 832

DIVORCE.

(See HUSBAND AND WIFE.)

DONATIO MORTIS CAUSA.

Certificates of building society shares—Post Office Savings Bank deposit book—Document embodying terms of contract.—T. W., when lying ill in hospital in March 1901, gave H. M., to whom he was engaged to be married, the key of a drawer in his bedroom in which the certificates for eight investment shares in a building society, and a Post Office Savings Bank book showing a deposit of about 130*l.*, were kept, and told her to keep them. H. M. subsequently offered them with the key to T. W., who said he wished her to keep them, and later also stated that he wished, in the event of his death, all his property, with one small sum excepted, to be hers. T. W. died on the 1st May 1901, and letters of administration were taken out to his estate by B. This was an application by B. to have it decided whether under the circumstances H. M. was entitled to the shares and the money standing to the deceased's credit in the Post Office Savings Bank, which she now claimed. Held, that the shares were not the proper subject-matter of a *donatio mortis causa*, but that the Savings Bank Book was capable of being well given so as to create such a gift. (*Re Weston; Bartholomew v. Menzies.*) ... 551

Cheque—Presented but not paid in donor's lifetime—Donor's account at bank overdrawn—Validity.—The delivery of the donor's cheque on his bankers, which was presented by the donee though not paid, either actually or constructively, before the donor's death: Held, not a good *donatio mortis causa*. (*Re Beaumont; Beaumont v. Ewbank.*) 410

Delivery of a cheque accompanied by a written request that a third party shall pay same to donee after decease of donor—Gift declared invalid.—An invalid lady with the help of a friend sent three cheques, each for the sum of 100*l.*, made out to three different persons, to another friend of hers with a letter couched in the following terms: "Miss Davis wishes me to send you the three inclosed cheques for you to keep for her, and in case of her death, and then see the said persons have the money, &c." Miss D. died upon the following day. Upon an originating summons taken out by the executor to ascertain whether he was justified in paying the three sums of 100*l.*: Held, that there had been no valid *donatio mortis causa*, and that the executor was not at liberty to honour the cheques. (*Re Davis; Griffith v. Davis.*) ... 889

EASEMENT.

Ancient lights—Building agreement—Owner of two tenements—Conveyance of one tenement—General words—Implied grant—Derogation from grant—Obstruction—Injunction.—In 1884 O., the owner of a building estate, entered into a building agreement with a builder S. Upon part of the land comprised in the agreement S., with the concurrence of Q., built a block of mansions (which was not in accordance with the scheme of the agreement) with windows facing west. To the west of the site of the mansions were certain plots, referred to as the "adjoining ground," on which, by the agreement, there were to be built "a coach-house or stable premises, dwelling-house, or cottage," as might be agreed upon. When the building of the mansions was commenced, S. contemplated the erection of a corresponding block of mansions on the "adjoining ground," and laid foundations therefor, and constructed part of the western wall of the mansions as a party-wall with chimney breasts. S. exercised his option under the agreement to take the plots upon which the mansions were erected, and by a conveyance in 1886 O., as "beneficial owner," conveyed the mansions without

any express general words to S. S. subsequently mortgaged the mansions, the mortgage being afterwards transferred. The transferees eventually sold under their power of sale, O. himself being the purchaser. The plaintiffs were the trustees of a settlement made by O. of the mansions. The defendants, who were the successors in title of O. of the adjoining land under conveyances neither of which contained any express reservation of a right to light over the adjoining ground, had commenced to build on the adjoining ground stables, &c., which obstructed the light to the windows in the west side of the mansions, but to an admittedly less degree than would have been caused by a corresponding block of mansions if erected as originally contemplated. Held, that notwithstanding by virtue of sect. 6, sub-sect. 2, of the Conveyancing Act 1881 the parcels in the conveyance in 1886 included and operated as conveying all lights appertaining or reputed to appertain thereto or at the time of conveyance enjoyed therewith, yet having regard to the circumstances existing at the time of the grant, which were to be looked for in the building agreement, the conveyance did not as against O. pass to S. any right to have the access of light to the windows of the mansions looking west over the adjoining ground unobstructed by any building on the adjoining ground. (*Godwin v. Schwepes Limited.*) ... 377

Ancient lights—Conservatory—Sloping glazed roof—Window—Agreement allowing window to overlook.—By an agreement in writing, made in 1873, and signed by B., the plaintiff's predecessor in title, E., agreed to pay the defendant 1*l.* a year for allowing the window in his conservatory to open on and overlook the defendant's property. The conservatory had a sloping roof, which was glazed as also was the vertical side facing the defendant's property to within a few feet of the ground. Portions of the glazed side were movable, and when open overhung the defendant's property. The sloping roof did not open. The annual payments under the agreement were made until 1883, when the vertical side was bricked in, leaving the glazed roof in its original position so as to form a skylight to what became a corridor to the hotel against which the conservatory was erected. In 1901 the defendant obstructed the access of light to the glazed roof of the corridor. In an action by the plaintiff for an injunction restraining the defendant from obstructing the light: Held, that the word "window" in the agreement applied to the sloping glazed roof as much as to the fixed and glazed portions of the vertical side, and that a window was not the less a window because it was not capable of being opened or because it was not fixed in a vertical plane. Held, also, that inasmuch as the skylight received light over the defendant's property it overlooked the property in the sense of the term used in the agreement, and that the right to light had therefore been enjoyed by consent or agreement within the meaning of sect. 3 of the Prescription Act 1832. Plaintiff's action therefore was dismissed. (*Easton v. Isted.*) 442

Right of way—Alleged extinguishment and partial abandonment—Obstruction—Mandatory injunction to remove obstruction refused.—The plaintiffs, as owners of certain lands situate in Croydon known as Whitehorse-lane, had a right of way over a strip of land 10ft. wide on adjoining property in the occupation of the defendants. Some years before action brought the plaintiffs erected a summer-house which projected over the strip of land to the extent of 2ft. 4in. Before action brought the defendants erected and eight months prior to the date of the writ they completed the erection of a stable on the strip of land which obstructed the plaintiffs' right of way. The plaintiffs brought an action (1) for a declaration that they were entitled to the right of way; (2) an order requiring the defendants to remove the buildings in question; (3) for an injunction to restrain the defendants, their servants and agents, from obstructing the plaintiffs and their tenants,

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and the agents of the plaintiffs and their tenants, in the exercise of such right of way. The defendants pleaded extinguishment or abandonment before action brought. Held, (1), on the facts, that the plaintiffs had proved their title to and had not abandoned or extinguished their right of way; (2) that partial abandonment, by the erection of a summer-house projecting across a portion of the strip of land was not, in the circumstances, sufficient evidence of abandonment; that the plaintiffs were entitled to an injunction and 40s. damages, but that, owing to the fact that the defendants' obstructing building had been completed eight months before action, an order for its removal could not be made. (Young and others, Trustees of Frederick Young, deceased v. Star Omnibus Company Limited.) 41

Right of way—Railway—Compulsory powers—Obstruction—Injunction—Compensation—Motion by the plaintiff to restrain the defendant railway company and their contractors from obstructing and interfering with the right of way of the plaintiff over a certain occupation road, and from permitting any railway to continue upon, and from running trains or locomotives along the road. The defendants had laid down a line which passed along the occupation road, and ran trains thereon for the purpose of carrying the plant and necessary materials for the construction of the lines authorised by the Great Western Railway Act 1899. Held, that the plaintiff was not entitled to an injunction, but that he had his remedy by compensation under sect. 68 of the Lands Clauses Consolidation Act 1845, because his property had been injuriously affected. (Barnard v. Great Western Railway and others.) 798

ECOLESIASTICAL LAW.

Chancellor of diocese—Jurisdiction—Patent of appointment—Reservation of bishop's consent in certain causes in consistory court—Validity—Prohibition.—The bishop of a diocese appointed a chancellor by letters patent which were drawn up in the form customary in that diocese. By these letters the chancellor was authorised to hear causes in the consistory court in the absence of the bishop; but, after conferring certain general powers on him, the letters contained this clause: "Nevertheless first consulting us and our successors and having our consent in case either party earnestly craved our judgment," and another clause, "Except notwithstanding and always reserved to us and to our successors the complaints and supplications hereafter to be made by whatsoever clergy in all and singular causes and reserved also to us and to our successors equally to examine and determine every cause in our proper person in our court of consistory." A cause having been instituted in the consistory court to obtain the removal of certain ornaments from a parish church, the vicar and churchwardens in their answer to the petition propounded that before any decision in the cause the bishop should be first consulted and his consent had, and they craved the bishop's judgment and supplicated that he should hear the cause in his own proper person. The chancellor without consulting the bishop or obtaining the bishop's consent to his hearing the cause, held that he had jurisdiction to determine the cause, and decided it in favour of the petitioner. The vicar and churchwardens obtained a *rule nisi* for a prohibition against the chancellor. Upon the argument of this rule: Held, first, that the reservations in the patent were legal; secondly, that the limiting words in the reservations went to jurisdiction, not merely to procedure, so that, upon the bishop's judgment being craved by the defendants in the cause, the consultation with and consent of the bishop was a condition precedent to the jurisdiction of the chancellor to hear the cause; and, thirdly, that the objection to jurisdiction sufficiently appeared on the face of the proceedings. (Rex v. Tristram and another.) ... 515

Mandamus—Confirmation of bishop-elect by archbishop or vicar-general—Objections as to doc-

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trine—25 Hen. 8, c. 20.—G. having been, in pursuance of letters missive and *compte d'élire*, elected Bishop of W. by the dean and chapter, letters patent issued to the Archbishop of C. directing him to confirm and consecrate G. Thereupon a citation of opposers was issued, and notice of objections in writing was ordered to be given before a certain date, a day prior to the day fixed for confirmation, and the vicar-general sat in chambers to consider such objections before proceeding with the confirmation. The objections handed in alleged that the bishop-elect had committed ecclesiastical offences and had published false doctrine, and had thereby contravened the articles of religion, and that he was by reason of such publications unfit to be intrusted with the care and superintendence of a diocese; that he was not a prudent and discreet man, and not at all a fit and proper person to fill the office of bishop, by reason of certain passages in his published works; and, further, that he had been a member of certain societies mentioned in the objections. The vicar-general, after considering the nature of the objections, declined to hear any of the opponents in support of them at the confirmation, and, when he sat in court, after taking the names of the objectors, gave his decision that they were not objections which he could entertain, and he thereupon proceeded with the confirmation in the usual manner. Rules *nisi* having been obtained on behalf of objectors for a *mandamus* to the Archbishop of C. or his vicar-general to hear the objections: Held, that the vicar-general was right in not entertaining objections of this kind. *Semble*, that a *mandamus* will not lie to the archbishop to compel him to inform his mind as to the fitness of the bishop-elect before he proceeds to confirmation. The practice of requiring written notice of the objections to be presented before the actual ceremony of confirmation is a proper one. (Rex v. Archbishop of Canterbury; *Re* Gore; *Ex parte* Cobham and Garbett.) 79

Separation order—"Persistent cruelty"—Declaration of vacancy of preferment—Validity.—A separation order was made against a clergyman under the Summary Jurisdiction (Married Women) Act 1895, on the ground that he had been guilty of persistent cruelty to his wife, and by such cruelty had caused her to leave and live separately and apart from him. Held, that this did not justify the bishop in declaring the preferment of the clergyman to be vacant under sect. 1 of the Clergy Discipline Act 1892. (Sweet v. Bishop of Ely.) ... 679

ELECTRIC LIGHTING.

Exclusive privilege—Revocable licence—Revocation.—In 1887 a town council granted to the O. Company permission to place posts in the streets for the establishment of a system of electric lighting, and the company established such system. In 1894 the H. Company obtained the "exclusive privilege" during thirty-five years of establishing in the town a system of lighting and heating whether by gas, electricity, or otherwise, and this grant was confirmed by an Act of the Provincial Legislature. The corporation professed to grant such exclusive rights "as it possesses and as it has the right to grant this day." Held, that the grant to the H. Company was made subject to the existing rights of the O. Company, and did not operate as a revocation of the licence to them. (Hull Electric Company v. Ottawa Electric Company and the Corporation of Hull.) 208

Supply—Discontinuance—Receiver—Agent—"Occupier."—The plaintiff was in possession of an hotel as receiver, under an order made by the court in a debenture-holder's action against the company which had issued the debentures and formerly carried on the hotel. A motion was made by the plaintiff in an action against the defendants, an electric lighting company, that the defendants might be restrained until the trial of the action or further order from taking any proceedings by cutting off or discontinuing the supply of electric current from their mains to the hotel,

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to recover the amount due to them by the company in respect of electric current supplied by the defendants to the company prior to the 17th Jan. 1902. On that date the court, in the debenture-holders' action, had appointed the plaintiff as the receiver of the undertaking and property of the company, and directed the company to deliver up possession of the property to him so far as was necessary for the purposes of such receivership. On the same day the plaintiff took possession of the property, including the hotel. On the 20th Jan. 1902 the defendants threatened to cut off the current unless the plaintiff paid about 400*l.* arrears due from the company to the defendants for current supplied to the hotel. An interlocutory injunction was granted by Kekewich, J. upon the undertaking of the plaintiff to make such necessary application and enter into a new contract as required by clause 47 of the provisional order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act 1889. The defendants appealed on the ground that the plaintiff was not an "occupier" of the hotel within the meaning of the provisional order; and that consequently the defendants were not bound to supply him with electric current, or at any rate, not until he had entered into a new contract with the defendants. Held, that, assuming that the company's occupation of the hotel had come to an end and that there was a new occupation by the plaintiff, he was not entitled to any supply of electric current unless and until he had entered into a new contract with the defendants pursuant to sect. 19 of the Electric Lighting Act 1882; that if, on the other hand, it were supposed that the old contract with the company remained in force, and the supply continued thereunder, the defendants were undoubtedly entitled to cut off the supply until the arrears due by the company had been paid; and that in either case, therefore, it was not right to grant an injunction. (*Husey v London Electric Supply Corporation Limited.*) 166

EMPLOYER AND WORKMAN.

Employer's liability—Colliery proprietor—Contractor employed by colliery proprietor—Workman employed by contractor—Injury to workman—Liability of colliery proprietor.—The defendants, the owners of a coal mine, employed a contractor to sink a shaft in the mine, who was to be paid so much a yard and was to find all labour. All the workmen employed by the contractor signed a book kept by the defendants, which was a "record book of persons employed" and contained the "conditions of employment." By the conditions it was provided that "every workman employed by a contractor shall, in consideration of being employed at the works, be bound, both as between himself and the contractor and between himself and the owner, by the terms of these conditions." A workman engaged and paid by the contractor and employed in sinking the shaft was killed by an explosion in the shaft, and his father sued the defendants for damages under the Employers' Liability Act 1880. Held, that the signing of the rules by the deceased workman was not evidence that the relation of employer and workman had been created between him and the defendants within the meaning of the Employers' Liability Act 1880, and that therefore the defendants were not liable under the Act. (*Fitzpatrick v. Evans and Co. Limited.*) 141

(See WORKMEN'S COMPENSATION ACT 1897.)

ESTATE DUTY.

(See REVENUE.)

FACTORY.

Non-textile—Bottling and aerating beer.—Certain premises were used for the purpose of aerating and bottling beer in order to adapt it for sale

as bottled beer. Gas engines were used for the purpose of aeration, but the bottling was done by hand, the bottling machine not being worked by mechanical power, and the bottle filling by means of the pressure of gas with which it had been aerated. Held, that these premises were a non-textile factory within sect. 93 of the Factory and Workshop Act 1878. (*Hoare, app. v Truman, Hanbury, Buxton, and Co., resps.*) 417

FAIR TOLLS.

Construction of ancient charters and lease relating to—Meaning of the term "fair toll"—Whether the term "fair" is included in the term "market."—Action for (1) a declaration that the defendants were not entitled to establish or maintain at Workshop any cattle or other market, or to take or exercise tolls or dues in respect of the sale of cattle, horses, sheep, pigs, or other animals, or any other market profits or rights, except in accordance with a lease made between the predecessors in title of the plaintiff and defendants in 1851 and to the extent of the tolls and premises thereby demised, but not otherwise, and so that any market held by the defendants shall be the plaintiff's franchise market only; (2) to have the plaintiff's rights under certain charters and the lease of 1851 declared and enforced; (3) an injunction to restrain the defendants from collecting toll or dues and from purporting to exercise rights belonging to or connected with a cattle market otherwise than under the said lease of 1851 and in accordance with the declaration claimed; (4) an account of and payment of the tolls and other payments collected or received by the defendants in respect of fairs during the six years preceding the date of the issue of the writ in this action. The defendants by their defence alleged (*inter alia*) that the express purpose of a further lease made in 1878 was to enable their predecessors to hold a weekly Wednesday cattle market on the Fair Green and to take tolls thereof for their own benefit; that the plaintiff, who in 1855 had commenced to receive rents reserved by the lease of 1878, could not be heard to say that the obligation of the lease of 1851 was broken by reason of the removal of the site of the Workshop cattle market. With regard to the fair tolls they argued that as these had never (upon the evidence) been exacted from time immemorial, no account of them could now be claimed. Held, (1) that although an entire change of days is a cause of forfeiture against the Crown only, the original charters did not support any action to recover tolls in respect of fairs held on other days; (2) a market or fair cannot be a legal market or fair without a grant of the right to hold it on the day claimed; (3) that the omission of all express reference to fair tolls in a lease is evidence that the parties were contracting with the knowledge and on the basis that there were no fair tolls; (4) a fair toll may be defined to be a toll payable to the owner of the franchise in respect of goods sold in his fair or brought into the fair for sale whether he be the owner of the soil or not, and has nothing to do with the ownership of the soil; (5) it is not necessary that tolls charged shall be the same for all persons; (6) that defendants were entitled to judgment with costs as between solicitor and client. (*Newcastle, Duke of v. Workshop Urban District Council.*) 405

FISHERY.

Bye-law—Fishing for salmon in weekly close time—Intention—Evidence.—D. had a net fixed and kept up and closed in salmon waters capable of taking salmon during the weekly close time provided by the bye-laws, and in which salmon had been in fact taken, and in respect of which he had taken out a salmon licence. The mesh of the net was smaller than that allowed by the bye-laws. Held, that, provided the justices found intention, there was evidence of fishing for salmon otherwise than by rod and line during the weekly close time, and of attempting to take salmon with smaller

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measles than that allowed by the bye-laws. (Davies, app. v. Evans, resp.)	419
Lease—Construction—Exclusive right of fishing—Covenant not to assign demised premises—Breach.—By an indenture of lease the defendant demised to the plaintiff the exclusive right of fishing in a certain river. The plaintiff covenanted that he would not underlet, assign, transfer, or set over or otherwise procure the premises to be assigned, transferred, or set over unto any persons whomsoever without the consent in writing of the defendant. The plaintiff proposed to grant a licence and authority to B. to fish in that portion of the river comprised in the lease in manner and for like periods provided by the lease (but so that not more than two rods should be used at any time) for the unexpired residue of the term. On summons to determine whether the proposed licence was a breach of the covenant not to assign: Held, that, as the plaintiff was not excluded from fishing himself and the covenant did not extend to "any part of" the premises, the proposed licence was not a breach of the covenant. (Grove v. Portal.)	350
Lease of land including stream—No reservation of fishery rights to landlord—Passing of fishery rights under lease to tenant—Right of landlord to prosecute for taking fish.—By a lease of land, whether agricultural or other land, through which a river flows, the right of fishing in the river, unless expressly reserved to the lessor in the lease, passes to the tenant, and the lessor cannot prosecute persons for unlawfully taking fish in the river. (Jones and others, apprs. v. Davies, resp.)	447
FOOD AND DRUGS.	
(See ADULTERATION.)	
FOREIGN JUDGMENT.	
Action on—Contract between British subject and foreigner—Agreement to refer disputes to foreign jurisdiction—Judgment against British subject—Binding effect of judgment.—A clause in a contract made between a British subject resident and domiciled in England and a foreigner that all disputes relating to the agreement and its fulfilment should be determined by the jurisdiction of the foreign country, gives the courts of the foreign country jurisdiction to deal with such disputes, and to bind the British subject by a judgment of the foreign court duly given against him in default of his appearance, where all the requirements of the law of that foreign country as to citation, service of process, and otherwise, have been complied with; and an action upon such judgment may be maintained in the courts of this country against the British subject. (Feyerick and others v. Hubbard.)	829
FRAUD.	
Passing off goods as plaintiff's—Action for injunction—Injunction in default of defence—Subsequent alleged breach—Absence of direct evidence— <i>Res judicata</i> —Admissions.—The plaintiff brought an action against the defendant firm, of which S. was the sole partner, for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of the plaintiff's manufacture. S. made default in pleading, and the injunction was granted in due course. Later it appeared that similar goods to those complained of were being put upon the market by N., for whom S. was acting as agent for sale. Thereupon a motion was made for attachment of S. for breach of the injunction. No direct evidence was forthcoming, but the case was rested on admissions by S. (which the court held to be insufficient) and on the fact that he, having allowed judgment to go against him by default, was estopped from denying that the goods complained of were an imitation of those of the plaintiff's manufacture. Held, that in these circumstances an attachment could not issue. (Ripley v. Arthur and Co.)	495, 735

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FRIENDLY SOCIETY.	
Policy of life assurance—Assignment—Validity—Nomination.—Policies of life assurance granted by friendly societies under the Act of 1875 are assignable in the ordinary way as well as by nomination under that Act. <i>Seemle</i> , such policies are assignable in the same way if granted under the Friendly Societies Act 1896. (<i>Re Griffin</i> ; <i>Griffin v. Griffin</i> .)	38
GAVELKIND.	
Custom of—Male heirs—Degrees of remoteness.—The custom of gavelkind is the common law of the land in Kent, and lands held thereunder descend to male heirs in all degrees of remoteness. (<i>Re Chenoweth</i> ; <i>Ward v. Dweilley</i> .)	890
GUARANTEE.	
Indemnity—Verbal promise—Promise to answer for debt of another.—The defendant was a director of and held a large number of shares in a company, which he had also financed, but he had no charge on its property. The plaintiffs were judgment creditors of the company and had issued a writ of <i>f. fa.</i> upon the judgment, but the sheriff had failed to levy because he could not effect an entry. The defendant then verbally promised the plaintiffs that he would indorse bills for the amount of the debt. Held, that the promise was not a contract of indemnity, but "a promise to answer for the debt of another" within sect. 4 of the Statute of Frauds; and as it was not in writing the plaintiffs could not maintain an action against the defendant for the breach of it. (<i>Harburg Indiarubber Comb Company v. Martin</i> .)	505
HAWKER.	
Carrying to sell—Carrying goods to show on approval with a view to sell—Previous request to a canvasser to send goods on approval—Necessity of hawker's licence.—By sect. 2 of the Hawker's Act 1888 "hawker" means "any person who travels with a horse . . . and goes from place to place or to other men's houses carrying to sell or exposing for sale any goods," &c. The respondent was sent out by his employers, who were manufacturers of sewing machines, with a horse and van in which were some sewing machines, with instructions to call at certain specified houses in different places and show the machines on approval for the purpose of selling them, and he did so. None of the persons in the houses called at had bought or agreed to buy machines, but they had previously been visited by a canvasser to whom they had expressed a desire to see a machine to decide whether they would purchase it. The machines were shown at these houses on approval, and if approved of they would be sold there. Held, that the respondent was going "from place to place carrying to sell" within the meaning of sect. 2, and was therefore a "hawker" and required a hawker's licence; and that he was none the less a hawker because he had offered the machines only to persons who had previously been visited by a canvasser. (<i>Holland, app. v. Hall, resp.</i>)	355
HIGHWAY.	
Drainage of surface water—Discharge on to land of adjoining owner—"Drain"—Improper outlet—Presumption of legal origin.—The surface water collecting at a certain point on a highway was received in a catch-pit, from which it was carried through the hedge by the roadside by means of a pipe 6ft. long, and was discharged on to the surface of the adjoining land. This system had lasted as long as living memory would go when the defendant purchased the adjoining land and stopped up the outlet of the pipe from which the water was discharged. The local authority claimed an injunction to restrain him from stopping up the pipe. Held, that there was nothing in the manner in which the water was discharged	

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- on to the defendant's land which prevented the arrangement for getting rid of water from the highway from being a "drain" within sect. 67 of the Highway Act 1836; and that under the circumstances a legal origin for the drain ought to be presumed. (The Attorney-General, on the Relation of the Bromley Rural District Council v. Copeland.) ... 486
- Light locomotive—Driven "to the common danger of passengers."—Under art. 4, sect. 1, of the Light Locomotives on Highways Order 1896 it is an offence to drive a light locomotive on a highway "to the common danger of passengers." A person who is shown to have driven a light locomotive on a highway at a fast pace may be guilty of the offence although there is no evidence to show that there were any passengers on the highway at the time he so drove it. (Mayhew v. Sutton.) ... 18
- Power to dedicate—Land vested in company for statutory purposes—Canal company—Reservoir embankments.—A statutory body cannot dedicate to the public a right of way which would be incompatible with the special purpose for which it was incorporated. So a canal company, which was empowered and obliged to make a canal and the works incident and necessary for the purpose of making and maintaining the canal, was held to have been incapable of dedicating to the public a right of way over the embankments of reservoirs constructed by or in pursuance of its powers in a case where it was subsequently proved that the user by the public of the right of way must ultimately lead to the destruction of the embankment and consequent damage to the public unless great expense was incurred by the company to prevent such a result. (Great Western Railway Company v. Solihull Rural District Council.) ... 852
- Repair *ratione tenuræ*—Writ *ad quod damnum*—Inquisition—Presumed licence from Crown—Stopping up old highway—Obligation imposed on owner and his assigns to make and repair new road—Liability to repair *ratione tenuræ*.—A grant of a licence by the Crown to the owner of lands to stop up and inclose for the benefit of himself and his heirs a public highway through his lands, imposing at the same time a condition that the owner should make a new road through his lands, and that he, his heirs and assigns, should keep the new road in repair, establishes against the grantee, who has acted upon the grant by stopping up the old road, an obligation *ratione tenuræ* to repair the new road, and it is immaterial whether such grant was made before or after the reign of Richard I., the period of legal memory. In such case the liability to repair is charged upon the heirs and assigns of the lands, and if the lands become divided among several persons the alienee and occupier of each and every part of the lands is liable to the whole charge. Upon an inquisition taken in 1773 under a writ of *ad quod damnum* the jurors presented that the King should grant to O., the owner of certain lands through which passed an old highway for horses, carts, carriages, and foot passengers, a licence to inclose and stop up the old highway and hold the same when so stopped up to him and his heirs for ever, upon the condition that O. did in his own land make and set out another road equally fit and convenient for horses, carts, carriages, and foot passengers, and that such new road should be for ever thereafter kept in proper repair by O., his heirs and assigns. The old road was stopped up and inclosed, and the new road set out pursuant to the inquisition, and has ever since been used as a highway, although at some period it was stopped up at one end for horses, carts, and carriages, and became a *cui de sac* for traffic of that kind, but it was always used as a highway, for foot passengers. No licence from the King pursuant to the terms of the inquisition could be found, and if any such licence was granted it appeared to have been lost. In an action against the owner and occupier of part of the lands formerly belonging to O., for the expenses of repairing the substituted highway on the ground of a liability to repair the same *ratione tenuræ*: Held, that a licence from the King incorporating the conditions of the inquisition must be presumed in fact to have been granted; that the substituted road was laid out pursuant to such inquisition and licence; that the road was still a public highway, notwithstanding the changes in it, and that the defendant was an "assign" of O. within the meaning of the inquisition, and that as such "assign," and by reason of his tenure and occupation of the lands, he was liable for the repair of the highway, although he was an assign of part only of the lands formerly belonging to O. (Urban District Council of Esher and the Dittons v. Marks.) ... 223
- Repairable by inhabitants—Substitution—Disrepair—Order under sect. 10 of Highways and Locomotives Act 1878—Width not specified in indictment—Liability of defaulting highway authority.—In 1891, by an order of quarter sessions, a highway was stopped and a new road substituted for it, which was made by the owner, at whose instance the change was made. The certificate stated that the new road was 12yds. wide, but in fact it was 14yds. or 15yds. wide. The new road having got into bad repair, an order was made under sect. 10 of the Highways and Locomotives Act 1878 on the defendants, and an indictment was preferred. After the order the defendants served notices on the frontagers under sect. 150 of the Public Health Act 1875. The width of the road was not specified in the indictment, and the jury found that the old road was a highway repairable by the inhabitants at large before 1835. Held, that judgment was rightly entered for the Crown. (Rex v. Crompton Urban District Council.) ... 763
- (See LOCAL GOVERNMENT.)
- HUSBAND AND WIFE.
- Appeal from justices—Allowance—Stepchildren—Liability of husband—Discretion of justices.—A husband is liable under the Poor Law Amendment Act 1834 for the support of his stepchildren, and the liability is fully recognised by sect. 4 of the Summary Jurisdiction (Married Women) Act 1895. In assessing the amount of the allowance which a husband is to be ordered to pay for the support of his wife, who has obtained a separation order against him, and her family, the justices ought to consider the circumstances of the case—the number of children, whether of the second or a former marriage, and the principles and practice of the High Court in cases of judicial separation upon which allotments of alimony are made. If the court is of opinion that the justices have acted reasonably under all the circumstances of the case, the allowance ordered by them will not be interfered with. (Hill v. Hill.) ... 597
- Appeal from justices—Separation—Agreement—Bankruptcy of husband—Neglect causing wife to live separate—Time for proceedings.—When a husband and wife have lived apart for several years, and the husband has agreed to pay to his wife a certain weekly allowance, his failure to pay such allowance and his subsequent filing of his petition in bankruptcy, with the object of evading the payment of arrears, do not replace the parties in the same position towards each other which they occupied before the separation actually took place. Under such circumstances a wife is not entitled to a separation order under the Summary Jurisdiction (Married Women) Act 1895, on the ground that she has been compelled to live separately and apart from her husband because he has neglected to maintain her, although she commences proceedings within six months of the making of the receiving order, as she is out of time under sect. 11 of the Summary Jurisdiction Act 1848. (Rowlands v. Rowlands.) ... 125
- Divorce—Adultery of wife—Co-respondent and costs—Practice.—Even when, upon an application to make a co-respondent liable for the costs of a divorce suit, the only evidence against him as to

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- his knowledge of the fact that the respondent was a married woman is an admission that he became aware of it a fortnight after the first act of adultery, the court may infer that he was practically aware of the fact from the first, and, if it so infers, an order for costs will be made in favour of the petitioner against the co-respondent. (*Bilby v. Bilby and Harrop.*) ... 123
- Divorce—Cross-petitions—Adultery of wife—Adultery of husband—Condonation of wife—Discretion of court as to decree—Costs.**—A husband presented a petition for a dissolution of his marriage on the ground of his wife's adultery with the co-respondent, and the wife presented a cross-petition for a divorce by reason of her husband's cruelty and adultery. The consolidated cases were twice heard. On the first trial, before the President, the jury were unable to come to a decision upon all the issues, and on the second, before Barnes, J., they found (1) that the respondent and co-respondent had committed adultery, (2) that the petitioner had been guilty of adultery, and (3) that the respondent had condoned her husband's adultery. On these findings the petitioner applied that the petition of the respondent should be dismissed, and that the co-respondent should be condemned in the costs; the respondent that she should have the costs of both trials, although she had not applied for any security on the first hearing; and the co-respondent that he should not be condemned in any costs. Held, that under the circumstances of the case the court would not exercise its discretion in favour of the petitioner; that the wife was entitled to her full costs, not only of the second trial, but also of the abortive first trial; and that the co-respondent should pay the costs of those issues on which he had failed. (*Waudby v. Waudby and Bowland.*) 123
- Divorce—Decree nisi—Intervention of co-respondent—Decree absolute.**—A co-respondent entered an appearance in a divorce suit, but did not defend the action. A decree nisi was obtained by the petitioner. It was held by the court that the co-respondent could not afterwards intervene to show cause why the decree should not be made absolute. (*Harries v. Harries and Gregory.*) ... 262
- Divorce—Husband's petition—Adultery of wife—Policy of insurance in favour of wife—Report of registrar—Variation—"Property in reversion"—Order.**—The money secured to a wife under a policy of insurance, and to be paid to her under the terms thereof if she is living at the time of her husband's death, may be "property in reversion," although the policy itself may not be a marriage settlement; and the court has power to compel her, if she is the guilty party in divorce proceedings, to settle her interest under the policy in favour of her husband and children. (*Stedall v. Stedall.*) ... 124
- Divorce—Practice—Petition of husband—Husband an undischarged bankrupt—Alleged adultery of wife—Claim for damages—Security for co-respondent's costs.**—The fact that the husband, who is petitioner in a suit for dissolution of marriage, is an undischarged bankrupt is not necessarily a ground for requiring him to give security for the costs of the co-respondent, against whom there is a claim for damages. The same rules apply in the Probate, Divorce, and Admiralty Division as to security for costs as in other divisions of the High Court, when damages are claimed under sect. 33 of the Matrimonial Causes Act 1857. (*Blackett v. Blackett and Frail.*) 689
- Divorce—Wife's petition—Variation of marriage settlement—Property settled by husband—Life interest of husband therein—Extinguishment.**—Dissolution of a marriage having been decreed on the wife's petition, an order was made by Barnes, J., under sect. 5 of the Matrimonial Causes Act 1859, extinguishing the life interest of the husband in settled property, the whole of which was brought into settlement by him and the income of which amounted to 45*l.* a year, there being one child of the marriage who had not attained a vested interest. Held, that the order made by Barnes, J. was not only a legitimate order, but the best one possible that could be made in the interests of the wife and child. (*Kaye v. Kaye.*) ... 638
- Divorce—Wife's petition—Rape—Indecent assault—Conviction of husband—Breakdown of health of wife—Conduct amounting to cruelty.**—A wife may obtain a divorce from her husband for rape, though he has been prosecuted and convicted for indecent assault only. Alternatively, a wife will be entitled to a decree of judicial separation on the ground of cruelty if the conduct of the husband has been such as to cause a breakdown of her health by reason of the disgrace and shock arising out of his conviction. (*Bosworthick v. Bosworthick.*) ... 121
- Divorce—Wife's petition—Variation of marriage settlement—"Property settled" by wife—Extinguishment of all the life and derivative interests of the husband.**—A wife upon her marriage settled property to which she was entitled in her own right upon herself for life, and after her death upon her husband for life, if he survived her, with remainder to the children of the marriage. There was only one child of the marriage, a son. He attained the age of twenty-one years, and thus acquired a vested interest in the property comprised in the settlement. Subsequently the wife petitioned for the dissolution of her marriage with the husband, and a decree nisi was pronounced in her favour. Before the decree was made absolute the son died, a bachelor and intestate. After the decree was made absolute the wife applied, under sect. 5 of the Matrimonial Causes Act 1859, for an order extinguishing all the husband's interest in the property, as he had become entitled to his son's interest, the latter having died intestate. Held, that there was "property settled" within the meaning of the section; and that the court had jurisdiction to extinguish the life interest of the husband in the trust funds, and such beneficial interest as he took as the next of kin of his son in the son's interest in the trust funds. (*Blood v. Blood.*) ... 121, 641
- Marriage with deceased husband's brother—Validity—*Lex domicilii*—General consent of Christendom—Settlement—Power of appointment in favour of husband and children.**—By a settlement made on the marriage of an English lady with an Italian domiciled in Italy certain funds were vested in English trustees upon trust for the wife, husband, and children of the marriage, with a proviso enabling the lady if she survived the husband and married again, to appoint one-third of the trust funds in favour of her second husband and her children by him. The ceremony took place in Italy, and children were born of the marriage. The husband died domiciled in Italy, and the lady, who continued to reside there, intermarried with his brother in accordance with the law of Italy, and had children by him. She then desired to exercise her power of appointment in favour of her second husband and the children of her second marriage; and a summons was taken out by the trustees of the settlement for determination of the question whether the power was exercisable in respect of her marriage with her deceased husband's brother, which was invalid according to the law of England. Held, that it was, as the marriage with her deceased husband's brother was valid according to the law of her domicile, and not incestuous according to the general consent of Christendom. (*Re Bozzelli's Settlement; Hussey Hunt v. Bozzelli.*) ... 445
- Married woman—Protection order—Address of husband unknown—Citation dispensed with—Practice.**—A wife had been deserted by her husband, and the only information she had ever been able to obtain as to his whereabouts was a statement made by his brother that he believed he was residing somewhere in Melbourne. Upon an application by the wife in chambers for a protection order, the same was granted without notice being given to the husband. (*Re Jenny Morris.*) ... 596
- Matrimonial cause—Bigamy—Nullity of marriage—Domicil—Jurisdiction—Application to make**

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decree nisi absolute at once—Discretion of court—Practice.—The petitioner was a native of Wales, and married the respondent, who was a native of Ireland and domiciled in that country, in the Isle of Man. At the time of the celebration of the ceremony the first wife of the respondent was still alive. Upon a suit being brought by the petitioner for a decree of nullity of marriage it was held that the test of the jurisdiction of the court in cases of this kind was not domicile, but residence. The practice is provided for by sect. 22 of the Matrimonial Causes Act 1857, following that of the Ecclesiastical Courts. The judgment of the Privy Council in <i>Le Mesurier v. Le Mesurier</i> (72 L. T. Rep. 873; (1895) A. C. 517) has overruled that in <i>Niboyet v. Niboyet</i> (39 L. T. Rep. 486; 4 P. Div. 1) only as to suits for dissolution of marriage. It has no application to a suit for a decree of nullity of marriage. Although there is no <i>prima facie</i> necessity for a petitioner to seek the relief of the court in a suit of this kind, where the respondent has committed bigamy, the court will not consider it a case of so exceptional a character as to justify it in exercising its discretion in shortening the period of six months which must elapse between the dates of the decree nisi and the decree absolute. (<i>Brennan, otherwise Roberts v. Brennan.</i>) 599		sumption of lost grant—Inclosure Act for purpose of drainage and inclosure—Act for public benefit.—An Inclosure Act, passed in 1812, provided for the inclosure of certain commons, and also for their drainage as part of a much larger district, and contained provisions for the subsequent appointment of drainage commissioners to preserve the system of drainage. The herbage on the roads to be set out by the award was to belong to the persons to whom the award should award the same; and the award was to contain orders and regulations for maintaining the inclosure and the system of drainage. The award, which was made in 1822, provided that the herbage on a certain road thereby set out, adjoining a watercourse which was part of the system of drainage, should belong to the surveyor of highways, and be let for depasturing sound and healthy sheep only, but no other cattle or stock. The surveyor of highways, ever since 1846, had habitually let the herbage for depasturing cattle and horses as well as sheep. The owner of an inclosure adjoining the road brought this action to restrain the defendants from pasturing cattle and horses on the road. Held, that the restriction on the use of the herbage of the road was intended to be a permanent provision for the protection of the system of drainage for the public benefit, and that it was therefore impossible to presume any lost grant by which that restriction had been released. (<i>Neaverson v. Peterborough Rural District Council.</i>) 739	
Matrimonial cause—Judicial separation—Wife's petition—Husband's desertion and adultery—Custody of children.—Upon a wife's petition for judicial separation on the grounds of her husband's desertion and adultery, the court will require very strong evidence of the aggravated character of the conduct of the husband before making an order, under sect. 7 of the Guardianship of Infants Act 1886, that he is a person unfit to have the custody of his children. (<i>Woolnoth v. Woolnoth.</i>) 598		INCOME TAX. (See REVENUE.)	
INCLOSURE.		INFANT.	
Action for breach of duty to repair roads—Canon of construction to be applied in construing Act.—By an Inclosure Act passed in the 7 Geo. 3 with reference to the inclosure of certain commons and waste grounds known as B. Moor, after reciting that the persons interested were owners and proprietors of messuages, &c., in the several townships therein mentioned, including, amongst others, the township of W., it was enacted that the commissioners should appoint and undertake the repair of (<i>inter alia</i>) two roads mentioned in the statement of claim. The plaintiffs alleged that these roads were duly made in accordance with the award, and were for many years kept in repair by the surveyor of the township of Wennington, and that the said township was included in the defendant urban district, and that the defendants were liable to repair them. There was no evidence that the inhabitants of W., taken as a body, had ever in fact repaired or paid for the repair of the roads in question since 1767, although it was shown that since 1859 certain of the inhabitants of the township had contributed towards the repair of the roads for their own convenience. It was contended by the plaintiffs that liability to repair the roads in question was imposed upon the defendants. Held, in the circumstances, that the court was justified in reading in after the words "in such manner as other public highways are by law directed to be repaired by such of the said townships respectively" the words "within whose district such public highways are situated"; that the doctrine of <i>contemporanea expositio</i> did not apply; that the defendants were not liable to repair the roads in question as the same were outside their district; and that in construing an Inclosure Act it is right to take the whole of the document as one complete document. It is not sufficient to take out one section and disregard others which are germane to the same subject. (<i>Attorney-General and the Rural District Council of Settle v. Rural District Council of Lunedale.</i>) 822		Contingent life interest—Maintenance—Accumulations of surplus income during minority—Right to accumulations—Remaindermen.—On the true construction of sub-sect. 2 of sect. 43 of the Conveyancing Act 1881 the word "property" means "income," and accumulations of surplus income during the minority of a person entitled absolutely or contingently belong to whomsoever, in the events which happen, becomes entitled to the income. (<i>Re Scott; Scott v. Scott.</i>) 349	
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		INNKEEPER.	
		Common law duty to receive travellers—Night—All bedrooms occupied—Inn full.—An innkeeper is under no common law duty to provide shelter and accommodation for travellers wishing to spend the night at his inn when all the rooms ordinarily used as bedrooms for guests are occupied. (<i>Browne, app. v. Brandt, resp.</i>) 625	
		INSURANCE.	
		FIRE.	
		Arbitration clause—English contract—Law of Jersey.—A policy of insurance against fire upon property in Jersey, issued by an English office, in the English language, but executed in Jersey, was made subject to a condition that no action should be brought for any money payable under the policy until the liability and the amount had been settled by arbitration; and it was further provided that the submission to arbitrators should be subject to the provisions of the Arbitration Act 1889, and might be made a rule of the High Court of Justice. Held, that the contract was governed by the law of England, and not by the law of Jersey. (<i>Spurrier and another v. La Cloche.</i>) 631	
		LIFE. (See FRIENDLY SOCIETY.)	
		MARINE.	
		General average—Assured owner of both ship and cargo—Insurance on cargo—Sacrifice of mast—Right of assured to recover under policy—Liability	

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of underwriter on cargo.—The fact that the assured under a policy of marine insurance on cargo is owner of the ship as well as owner of the cargo does not prevent him from recovering under the policy from the underwriters on the cargo in respect of a general average loss, as a general average act does not depend on the consideration whether there can be any contribution or not as between the respective interests. A loss by the cutting away of the mast of a ship, which by the master's orders is cut away for the safety of the whole adventure, but which at the time it is cut away is not hopelessly lost and might be saved, is a general average sacrifice for which underwriters of a policy on the cargo against perils of the seas are liable to contribute, and they are none the less liable because the assured are owners of both ship and cargo. (*Montgomery and Co. v. Mutual Marine Assurance Company Limited.*) ... 462

Policy on "chartered or hire money" to cover "loss of hire money"—Loss of hire through vessel becoming inefficient—Government charter-party—Option to discharge vessel—Loss by discharge of vessel—Right of assured to recover on policy.—By a charter-party in the Government form the Admiralty chartered a vessel for transport service for three months certain, and thenceforward until they should give notice to the owners that the vessel was discharged from their service, such notice to be given when the vessel was in port in the United Kingdom; and the charter-party provided that if the ship became incapable from any defect, or from any cause whatsoever, to perform the service efficiently, the Admiralty might make abatement by way of mulct out of the freight. The shipowners effected a time policy upon "chartered or hire money" to "cover the loss of hire money calculated at" so much per day caused by (amongst other things) want of repairs or breakdown of machinery, rendering the vessel inefficient for the service. Under the charter-party the vessel had made a voyage and had returned to England, and, the three months having previously expired, the Admiralty had continued the employment, and had given instructions that the vessel was to proceed on another voyage on a certain day. While the vessel was in dry dock it was discovered that some of the blades of her propeller were cracked and that it would take some time to repair the damage. In consequence of this the Admiralty, under their option in the charter-party, gave the owners notice discharging the vessel, and the vessel was discharged from the Government service as from that date. The vessel then underwent repairs, which took fifteen days from the date of her discharge by the Admiralty. In an action on the policy by the owners of the ship to recover from the insurers the loss of hire money for the fifteen days: Held, that the "chartered or hire money" in the policy meant "hire money" in the nature of freight payable under a contract; that the loss of such hire to the shipowners for the fifteen days was caused by the exercise of the option which the Admiralty had under the charter-party to discharge the vessel from their service, and not by the want of repair, breakdown of machinery, or other perils insured against under the policy, and that there was therefore no loss under the policy, for which the shipowners were entitled to recover. (*Manchester Liners Limited v. British and Foreign Marine Insurance Company Limited.*) ... 148

MERCANTILE.

Construction of policy—Arrests and detentions of kings, princes, and people—Exceptions from risks—"Capture, seizure, and detention"—Seizure by foreign Government of property of its own subjects before outbreak of war—Absence of violence.—A gold mining company, incorporated under the laws of the South African Republic, effected a policy of insurance on their gold in its transit from the mines by rail through the territories of the republic and so on to the United Kingdom. The risks insured against included "surprisals, takings at sea, arrests, restraints, and detentions of all

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kings, princes, and people," but the policy contained a clause, "warranted free of capture, seizure, and detention . . . and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." In the course of its transit through the territory of the republic, the gold was taken possession of by the executive Government, in anticipation of an outbreak of war, which in fact took place a few days later. This act of the executive was in accordance with the laws of the republic. No violence was used in carrying out the order of the executive for the seizure of the gold, but the escort in charge of it during its transit gave up possession when required to do so. None of the gold thus taken possession of by the executive was ever recovered by the company. In an action against the underwriters on the policy: Held, that the underwriters were protected by the terms of the warranty from liability under the policy for the loss of the gold. (*Robinson Gold Mining Company Limited v. Alliance Marine and General Assurance Company Limited.*) ... 858

JUSTICES.

Application for summons—Offence under the Roman Catholic Relief Act 1829—Discretion of magistrate to refuse summons.—Upon a rule nisi for a *mandamus* to command a metropolitan magistrate to hear and determine an application for a summons for an offence under sect. 34 of the Roman Catholic Relief Act 1829: Held, that though the information disclosed a *prima facie* case that the offence was committed, nevertheless the magistrate was entitled in the exercise of his discretion to refuse to issue a summons, and, if he did so, the court had no jurisdiction to compel him to review his decision unless the discretion was exercised on improper and extraneous grounds. Held, further, that, in prosecutions under sect. 34 of the Roman Catholic Relief Act 1829, the fact that there had never been any prosecutions under the section, and that the magistrate was of opinion that if any prosecutions under it were now to be commenced they should be commenced by the Crown, were not improper and extraneous grounds in considering an application by a private person for a summons under sect. 34. Held, further, that there is nothing in that Act to prevent private persons from commencing prosecutions under sect. 34. (*Rex v. Kennedy, a Metropolitan Magistrate.*) ... 753

Costs of appeal from licensing justices to quarter sessions—Borough or county funds.—C. is a county borough, having a separate commission of the peace, but no separate court of quarter sessions. The justices of the county of W. hold quarter sessions at C. by adjournment from W. An appeal was brought to the quarter sessions against the refusal of the justices of C. to grant the renewal of a licence, and that appeal was allowed. Held, that the costs of the justices of C. by virtue of sect 29 of the Alehouse Act 1828 were not payable by the treasurer of the borough of C., but by the treasurer of the county of W. (*Rex v. Justices of Warwick; Ex parte Mayor of Coventry.*) ... 568

Jurisdiction—Conviction—Right of common—"Title to any lands . . . or any interest therein"—Where an assault was committed by one commoner on another, and it was alleged that the assault was committed in setting up a claim of right to prevent the complainant from spoiling the pasture of the common by taking a cart and horse across it: Held, that the jurisdiction of the justices was not ousted under sect. 46 of the Offences against the Person Act 1861, as no question arose as to the title to any lands or any interest therein. (*Rex v. French; Ex parte Roberts and another.*) ... 587

(See LICENSING.)

LANDLORD AND TENANT.

Covenant to pay "rates, taxes, assessments, and outgoings"—Paving expenses.—Apportioned paving expenses under the Public Health Act 1875, which

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- the landlord has paid, can be recovered from the tenant where the latter has covenanted to pay all rates, taxes, assessments, and outgoings payable, or to become payable, whether by the landlord or tenant, in respect of the premises. (*Weld and others v. Clayton-le-Moors Urban District Council.*) ... 584
- Lease—Assignment—Assignment for benefit of creditors—Bankruptcy of assignor—Avoidance of assignment—Liability of assignee for rent.**—The lessee of the plaintiffs of a house made an assignment to the defendant of the lease, with her other property, in trust for the benefit of her creditors generally. Rent became due under the lease, and this action was brought to recover that rent. Before the action came to trial the lessee was adjudged bankrupt in respect of the act of bankruptcy committed by making the assignment for the benefit of creditors, and the trustee in bankruptcy disclaimed the lease. Held, that the defendant was liable for the rent which accrued due before the bankruptcy of the lessee. (*Stein and another v. Pope.*)... 283
- Lease—Covenant by tenant to pay impositions charged or imposed in respect of the premises on the landlord—Construction—Liability of tenant—Notice by sanitary authority to landlord to abate nuisance.**—A lease contained a covenant by the lessee that he would "pay and discharge all taxes, rates, including sewers, main drainage assessments, and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed, rated, assessed, charged, or imposed upon or in respect of the said premises or any part thereof on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no covenant to repair either by lessor or lessee. Under a local Act the sanitary authority served a notice on the lessor requiring him to remove an offensive privy and to construct a water-closet in accordance with certain requirements. The lessor did the work required, and brought an action against his lessee to recover the expenses. Held, that the words of the covenant were wide enough to cover these expenses, and that the obligation on the lessor to incur them was one which might reasonably be supposed to have been within the contemplation of the parties at the time of the execution of the lease; and that, therefore the lessee was liable under his covenant to recoup his lessor. (*Foulger v. Arding.*) ... 488
- Lease—Express demise of lights—Covenant—Not to "object to any works to adjoining premises"—Obstruction of lights—Construction.**—Under a lease, dated the 20th Sept. 1894, W. became the lessee of certain premises for a term expiring in 1932. By a deed, dated the 3rd Aug. 1899, W. demised the premises to H. for a term of twenty-one years, "together with all . . . lights, easements, . . . and appurtenances to the said premises belonging." The deed contained a covenant by the lessee that he would not "object to any works to adjoining premises" that might be sanctioned by or on behalf of the lessor or the superior landlords or landlord. The lease also contained a covenant by the lessor for quiet enjoyment of the premises. A company had acquired an interest in certain property adjoining to the demised premises and forming part of the same estate, and were proposing to erect thereon some buildings which, as H. alleged, would obstruct the access of light hitherto enjoyed by his premises. He accordingly brought an action to restrain the company from building so as to obstruct his light. The proposed buildings had been approved by the surveyor of the estate. In these circumstances, W., who was interested in the company, brought an action against H. to restrain him from objecting to the buildings then being erected by the company, on the ground that his action constituted a breach of the covenant; and he then moved, under sect. 24, sub-sect. 5, of the Judicature Act 1873 for a stay of proceedings in H.'s action. Held, that the words "adjoining premises" did not extend to any buildings which were situated near enough to affect materially the demised premises by obstructing easements, but only to buildings which came into physical contact with the demised building; that "adjoining" meant adjoining in the sense in which it was used in the London Building Act 1894, and could not be used in the sense of "neighbouring"; and that therefore H. was not precluded on that ground from objecting to the erection of the buildings. (*White v. Harrow; Harrow v. Marylebone District Property Company Limited.*) ... 4
- Lease—Forfeiture—Liquidation—Voluntary winding-up.**—The respondents by lease demised a public-house to C. and Co. Limited, a firm of brewers, for a term of thirty years. The lease reserved a power of re-entry to the lessors if the lessees or their assigns, being a company, should enter into liquidation, whether compulsory or voluntary. During the continuation of the term C. and Co., being then solvent, went into voluntary liquidation solely for the purpose of amalgamating with two other firms of brewers. Held, that the liquidation operated as a forfeiture of the lease, and was within sect. 14, sub-sect. 6, of the Conveyancing and Law of Property Act 1881. (*Watney, Combe, Reid, and Co. v. Ewart and others.*) ... 242
- Means of escape from fire—Division of cost between owner and occupier—Covenants in lease.**—As lessor of a factory the plaintiff had been required by the London County Council, under sect. 7 (2) of the Factory and Workshop Act 1891, to provide means of escape from fire, which he did at a cost of 368l. 17s. 6d. The lease contained the following covenant by the lessee, the tenant: "That he would 'from time to time and at all times during the said term pay and discharge all rates, taxes, charges, assessments, and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, which now are or may be at any time assessed, charged, or imposed upon the demised premises or the landlord or the occupier in respect thereof (the landlord's property tax only excepted)." Held, that whatever might be the true construction of the covenant, the County Court judge had jurisdiction, under sect. 7 (2), to apportion the expense of providing means of escape between the lessor and lessee in such proportion as appeared to him "just and equitable under all the circumstances of the case." *Semble*, that if by the terms of the lease these expenses under sect 7 (2) were expressly in terms provided for, it would not be "just and equitable" to make any order not in accordance with such express contract. (*Monk v. Arnold.*) ... 580
- Public-house—Agreement for one year certain—Covenants—To preserve licences—To reside on premises—Premises closed—Breach of covenants—Licences in jeopardy—Receiver—Delivery of licences to receiver—Possession.**—Where the tenant of a public-house who has continued in possession under the terms of an agreement for one year certain, which has expired, shuts up the public-house and leaves the premises in breach of covenants by him (1) not to do any acts whereby the licences shall be jeopardised, (2) not to shut up the premises, but to reside therein, and (3) upon quitting the same to assign over all licences to the landlords or such persons as they may appoint, the court has jurisdiction to appoint, and will appoint, a receiver of the public-house for the purpose of preserving the licences, and will order possession to be given to him so far as necessary for that purpose. (*Charrington and Co. Limited v. Camp.*) ... 15
- LANDS CLAUSES ACT 1845.**
- Compensation—Land subject to restrictive covenant**—No buildings to be erected other than dwelling-houses—Railway embankment—Land not taken injuriously affected.—The owners of an estate laid

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- out part of it for building, and sold that part of it in plots. The purchasers of these plots entered into restrictive covenants with the owners of the estate, the covenants being imposed by the owners for the benefit of the land retained by them. By one of these covenants the purchasers bound themselves not to erect any buildings on the land purchased other than private dwelling-houses of a certain specified description. Afterwards a railway company, having notice of these covenants, and acting under their statutory powers, purchased from the purchasers the plots of land subject to the restrictive covenants. The railway company then constructed a railway embankment on the land so taken. Held, that the railway company had committed a breach of the covenant not to erect on the land any buildings other than dwelling-houses. Held, also, that the land retained by the owners of the estate had been injuriously affected by this breach, and that the owners were entitled to obtain compensation under sect. 68 of the Lands Clauses Consolidation Act 1845. (*Long Eaton Recreation Grounds Company Limited v. Midland Railway Company.*) ... 873
- Compensation—Tenancy from year to year—Jurisdiction of justices to inquire into title of claimant—Requirement to give up possession before expiration of term—Condition precedent to right to compensation.—Where a claim for compensation is made under sect. 121 of the Lands Clauses Consolidation Act 1845 by a person who has no greater interest than as a tenant for a year or from year to year, and the claimant alleges such an interest, the justices have no jurisdiction under that section to inquire into the title of the claimant to the interest which he alleges, but they are bound to assess the compensation upon the basis of his alleged interest, if there be no other objection to their jurisdiction. It is a condition precedent to the right to obtain compensation under sect. 121 that the claimant should have been required to give up possession before the expiration of his term or interest in the premises, and the justices have jurisdiction to inquire and must ascertain whether the claimant has been so required to give up possession before the end of his term, as the question of the amount of compensation for the claimant's unexpired term will depend upon that, and if there be no evidence of a requirement to give up possession the justices ought not to assess compensation. (*Great Northern and City Railway Company, apprs. v. Tillett, resp.*) ... 723
- LEASE.
- Surrender—Fine—Tenant for life.—The legal tenant for life under a will of certain estates granted a mining lease under a power in the will for a term of twenty-two years from the 1st July 1898, receiving a dead rent and royalties which were to cease when the minerals were worked out. The lessees under a power in the lease determined the lease, and paid the dead rent for the whole of the unexpired term. Held, that the money belonged to the tenant for life. (*Re Hunloke's Settled Estates; Fitaroy v. Hunloke.*) ... 829
- (See COSTS—FISHERY—LANDLORD AND TENANT.)
- LICENSING.
- Bona fide* club—Intoxicating liquors—Delivery to wife of member for his consumption off the premises.—A member of a *bona fide* club not licensed for the sale of intoxicating liquor sent his wife to buy intoxicating liquor at the club for his consumption off the premises, having given her for that purpose a written order addressed to the steward of such club. The appellant served the wife with such liquor, and she handed over to the appellant on behalf of the club the price of the liquor. Held, that no offence had been committed by the appellant, under sect. 3 of the Licensing Act 1872, of selling intoxicating liquor without a licence. (*Davies, app. v. Burnett, resp.*) ... 565
- Justices—Likelihood of bias—Justice holding brewery shares—Disqualification.—An application was made to the licensing committee of the borough of T. for the removal of a licence to new premises. Three of the justices were members of the borough council of T., and one held shares in a brewery company that sold beer within the district. A suggestion was made before the committee that if the transfer was granted another licence would be given up and certain property would be placed at the disposal of the corporation for town improvements. The transfer was granted. The confirming authority, which included the four justices, confirmed the transfer, but the offer above stated was withdrawn. Held, that there was not any likelihood of bias on the part of the three justices who were members of the borough council, so as to render the orders made invalid; and held, further, that the orders were not invalid by reason of the fact that the fourth justice adjudicated, owing to proviso (3) of sect. 60 of the Licensing Act 1872. *Secus*, where actual bias could be shown in fact to exist. (*Rex v. Tempest and others.*) ... 585
- Objections by justices—No objection taken at meeting—Adjournment—Refusal of renewal—Jurisdiction—*Mandamus*—Form of.—Where no notice of objection has been served not less than seven clear days before the commencement of the general licensing meeting any objection then made under sect. 42 (2) of the Licensing Act 1872 must be made in open court before the adjournment, otherwise when the justices deal with the renewal upon the adjournment they will have no jurisdiction except to renew the licence. An objection can be made under sect. 42 (2) at the general annual licensing meeting by the justices themselves, but such objection must be made in open court. The court will not by *mandamus* order a judicial tribunal to act in a particular way, unless it is quite plain that what it has to do is purely ministerial and not judicial. Therefore, a *mandamus* will not be granted to justices to hold a further adjournment of the general annual licensing meeting and at such further adjournment grant a renewal of a licence, but it will merely order the justices to hear and determine according to law. (*Rex v. Justices of Kingston; Ex parte Davey.*) ... 589
- Renewal of licence—Notice of objection given by justices—Disqualification of justices—Bias.—In consequence of a suggestion that the number of licensed houses in a certain district was needlessly large, the licensing justices appointed a committee out of their number to inquire into the condition, position, and circumstances of each licensed house in the district. The committee, as the result of their inquiries, drew up a report in which certain recommendations were made. The licensing justices then, by their clerk, served on all the licence-holders in the district notices of objection to the renewal of their licences. At the hearing of the applications for renewals the justices, upon the evidence which was given on oath before them, refused to renew nine of the applications. Held, that the giving of the notices of objection by the licensing justices did not of necessity debar them from afterwards hearing and determining the applications for the renewal of licences. Held, also, that as what was done by the justices in connection with the inquiry and the report by the committee was honestly done to enable them to secure a full investigation of the facts with no other motive than the desire of discharging properly their duties as licensing justices, and as all the formalities of sect. 42 of the Licensing Act 1872 had been complied with, there was nothing to invalidate their decisions. (*Rex v. Farnham Justices; Ex parte Smith.*) ... 839
- Transfer—Condition on original grant—Licence to be given up on applicant leaving—Application for transfer—Discretion.—A licence was granted by justices subject to the condition that it should be given up upon the original holder leaving or ceasing to carry on business upon the premises.

Held, that this condition was not a bar to the justices granting a transfer of the licence upon the original holder leaving or ceasing to carry on business on the premises. (*Justices of Oldham, appa. v. Gee, resp.*) ... 389

(See JUSTICES.)

LIMITATIONS, STATUTE OF.

(See STATUTE OF LIMITATIONS.)

LOCAL GOVERNMENT.

Abolished office—Compensation to officer.—A local authority when assessing under sect. 120 of the Local Government Act 1888 the just compensation to be paid to an officer whose office has been abolished are bound to exercise their own judgment and discretion. J., a solicitor, was clerk to the vestry of M. E., and also practised at his profession. The duties and powers of such vestry were taken over by the corporation of S. under the London Government Act 1899, and the office of clerk was abolished under sect. 30 of that Act. J. applied to the corporation of S. for compensation, to be assessed under sect. 120 of the Local Government Act 1888. The corporation applied to the Treasury for information as to the principle on which they compensated officers whose offices were abolished, when such officers did not devote all their time to the duties of their offices. The Treasury replied that the practice was to calculate the compensation as if the officers did so devote all their time, and then to deduct 25 per cent. The corporation, without inquiring into the particular case and without exercising their own discretion in the matter, assessed the compensation to be paid to J. on this principle. Held, that a *mandamus* lay against the corporation to direct them to consider and assess the compensation justly payable to J. (*Rex v. Mayor, &c., of Stepney.*) ... 21

Bye-laws—"Laying out new street"—Penalties—Injunction.—The bye-laws of a local authority framed under sect. 157 of the Public Health Act 1875 made certain provisions with respect to the laying out and construction of new streets, as to level, width, construction, &c. Bye-law 97 provided that persons who should offend against the foregoing bye-laws should be liable to penalties; and bye-law 98 that, if any work, to which any of the bye-laws relating to new streets might apply, should be begun or done in contravention of any such bye-law, then, if such person should fail to show sufficient cause why such work should not be removed, altered, or pulled down, the sanitary authority should be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work. The defendants owned a piece of land within the jurisdiction of the local authority and abutting on two public highways, H.-lane and T.-road, the latter being a main road. On this land they erected certain houses without removing the fence on either side, but making the necessary openings here and there so as to provide means of entrance to and exit from the houses; they had not attempted to alter or interfere with H.-lane or T.-road. On the plaintiffs seeking an injunction to restrain the defendants from erecting or continuing the erection of any building upon, and from laying out any new street intended for use as a carriage road upon or in connection with, the defendants' land in contravention of the above bye-laws; and for an order on the defendants to remove, alter, or pull down all the works begun or done by the defendants contrary to the bye-laws, or, alternatively, a declaration that the plaintiffs were entitled to remove, alter, or pull down the same: Held, first, that the defendants were not laying out or constructing a new street within the meaning of the above bye-laws; and, secondly, that the plaintiffs could not enforce the bye-laws by an action for an injunction. (*Mayor, &c., of Devonport v. Tozer.*) ... 612

Bye-laws—Power to make bye-laws for regulating sale of articles on beach—Bye-law forbidding sale except under agreement—Validity.—Under statutory powers enabling a corporation to make bye-laws for regulating the selling or hawking of any article on their beach and foreshore, the corporation made a bye-law that: "A person shall not on the said beach or foreshore sell or hawk or offer or expose for sale any article, commodity, or thing, except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall by notice affixed or set up thereon from time to time appoint for the purpose." Held, that the bye-law was unreasonable and bad on the ground that it gave the corporation power to make any agreement they chose without reference to the question of the reasonableness or unreasonableness of such agreement, and that it reserved to them a right to refuse to give a licence to any particular person. (*Parker, app. v. Mayor, Aldermen, and Burgesses of Bournemouth.*) ... 449

District council—Parliamentary opposition—Expenses of opposition—Application of district rate—Ratepayers' consent—Sanction of Local Government Board.—An urban district council cannot apply the district rate towards payment of the expenses of opposing a local bill not affecting their own duties, rights, or privileges, without first obtaining the consent of the ratepayers under sect. 4 of the Borough Funds Act 1872, nor is sect. 3 of the Local Authorities (Expenses) Act 1887, under which such expenses if incurred may be sanctioned by the Local Government Board, intended to prevent the court from intervening to restrain such expenses being thrown on the rate when the sanction of the Local Government Board has not been applied for. (*Attorney-General v. Rickmansworth Urban District Council.*) ... 521

Highways—Bridges—Surveyor of highways—Agreement between surveyor of highways and county council for building bridge—Power to bind successors—District council becoming highway authority—Liability under agreement.—The surveyor of highways for a parish was appointed on the 19th April 1898 for one year. On the 24th Sept. 1898 he made an agreement with the county council, under sect. 3 of the Highways and Bridges Act 1891, for the building of a bridge in the parish by the county council, and thereby agreed to contribute towards the expenses two sums of 100l., payable on the 31st Dec. 1898 and the 31st Dec. 1899 respectively. On the 1st April 1899 the rural district council became the highway authority for the parish, under sect. 25 of the Local Government Act 1894, and they refused to pay the sum of 100l., which became due under the agreement on the 31st Dec. 1899, upon the ground that the surveyor of highways could not bind his successors. Held, that the surveyor of highways had power, under sect. 3 of the Highways and Bridges Act 1891, to make this contract so as to bind his successors, and that the liability thereunder passed to the rural district council. (*Hertfordshire County Council v. Barnet Rural District Council.*) ... 580

Lands acquired for volunteer purposes—Land owned or occupied for Crown purposes—Apportionment of expenses for paving, &c., highway.—Certain lands and premises were purchased by H. for the purpose of them being transferred to and used by the volunteer battalion of which he was commanding officer. They were afterwards mortgaged to the Public Works Loan Commissioners, and the money so received was used to repay the respondent and to fit up the premises, and they were held by the defendant and his successors as commanding officer under the Volunteer Act 1863. The premises have been used ever since as the headquarters of and for the purposes of the volunteer battalion, and for no other purpose. Held, that the premises were owned and occupied by the respondent as a servant of the Crown for the purposes of the Crown, and that he was exempt from liability to pay any expenses in respect thereof apportioned under sect. 150 of the Public Health

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Act 1875. (Hornsey Urban District Council, <i>apps. v. Hennell, resp.</i>)	423	therein specified, and these sums were paid. Subsequently, the rural council, finding that the severance was a pecuniary loss to them, requested the urban council to come to an agreement as to the amount to be paid for such loss, but the councils were unable to agree and an arbitrator was appointed to determine the question of adjustment of the financial loss sustained by the rural district by the severance of the urban district, in so far as such loss was not determined by the prior agreement. No claim for such loss was included in the prior agreement: Held, that the adjustment claimed by the rural council was an adjustment within the meaning of sect. 68 of the Local Government Act 1894, although the severed portion had been formed into an urban district of itself and had not been transferred to an existing district; and further that the claim to have such adjustment was not barred by the prior agreement between the councils. (<i>Re an Arbitration between the Rural District Council of St. Thomas and the Heavitree Urban District Council.</i>)	153
London County Council—Statutory powers—Tramways—Omnibuses.—By sect. 2 of the London County Tramway Act 1896 the London County Council were authorised to purchase and work tramways, and in exercise of the powers conferred by the statute they purchased certain tramways from a limited company. The company had run omnibuses in connection with their tramways, and the county council continued to run them. Held, that the statute gave them no power to purchase or run omnibuses, such a business not being incidental to the working of the tramways. A court of law has no power over the action of the Attorney-General sung on behalf of a relator on a matter within his jurisdiction. (<i>London County Council v. Attorney-General and others.</i>)	161	Streets—Vesting in urban authority—Disturnpiked road—Electric light company—Right to carry wires across such road.—A local authority in an urban district, who were the successors in title of a turnpike trust, had obtained a provisional order from the Board of Trade for lighting the district by electricity. In consequence of delay the plaintiff company was started, which, in order to supply the best part of the district, found it necessary to cross with their wires a street which had formerly been a turnpike road and was now vested in the defendants. The wires were cut by the defendants. In an action for an injunction to restrain the defendants from interfering with such wires: Held, that what passed to the defendants was so much of the land in question as is required for the purposes of the road, considering the nature of the particular purposes, in a given case. That here, inasmuch as the street was constructed under the General Turnpike Act and passed by purchase to the trustees for the purposes of that Act, the purchase extended <i>usque ad celum usque ad infernum</i> , and that the defendants, therefore, when they took it over acquired equal rights therein, and that it was now held by them in like manner for the purposes of the street. That the claim therefore failed. But as in an earlier stage of the action, when certain facts now known were not before the court, an interlocutory injunction had been granted, the action would be dismissed without costs. (<i>Finchley Electric Light Company v. Finchley Urban District Council.</i>)	286
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Private street works—Summary jurisdiction of justices—Decision that road is highway repairable by inhabitants at large—No estoppel.—The decision of justices on an objection taken under sect. 30 of the Wakefield Corporation Act 1892 (which is identical with sect. 7 of the Private Street Works Act 1892), that the street in which the works are proposed to be executed is a highway repairable by the inhabitants at large, is not a judgment <i>in rem</i> , and will not estop the local authority from subsequently claiming the amount of an apportionment in respect of the same street under proceedings subsequently taken. (<i>Wakefield Corporation, apps. v. Cooke and others, resps.</i>)	198		
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Agreement not to be interested in a similar business—Servant at fixed salary—Breach of agreement.—By an agreement between a firm of jewellers and a manager at one of their establishments the latter agreed that after the determination of his engagement he would not become interested in, either directly or indirectly, a similar trade or business. He afterwards entered the service of another firm of jewellers carrying on business in the same street as shopman at a fixed salary, not depending in any way upon profits or gross returns. Held, that his employment as shopman at a fixed salary did not cause him to become interested, either directly or indirectly, in a similar business in breach of his agreement. (<i>Gophir Diamond Company v. Wood</i>)	901	
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Servant's authority to contract—Implied authority—Evidence of holding out as agent.—The defendant made an arrangement with his coachman whereby he undertook to pay the coachman a certain sum per week per horse, and the coachman undertook to provide the forage and shoeing of the defendant's horses. The coachman then went to the plaintiff, a corn merchant, and saying he was in the defendant's service, ordered forage for the defendant's horses. The plaintiff knew that some of his customers made arrangements with their coachmen similar to that made by the defendant, but he did not inquire of the defendant whether his coachman had authority from him to buy forage on his behalf. The defendant paid the coachman the sum per horse which he had agreed to pay. In an action to recover from the coachman's master the price of forage supplied: Held, that there was no evidence of any holding out by the defendant of his coachman as having authority to pledge his credit, nor of any knowledge or ratification by the defendant, and that therefore he was not liable to pay for the forage supplied. (<i>Wright v. Glyn</i>)	373	
Trade union—Inducing breach of contract—Malice— <i>Bona fides</i> —Right of action.—By an indenture the plaintiff was bound as apprentice to W. and W. for three years as a stonemason. At that time he was being employed by them as a labourer and was twenty-five years of age. Certain rules had been drawn up between the masters and men, which W. and W. had agreed to and signed. By rule 6 it was provided: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average." The defendants threatened to withdraw the men employed by W. and W. if the plaintiff was taught the art of a stonemason, and accordingly the plaintiff was not taught by W. and W. in accordance with the indenture. Held (per Darling and Channell, JJ.), that the plaintiff would have a cause of action against the defendants unless they satisfied the court that when they interfered with the contractual rights of the plaintiff they had sufficient justification for their interference; that such sufficient justification for interference with the plaintiff's right must be an equal or superior right in themselves, and it would be no excuse that they had acted on a wrong understanding of their rights or without malice, or <i>bona fides</i> , or in the best interests of themselves; that under the circumstances there should be a new trial. Per Lord Alverstone, C.J.: That the facts disclosed negatived any suggestion that the action taken was to protect the interests of the defendants, and that judgment should be entered for the plaintiff. (<i>Read v. Friendly Society of Operative Stonemasons</i>)	593	593
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Combined scheme—Order of local authority—Alteration—No order—Drain a sewer.—Certain houses in B. street in 1863 were drained by a combined scheme under the order of the local authority. In 1899 No. 85, B. street was disconnected from No. 83 and connected to its adjoining house on the other side, No. 87. No order was made by the authority for this, but it was superintended by their officers. In 1900 the owner of No. 85 erected a workshop on the garden, and the drainage from that, including an additional w.c., was connected with the drain of No. 87. This was superintended by the respondents' officers, and, although a plan had been approved by the respondents, the work was not in fact carried out in accordance with that plan. Held, that the drain of No. 87 did not become a sewer. (<i>Gorringe, app. v. Mayor, &c., of Shoreditch, resps.</i>)	592	592
Management Acts—"New street"—Sewer—Expenses of sewerage—Liability of frontagers.—The boundary line between the parish of C., in the county of London, and the parish of H., in the county of Middlesex, ran along the centre of an old highway. Before the Metropolis Management Act 1855 came into operation in 1856 buildings had been erected along nearly the whole of the H. side of the road, but on the C. side of the road there were only seven or eight scattered buildings. Afterwards buildings were erected along the whole of the C. side of the road, and the vestry of C. constructed a sewer on that side of the road for the drainage of those buildings. The vestry apportioned the expenses of making the sewer among the frontagers on the C. side of the road, contending that this side of the road was a "new street" within the meaning of the Metropolis Management Amendment Act 1862. Upon a summons against a frontager to enforce payment, the justices found as a fact that, taken as a whole, the road was sufficiently built upon before 1856 to be a "street," and that, therefore, the C. side of the road was not a "new street." Held, that the justices could properly consider the road as a whole, and find that the whole was a "street"		

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- in 1856, and were therefore right in holding that the C. side of the road was not a "new street." (Clerkenwell Vestry v Edmondson and Son.) ... 137
- New street—Paving expenses—New strip of land added to old street—Cost of paving new strip—Liability of frontagers.**—An old highway, 16ft. wide, which before 1855 was a formed and made road with houses along the south side, and was repaired by the local authority, was widened in 1898 by the addition thereto of a strip of land 24ft. in width on the north side thereof, and houses were then built on that side. The local authority then resolved to pave the added part of the road as a "new street" and to apportion the expenses among the frontagers on the north side only. Upon a summons to recover the amount apportioned upon one of the frontagers, the magistrate decided that the old part of the road was an old street, and that the added part was of itself a "new street." Held, that the part added to the old street was a "new street" within the meaning of the Metropolis Management Acts, and that the expenses of paving the added part were properly apportioned among the frontagers on that part of the street. (Property Exchange, No. 1, Limited v. Wandsworth Corporation.) ... 481
- Paving apportionment—Dismissal of summons on ground of street not being a new street—Fresh apportionment—*Res judicata*.**—On the 9th Nov. 1898 the H. Vestry resolved that R.-street be paved as a new street, and apportioned the sum of 37l. 16s. 8d. on the respondent, which he refused to pay. On the 15th Sept. 1899 the H. Vestry summoned the respondent for that sum, but the summons was dismissed on the ground that R.-street was not a new street within the Metropolis Management Acts. On the 13th June 1900 a resolution was passed by the H. Vestry rescinding the above apportionment, and on the 14th March 1901 the H. Borough Council resolved that R.-street be paved as a new street, and apportioned on the respondent the sum of 32l. 16s. 1d., which he refused to pay, and thereupon the present summons was issued. The magistrate held that the adjudication of the 15th Sept. 1899 was conclusive, and he dismissed the summons. Held, that the decision of the 15th Sept. 1899 was not conclusive and the present case should be heard on its merits. (Scott, app. v. Lowe, resp.) ... 421
- "Wooden structures"—Licence to erect—Jurisdiction of borough corporations—London County Council—Stands and platforms constructed entirely of wood save as to the nails holding the planks together were erected within the city of Westminster.** The corporation of Westminster claimed that as by sect. 5 and sched. 2, part 1, of the London Government Act 1899 the power to license wooden structures given to the London County Council was transferred to them, they were the proper authority to license the erection of these structures, and to take proceedings in default of obtaining such licence. Held, that sect. 84 of the London Building Act 1894 applied to all wooden structures, whether permanent or temporary, not coming within the general provisions of part 6 of that Act; that it therefore applied to these structures; and that consequently the power to license their erection was transferred by sect. 5 and sched. 2, part 1, of the London Government Act 1899 to the corporation. (Mayor and Corporation of Westminster v. London County Council.) ... 53
- (See RATING.)
- MORTGAGE.**
- Power of sale—No express power—Shares in a company—Damages.**—A mortgage of shares, which was not by deed, contained no express power of sale, and no time was fixed for the payment of the mortgage debt. Held, that the mortgagee had an implied power of sale after a reasonable time had elapsed from the date of a notice by the mortgagee to the mortgagor requiring payment on a certain day. Held, by Stirling and Cosens-Hardy, L.JJ. that a reasonable and proper notice had been given. Held, by Williams, L.J. that a good notice had not been given, as there had been such misstatements in the letters as brought the case within *Pigot v. Cudley* (15 C. B. N. S. 701), and, further, no day certain had been fixed for payment; but the plaintiff was only entitled as damages to the price realised by the shares, less the amount due to the defendants for principal, interest, and proper charges, as the plaintiff was never in a position to redeem the shares before the sale. (Deverges v. Sandeman, Clark, and Co.) ... 269
- Redemption—Costs of negotiating the loan, investigating the title, and preparing the mortgage deed.**—Where the costs of negotiating the loan, investigating the title, and preparing the mortgage deed have not been deducted, as is usually the case, from the loan, they cannot be charged on redemption against a puisne mortgagee as costs, charges, and expenses properly incurred by virtue of the mortgage. (Wales v. Carr.) ... 288
- Restrictive covenant—Clog on equity of redemption—"Tied house."**—Any stipulation which varies the effect and incidents of redemption of a mortgage on payment off of what is due on the loan is a "clog" within the meaning of the equitable rule, and cannot be enforced. A covenant in a mortgage of a public-house to a firm of brewers binding the mortgagor to sell on the licensed premises no malt liquors except such as he purchased from the mortgagees, although valid during the continuance of the security, cannot be maintained after the mortgage debt has been paid off, as being a clog on the equity of redemption. (Noakes and Co. v. Rice.) ... 62
- (See BANKRUPTCY—COSTS—SOLICITOR AND CLIENT—STATUTES OF LIMITATION—VENDOR AND PURCHASER—WILL.)
- NEGLIGENCE.**
- Damage by electricity—"Leak"—Statutory powers—Right of action.**—The respondent companies were incorporated by Acts of Parliament, and authorised to work lines of tramway by electric power. Each statute contained a provision that the company "specially undertakes that, in the event of any electric leak taking place and any damage being caused thereby by electrolysis or otherwise, it will make good . . . all costs, damages, and expenses; and provided that nothing in this Act contained shall entitle the company to use the rails as a part of its system of conductors for the return electric current without the consent of the council." A short section of the tramway lines was not included in the lines authorised by the Acts, but the road authority had granted permission to lay tramway lines on that section. Consent was obtained for the use of the rails for the return electric current, but it was found that without any negligence there was necessarily an escape of electricity from the rails into the earth, which affected a telegraph cable belonging to the appellant company, and interfered with the transmission of messages. The appellants were put to considerable expense in devising means to counteract it. Held that, there being no tangible or sensible injury to person or property, the respondents were not liable at common law for the affection of the peculiar apparatus of the appellants, within the principle of *Fletcher v. Rylands* (19 L. T. Rep. 220; L. Rep. 3 H. L. 330), although the principle of that case does obtain in the Roman law; secondly, that the necessary escape of the electricity from the rails was not a "leak" within the meaning of the statute so as to make the respondents liable for the resulting damage to the appellants. (Eastern and South African Telegraph Company v. Cape Town Tramway Companies.) ... 457
- Railway—Trucks on incline—Act of trespasser—Damage—Liability.**—A railway company left certain trucks in a position on an incline, which if

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not interfered with were safe as regards a highway. They were aware that there might be interference by trespassers, and the jury found that the danger of interference might have been guarded against by the exercise of reasonable care and skill on the part of the company, which they did not exercise, and the jury found they were negligent. An accident having arisen to the plaintiff, who was passing along the highway, owing to the trucks running down the incline: Held, that the railway company were liable. (*McDowall v. Great Western Railway Company.*) ... 558

PARTNERSHIP.

Liability of member of firm for default of his co-partner—Election to charge partner alone.—The plaintiffs in the year 1899 appointed one F. A., who carried on business alone under the name of A. and A., to act as their solicitor in connection with certain mortgage transactions, one of which is hereinafter referred to as the Coleman mortgage. On the 31st Dec. 1900, and while the business in question was being carried out, F. A. entered into articles of partnership with the defendant P. On the 5th Feb. 1901 F. A. gave the plaintiffs notice in writing to the effect that he had taken defendant into partnership, and that the style of the firm would in future be A. and P. The plaintiffs ignored this notice. On the 28th Feb. 1901 the plaintiffs sent a cheque, payable to A. and A., in settlement of the Coleman mortgage. The proceeds of this cheque were misappropriated by F. A., who subsequently absconded. In an action against P. for the amount of the cheque: Held, on the evidence, that the plaintiffs had elected to abide by their original contract with F. A., and had not adopted the new firm as their solicitors to act for them in the particular transaction; that sect. 11 (b) of the Partnership Act 1890 had no application, as it could not be said that the firm of A. and P. did in fact receive money or property of the plaintiffs. *Per cur.*, following Lord Blackburn in *Scarf v. Jardine* (47 L. T. Rep. 268; 7 App. Cas. at p. 360): "Where A., knowing B. and C. to be partners, refuses to contract with them jointly, and insists on contracting with B. alone, he cannot afterwards treat B. as liable." (*British Homes Corporation Limited v. Patterson.*) ... 826

Solicitors—Profits—How ascertained.—In ascertaining the "profits" of a partnership, in the absence of special agreement to the contrary, the net profits of each year must be ascertained upon the footing of the moneys actually received and paid in that year without reference to when the work is done in respect of which the moneys are received. (*Badham v. Williams.*) ... 191

POLICE.

Pension—Calculation of—"Annual pay"—Free residence and fuel—Right to include for purpose of pension—Right of appeal from quarter sessions.—When a police constable appeals under sect. 11 of the Police Act 1890 to quarter sessions from the decision of the police authority on a reconsideration of the amount of his pension, the parties may appeal by case stated on a question of law for the opinion of the King's Bench Division, notwithstanding the provision in that section that the decision of the court of quarter sessions shall be final. By the Police Act 1890, a police constable, after a certain number of years' service, is entitled as of right to retire and to receive a pension to be calculated on the amount of his "annual pay" at the date of his retirement. A divisional inspector retired from the service with the right to a pension. At the date of his retirement he had, in addition to his weekly payment in money, a free residence for himself and family, and free fuel, gas, and water. Held, that the value of the free residence, fuel, gas, and water was not a part of his "annual pay" for the purpose of calculating his pension, and ought not to be taken into consideration. (*Goodwin, app. v. Corporation of Sheffield, resps.*) 682

POOR LAW.

Pauper—Settlement—Addition to parish of part of adjoining parish—Identity of parish not destroyed.—By an order of the Local Government Board made under the Divided Parishes and Poor Law Amendment Act 1876 and the Poor Law Act 1879 a part of a parish was taken away from it and added to another parish. Held, that the identity of the parish to which the addition was thus made was not destroyed by the addition; and that therefore a settlement which had been acquired by a pauper in the parish before the addition to its boundaries continued to exist. (*West Ham Union v. London County Council.*) ... 134

POWER OF ATTORNEY.

(See PRINCIPAL AND AGENT.)

PRACTICE.

Action for interference with water supply—Interlocutory application for an order for plaintiffs to enter upon and make excavations in defendant's land—Application refused for an action to restrain interference with the plaintiffs' water supply.—The plaintiffs applied by motion for an order permitting them to enter upon the defendants' land in order to inspect a certain shaft, and if necessary sink other shafts for the purpose of ascertaining whether water which came to the surface at a certain spring flowed underground in a known and defined channel. Held, without deciding whether the plaintiffs might or might not be entitled to make the necessary inspection and excavations at some time, that there was no sufficient evidence to justify the court in making any order on the motion. (*Mayor, &c., of Bradford and others v. Ferrand and the Urban District Council of Shipley.*) ... 497

Action *in rem*—Misdemeanor of plaintiff—Practice of Court of Admiralty—Irregularity—Amendment—Fresh step after knowledge of irregularity.—Order XLVIII.A, r. 1, allows any two or more persons claiming as co-partners to sue in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action. A plaintiff issued a writ in an action *in rem* for damage to cargo in the name of a firm of which he was the sole member, and indorsed it "the plaintiffs as owners of goods laden on board the steamship A." In a motion by the defendants to set aside the writ: Held, that as by the old Admiralty practice, which is not abrogated by the Judicature Acts, owners of a ship or cargo are entitled to sue as such, it would have been sufficient if the plaintiff had described himself as "owner" on the face of the writ, and that therefore this was a mere irregularity and might be cured by leave to amend under Order LXX., r. 1. Held, also, that as the defendants, by applying for security for costs after knowledge of the irregularity, had taken a fresh step in the action, they were precluded by Order LXX., r. 2, from taking advantage of the irregularity. (*The Assunta.*) ... 660

Adding defendant—Opposition of plaintiff.—Except in actions where the plaintiff sues in a representative capacity, or under very special circumstances, the court cannot under Order XVI., r. 11, add a defendant hostilely to the plaintiff. A beneficiary under a settlement sued the surviving trustee of the settlement in respect of a breach of trust. The defendant applied to have the legal representative of his deceased co-trustee added as a defendant in order that he might issue a third-party notice upon her claiming contribution. The plaintiff opposing, it was held that there was no jurisdiction to make the order. (*McCheane v. Gyles.*) 217

Appeal—County Court—Order made under sect. 5 of Workmen's Compensation Act 1897—Appeal to High Court.—An appeal from an order made by a County Court judge under sect. 5 of the Workmen's Compensation Act 1897 lies to the High

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Court under sect. 120 of the County Courts Act 1888. (<i>Morris v. Northern Employers' Mutual Indemnity Company Limited.</i>)	748	appeal as to costs without leave.—Where by an order of the court the whole of an action is referred for trial to an official referee with power to direct judgment to be entered and to deal with the whole action, and the order gives no direction as to costs, the decision of the official referee as to costs within his discretion cannot be appealed against except by his leave. (<i>Minister and Co. v. Apperly and others.</i>)	625
Appeal—County Court—Workmen's compensation—Order made by County Court judge against insurers of employer in respect of accident—Right to appeal to High Court.—An appeal lies, under sect. 120 of the County Courts Act 1888, to the King's Bench Division of the High Court, from an order made by a County Court judge under sect. 5 of the Workmen's Compensation Act 1897. (<i>Kniveton v. Northern Employers' Mutual Indemnity Company Limited.</i>)	721	Costs—Compulsory purchase of land—Purchase money paid into court—Petition for payment out—"Express provisions" of statute.—Some houses having been taken by the London County Council under their statutory powers, the compensation money was paid into court under sect. 76 of the Lands Clauses Consolidation Act 1845 by reason of the wilful neglect of the owner of the houses to make out a title to the property. A petition for payment out of the money was presented by an incumbrancer of the owner, to which certain other persons claiming to be incumbrancers were made respondents, and the London County Council were ordered to pay the costs of the petitioner and respondents of and incident to the petition. Held, that sect. 80 of the Lands Clauses Consolidation Act, 1845 did not contain an "express provision" as to these costs, and therefore the court had jurisdiction under sect. 5 of the Judicature Act 1890 to make the order. Held, also, that the London County Council were entitled to an order for payment to them out of the money in court of the amount of the sheriff's costs incurred by them under sect. 91 of the Lands Clauses Consolidation Act 1845 in order to obtain possession of the land, and which they had not deducted from the compensation before paying it into court as they had not then been incurred. (<i>Re Schmarr.</i>)	71
Appeal—Security for costs—Form of order—Bond to be given "to the satisfaction of the judge in chambers."—In orders for security for the costs of appeals in the Chancery Division, the practice, as in the King's Bench Division, is to require that the security be approved by the judge in chambers. (<i>Hope v. Hope.</i>)	363	Costs—Duties—Will—Power of appointment—Specific appointments—Appointment of residue.—By their marriage settlement a testator and his wife (now deceased) were empowered, subject to their life interests, to exercise a joint power of appointment over the whole of the funds settled by them among the children of their marriage. In the exercise of this power they appointed three sums of 10,000 <i>l.</i> each to three of their daughters upon their respective marriages. They also appointed the residue of the settled funds, after satisfying the previous appointments, up to the sum of 10,000 <i>l.</i> to a fourth daughter upon her marriage, and the testator covenanted with the trustees of her marriage settlement to make good any deficiency in her 10,000 <i>l.</i> out of his own estate. The settled funds now amounted to about 38,000 <i>l.</i> Upon summons to determine how in the distribution of the settled funds the duties and the costs ought to be borne: Held, that (1) the estate duties payable on the death of the testator and his wife, (2) the costs of raising and paying the same, (3) the costs of raising and paying the three first appointed sums of 10,000 <i>l.</i> , and (4) the general costs of administering the fund ought to be borne by all the appointed funds rateably. (<i>Re Chisholm; Goddard v. Brodie.</i>)	193
Appeal from order of judge at chambers—Practice and procedure—Question of compensation under the Lands Clauses Act 1845 (8 & 9 Vict. c. 18)—Order for trial of question in High Court.—Where an order has been made by a judge at chambers, under sect. 41 of the Regulation of Railways Act 1868, for the trial in the High Court of a question of compensation under the Lands Clauses Act 1845, an appeal against such an order lies to the Divisional Court, not to the Court of Appeal. (<i>Re Great Northern and City Railway Company.</i>)	440	Costs—Taxation—Estate duty—"Disbursement."—A payment in respect of estate duty, under sect. 6, sub-sect. 2, of the Finance Act 1894, made by a solicitor on behalf of his client, is not a "disbursement" within the meaning of sect. 37 of the Solicitors Act 1845: and therefore is not properly included in his bill of costs. (<i>Re Kingdon and Wilson.</i>)	639
Breach of trust—Solicitor borrowing money without security and with notice—Summary order.—The trustee of a will lent certain moneys which formed part of the trust estate to M., his solicitor, who had also acted as solicitor to the will. There was no security for the loan. M. was no party to an administration action subsequently brought by legatees against the trustee. Held, that the court, in the exercise of its jurisdiction, had power on motion in the action to order M. to bring the money into court. (<i>Re Carroll; Brice v. Carroll.</i>)	862	Costs—Taxation—Order for payment of costs to successful party except so far as increased by certain issues—Affidavit relating both to general and to excepted issues.—The Registrar of Trade Marks having granted an application by W., C., and Co. for the registration of their trade mark, an appeal was brought by the R. Company, which was allowed by Bryne, J. (83 L. T. Rep. 160; (1900) 2 Ch. 218). His Lordship gave the costs of the appeal to the R. Company except so far as they had been increased by certain issues, the costs of which were to be paid to W., C., and Co. Upon	
Costs—Action founded on tort—Action which could have been commenced in a County Court—Recovery of injunction and nominal damages.—Sect. 116, sub-sect. 2, of the County Courts Act 1888 provides that, with respect to any action founded on tort brought in the High Court which could have been commenced in a County Court, if the plaintiff shall "recover a sum less than 10 <i>l.</i> ," he shall not be entitled to any costs of the action. An action for trespass to land was commenced in the High Court, in which the plaintiff claimed an injunction and damages. The real dispute in the action was as to the existence of an alleged right of way. The plaintiff obtained an injunction and nominal damages. Held, that as the plaintiff had recovered substantial relief besides the amount of the nominal damages, the action was not within sect. 116, sub-sect. 2, and he was entitled to his costs of the action. (<i>Keates v. Woodward.</i>)	369		
Costs—Action founded on tort—Agreement for lease—Wrongful removal of fixtures before execution of lease.—The defendant agreed to lease a house to the plaintiff. Between the date of the agreement and the execution of the lease the defendant removed certain fixtures without the plaintiff's knowledge. The lease was afterwards executed, and the plaintiff took possession. He then found that the fixtures had been removed. In an action in the High Court against the defendant for thus removing the fixtures, the plaintiff recovered 20 <i>l.</i> and costs. Held, that, though the relationship between the plaintiff and the defendant arose out of the contract for the lease, the action for the removal of the fixtures was not an action founded on contract, but was in substance an action founded on tort within sect. 116 of the County Courts Act 1888; and that the plaintiff was therefore entitled to his costs on the High Court scale. (<i>Sachs v. Henderson.</i>)	437		
Costs—Appeal—Official referee—Reference of whole action—Discretion of referee as to costs—Right to			

- taxation of the costs, the taxing master disallowed the costs of a witness who had filed an affidavit upon which he had been cross-examined. The R. Company objected (*inter alia*) to the disallowance of these costs on the ground that the affidavit did not relate solely to the excepted issues. In his answer to objections the taxing master overruled the objections. The R. Company took out a summons to review taxation. Byrne, J. affirmed the decision of the taxing master upon the ground that the evidence in question was unnecessary in any view of the case. The R. Company appealed upon the ground that this evidence did not relate solely to the excepted issues; and that consequently the whole costs of the witness went to the appellants, the successful parties, on the principle of *Brown v. Houston* (85 L. T. Rep. 160; (1901) 2 K. B. 865). Held, that the decision of the taxing master was perfectly right; and that the case of *Brown v. Houston* (*ubi sup.*) did not apply, because that was a common law action and the order in no way separated the issues, whereas in the present case the learned judge had distinctly separated the issues. (*Re Wright, Crossley, and Co.*) ... 280
- County Court—Garnishee summons—Assignment of debt—Payment by garnishee—Balance in hand—Payment of balance under subsequent garnishee summons.—A debtor, after having been served by the judgment creditor in a County Court action with a garnishee summons, received notice of an assignment of the debt which he owed to the judgment debtor. He afterwards was served with another garnishee summons by another judgment creditor of the same judgment debtor. He then paid into court the amount of the judgment debt owing to the first judgment creditor, and the balance of his debt which then remained in his hands he paid into court in respect of the claim of the second judgment creditor. In an action subsequently brought against him by the assignee of the debt to recover the amount of the balance remaining after the first judgment creditor had been paid: Held, that the debtor, after having received notice of the assignment of the debt, was not justified in appropriating to the second judgment creditor the balance remaining in his hands after paying the first judgment creditor; and, as he had thereby deprived the assignee of the benefit of his assignment, he was liable in the assignee's action. (*Yates v. Terry.*) ... 133
- Court of Appeal—Security for costs—Application for a new trial.—The general rule of practice, laid down by the Court of Appeal in *Heckscher v. Crosley* (1891) 1 Q. B. 224, not to order security for costs of a motion for a new trial will no longer be treated as binding, and the court will exercise the same discretion as to security for costs in the case of an application for a new trial as in the case of any other appeal. (*Wightwick v. Pope and others.*) ... 750
- Interrogatories—Defamation—Plea of privilege—Information to enable plaintiff to prove malice.—A borough councillor brought an action for slander against another councillor of the borough. The defendant pleaded that the words were spoken only to other borough councillors in answer to inquiries made by them in respect of a matter in which he and they had a common interest, and that the words were spoken *bona fide* and without malice, and in the honest discharge of the defendant's duty as a councillor, and that the occasion was privileged. Held, that the plaintiff was entitled to interrogate the defendant as to what information he had which induced him to believe that the words spoken by him were true, and as to what steps the defendant had taken, before speaking, to ascertain whether the words were true or not. (*Elliott v. Garrett.*) ... 441
- Married woman—Intervener in probate action—Costs of "proceeding"—Property subject to restraint on anticipation.—The words "any action or proceeding . . . instituted by a woman," in sect. 2 of the Married Women's Property Act 1893, include an intervention by a married woman in a probate action; and the court has, therefore, jurisdiction, in the case of such action being dismissed with costs, to order payment, as and from the date of the intervention, of the costs of the opposite party out of property of the married woman which is subject to a restraint on anticipation. (*Crickitt v. Crickitt, Eliza Crickitt intervening.*) ... 635
- Staying proceedings in action—Arbitration—Summons for directions taken out by plaintiff—Leave to defendant to administer interrogatories—"Step in the proceedings."—Under the summons for directions taken out by the plaintiffs in an action for breach of contract an order was made against them for discovery, and leave was given to the defendant to administer interrogatories. Afterwards the defendant took out a summons under sect. 4 of the Arbitration Act 1889 asking for a stay of proceedings on the ground of an arbitration clause in the contract. Held, that, by the order he had obtained under the summons for directions, the defendant had taken a "step in the proceedings" which precluded him from obtaining a stay under sect. 4. (*County Theatres and Hotels Limited v. Knowles.*) ... 132
- Stay of execution pending appeal—Jurisdiction of Court of Appeal—Order LVIII, rr. 16, 17.—The Court of Appeal has jurisdiction to hear an application for a stay of execution in a cause in which an appeal has been entered in that court, although no application for a stay has previously been made to the judge who tried the cause. (*Brown v. Brook.*) ... 373
- Third-party notice—Service out of the jurisdiction—Jurisdiction of court—Third party domiciled in Ireland—Claim for contribution in respect of breach of trust committed in Ireland by third party's testator.—By a settlement made in Ireland and dated in 1874 A. and B. were appointed trustees of the sum of 1000*l.* upon and subject to the trusts and powers thereafter expressed. In 1875 A. and B. lent the whole of the trust fund upon an alleged contributory second mortgage executed in Ireland of land situate in that country, which was subsequently sold for a sum insufficient to meet any portion of the 1000*l.* secured thereon. In 1877 B. died, and his will was proved by his widow in Ireland. She was domiciled and resided there. In 1901 an action was brought by the sole beneficiary under the settlement, seeking to make A., as the survivor of the two trustees thereof, liable for the alleged breach of trust. A. was staying in England, and was duly served there. A. obtained leave to issue and serve a third-party notice upon B.'s widow, claiming contribution from her on the ground that her husband as co-trustee was equally liable with him. Held, that the court had no jurisdiction in this case to order service of the third-party notice out of the jurisdiction. (*McCheane v. Gyles.*) ... 1
- Third-party procedure—Counter-claim against plaintiff—Right of plaintiff to add third party as defendant to the counter-claim.—A plaintiff against whom a defendant has counter-claimed is, as regards the counter-claim, a "defendant" within the meaning of Order XVI., r. 48, which enables a defendant, who is entitled to contribution or indemnity against a person not a party to the action, to add him as a third party. (*Levi v. Anglo-Continental Gold Reefs of Rhodesia Limited; Taylor, third party.*) ... 357
- Trial of action—"Liberty to apply"—Inspection of documents—Recipe relating to secret remedy—Joint owners—Recipe in possession of one owner—Right of the co-owner to inspection.—In 1895 E. and R. were joint owners of the original recipe for the manufacture of a secret specific or remedy. On the 11th March 1896 E. assigned his half-interest to W., the assignment containing a clause precluding W. from the right of knowing the secret of the remedy. On the 23rd March 1896 W. assigned to F. one-half of his interest. In July 1897 R. assigned one-quarter of his half

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interest to P., but without communicating the secret to him. In 1900 R. purported to assign to T. the absolute sole right and interest in the remedy, and handed to him the original recipe. P. and W. brought an action against R. and T. claiming a declaration that the alleged assignment to T. was a fraud on their rights and void, and that P. was entitled to have the recipe shown to him by T. The action was tried by Kekewich, J. who, by an order dated the 10th July 1901, declared that the effect of the various assignments was to vest three-eighths of the remedy in T., three-eighths in P., and two-eighths in W. His Lordship, however, gave no decision upon the right of P. to inspect the recipe. Liberty was given to apply. It appeared that the original recipe was written on a piece of paper, which was destroyed by T. shortly after the trial, but that he had kept a copy of it, which was now in his possession, and which he refused to produce. A motion was subsequently made by P., under the liberty to apply, that he might be at liberty to inspect and take copies of the recipe. It was decided by Joyce, J. that the right to a share in the remedy did not involve a right to the knowledge of the secret for which P. ought to have bargained before paying his money; and that therefore the application must be refused. P. appealed. Held, without deciding the point determined by Joyce, J., that the liberty to apply reserved by the order of Kekewich, J. did not cover such an application as the present; and that therefore, on that ground, the appeal must be dismissed, but without prejudice to any subsequent proceedings. (<i>Poisson and Woods v. Robertson and Turvey.</i>) 302		year from his ceasing to receive remuneration from the plaintiffs. It was further agreed that if the defendant committed any breach of the agreement he should forfeit and pay 100% to the plaintiffs as liquidated damages. The employment having terminated, the defendant committed breaches of the agreement, and the plaintiffs sued for 100% liquidated damages and for an injunction. Held, that the plaintiffs could not pursue both remedies, but must elect between the damages and the injunction. (<i>General Accident Assurance Corporation v. Noel.</i>) 555
Writ—Service—Foreign corporation—Residence within jurisdiction—Service in England.—A foreign corporation, manufacturers abroad of motor-cars, hired a stand at the Crystal Palace to exhibit their goods at a cycle show for a period of nine days. They had the exclusive use of the stand, which was in charge of a person whom they had sent from abroad for the purpose, whose duty it was to explain the working of the articles exhibited, to press their sale, and to obtain orders. A motor-car exhibited at the stand was fitted with tyres which the plaintiffs alleged to be an infringement of their patent. The writ in an action for the alleged infringement was served upon the servant of the foreign corporation at the stand at the Crystal Palace. Held, that the defendants were carrying on business and were resident within the jurisdiction, and that the writ was properly served under Order IX., r. 8. (<i>Dunlop Pneumatic Tyre Company v. Actiengesellschaft für Motor, &c., Vorm. Cudell and Co.</i>) 472		Power of attorney—Construction—General words— <i>Ejusdem generis</i> —Power to borrow—Onus of proof—Excess of authority—Money had and received.—The plaintiff carried on business in Australia under a firm name. The firm had a London branch, and the plaintiff's brother, the defendant L. J., was appointed agent in 1893. In Jan. 1899 the plaintiff executed a power of attorney whereby he appointed the defendant L. J. to be his attorney to purchase goods in connection with the business, either for cash or on credit, or partly for cash and partly for credit, with power to modify or vary the terms and conditions of the contracts for purchase or wholly to cancel the same, and "where necessary, in connection with any purchases made on" the plaintiff's "behalf as aforesaid or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper in the premises, and to sign the plaintiff's name or his trading name to any cheques on his banking account in London. In June 1899 the defendant L. J., purporting to be acting on behalf of the plaintiff's firm, applied to and obtained from the defendants M. and M. a loan of 4000%., ostensibly for the general purposes of the business. The defendants M. and M. received from the defendant L. J. four bills of exchange to that amount accepted in his own name pro. the plaintiff's firm. The cheques for the 4000% were paid into the banking account in London of the plaintiff's firm, and drawn out by the defendant L. J., and applied to his own purposes without the knowledge of the plaintiff. An action was thereupon brought by the plaintiff against the defendants M. and M. and the defendant L. J. for an injunction to restrain the defendants from negotiating the bills for the 4000% upon the ground that they were accepted without the plaintiff's authority. The defendants M. and M. counter-claimed against the plaintiff and the defendant L. J. for payment of the sums due on the bills with interest at 4 per cent., or alternatively for the 4000% as money had and received by the plaintiff to the use of the defendants M. and M. with like interest. Held, that the power of attorney did not confer a general power of borrowing; that the plaintiff could not be held liable for the 4000% as money had and received for the use of the defendants M. and M.; that those defendants must be taken to have had full notice of the terms of the power of attorney and of the fact that the defendant L. J. had no power to borrow; and that the lending of money to a person who had no power to borrow was the proximate cause of the loss. (<i>Jacobs v. Morris.</i>) 275
Writ—Service out of jurisdiction—Breach of contract—Wrongful dismissal—Letter posted out of, but received within, jurisdiction—No breach within jurisdiction.—When a servant is wrongfully dismissed by a letter posted by the employer abroad and received by the servant within the jurisdiction, there is no breach within the jurisdiction of the contract to employ, and leave cannot be given to serve out of the jurisdiction notice of the writ in an action by the servant for wrongful dismissal, under Order XI., r. 1 (e). (<i>Holland v. Bennett.</i>) 485		Power of attorney—Implied warranty of authority—Forged signature—Transfer of stock—Liability of innocent attorney.—One of two trustees of two sums of stock standing in their names in the books of the Bank of England sold them out under powers of attorney to which the signature of his co-trustee had been forged, a stockbroker who had no knowledge of the forgery acting under the powers and executing the transfers. Held, that the stockbroker having demanded to act under the powers was liable, under an implied warranty that he had the authority of both trustees, to indemnify the bank for the loss they had sustained by being ordered in an action brought by the other trustee to replace the stocks. Held, also, that the case was within <i>Collen v. Wright</i> (8 Ell. & Bl. 647), which is not limited to cases of
(See COLONIAL LAW—COMPANY—COUNTY COURT—CRIMINAL LAW.)		
PRINCIPAL AND AGENT.		
Agreement by agent not to interfere in the business after ceasing to be employed—Liquidated damages—Injunction—Election.—By an agreement made between the plaintiffs and the defendant, the latter was appointed the agent of the plaintiffs, and he agreed that if he ceased to act as such he would not give information about the plaintiffs' connections and would not, directly or indirectly, interfere with the plaintiffs' business, or represent others doing similar business for a		

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contract. Held, also, that a "transaction" had taken place between the stockbroker and the bank within the rule stated by Lord Esher, M.R. in <i>Firbank's Executors v. Humphreys</i> (56 L. T. Rep. 36; 18 Q. B. Div. 54, 60). (<i>Oliver v. Governor and Company of the Bank of England.</i>)	PAGE 248	particulars, and noted down his answers in a book, and afterwards allowed him to go. The governor of the prison from which the plaintiff would have come if he had not been bailed was not present in court, and the unlawful detention by the warders was not by his orders or directions. In an action for false imprisonment against the governor: Held, that the legal custody of the plaintiff after he had surrendered and during his trial was in the governor of the prison, and that the governor, whose duty it was to see that the plaintiff was properly discharged after acquittal, was responsible for the illegal acts of the warders in so detaining the plaintiff. (<i>Mee v. Cruikshank.</i>)	PAGE 708
Power of sale—Transfer to agent of <i>indicia</i> —Fraudulent mortgage by agent—Limit of authority—Notice to mortgagee—Estoppel—Priority—Vendor's lien—Redemption.—R., a trustee under the will of G., employed H., a stockbroker, to sell a bond of the T. Commissioners of the value of 2000 <i>l.</i> , part of the testator's estate, and the bond was sent to H. at his request. Shortly after H. wrote R. that he was arranging the sale, and inclosed a transfer deed to himself, which was expressed to be made on receipt of that sum by R., although no money was in fact paid. H. then obtained registration as owner of the land, and in the meantime had fraudulently mortgaged it to W. for 1000 <i>l.</i> , who was ignorant of the real title of H. H. subsequently became bankrupt, and W. died. In an action by R. against W.'s executors and H. claiming delivery up of the bond or that he was entitled to a vendor's lien thereon or redemption: Held, that, whether the case was regarded as one of general authority with no limit brought to the notice of the mortgagee or as one of estoppel, the circumstances were such that the plaintiff had by his act or default displaced the higher equitable right given to him by the priority of his title in point of date. His claim for a vendor's lien also failed, and accordingly there would be the usual judgment for redemption. (<i>Rimmer v. Webster.</i>)	491	RAILWAY.	
PRINCIPAL AND SURETY.		Private sidings—Branch railway—Owner's right of communication with line of railway company.—Sect. 76 of the Railway Clauses Consolidation Act 1845 enables the owners of land adjoining a railway to lay down collateral branches of railway to communicate with the railway for the purpose of bringing carriages to or from or upon the railway; and requires the railway company, subject to certain conditions, to make communication between their line and the branch railway. Held, that the object of this section was to enable the owner of a branch railway to make use of a railway company's line as a highway on which he might work his own rolling stock; and that the section could not be made use of to compel a railway company to make communication with a private siding in order that the communication, when made, might serve as an occasion to the owner of the siding for demanding facilities under other Acts of Parliament. (<i>Lancashire Brick and Terra Cotta Company Limited v. Lancashire and Yorkshire Railway Company.</i>)	26, 176
Fidelity guarantee—Construction—Consideration indivisible—Death of guarantor—Knowledge of death—Determination of liability.—The liability under a bond by which the fidelity of a person as receiver of the rents of an estate is guaranteed, and for which the consideration is indivisible, is not determined by notice given during the lifetime of the guarantor or by knowledge of his death. In order that the liability may be so determined it must be expressly so stipulated. (<i>Balfour v. Grace.</i>)	144	Railway company—Dock company—Lines on docks—Traffic conveyed from docks over railway of railway company—Through rates—Right of dock company to claim through rates.—The Railway and Canal Traffic Act 1888, by sect. 25, provides that the facilities which, by sect. 2 of the Railway and Canal Traffic Act 1873, every railway company is required to afford shall include the due and reasonable receiving, forwarding, and delivering by every railway company, at the request of any other such company, of through traffic at through rates; and sect. 3 of the Act of 1873 provides that "the term 'railway company' includes any person being owner or lessee of or working any railway constructed or carried on under the powers of any Act of Parliament, and the term 'railway' includes every station, siding, &c., of or belonging to such railway and used for the purposes of public traffic." The plaintiffs, a dock company, had constructed and used under statutory powers lines of rails and sidings in their docks, which communicated with the railway of a railway company. Goods were conveyed over these lines and sidings, in trucks of the railway company drawn by engines of the dock company, to and from the quays and warehouses in the docks from and to the railway of the railway company. The private Acts under which these lines and sidings were constructed and used did not incorporate the Railways Clauses Consolidation Acts or contain the provisions usual in the case of railways. Held, that the dock company were not a "railway company" and the lines and sidings were not a "railway," within the meaning of sect. 25 of the Railway and Canal Traffic Act 1888, and that the dock company were not entitled to through rates under that section. (<i>London and India Docks Company v. Great Eastern Railway Company and Midland Railway Company.</i>)	26, 339
PROBATE.		RATING.	
(See ADMINISTRATION—WILL.)		Distress warrant—Objection before justices on application for—Jurisdiction to rate—Appeal.—By sect. 69 of the Great Northern and City Railway Act 1892 it was enacted: "The company	
PRISON.			
Governor of prison—Prisoners—Legal custody of, during trial in court—Illegal detention of prisoner by warder after acquittal—Liability of governor for illegal act of warder.—The legal custody of prisoners when at the place of trial and during actual trial in court is in the governor of the gaol from which they have come, or from which, if bailed, they would have come if they had not been bailed, as the effect of the Prison Act 1865 and the subsequent legislation has been to transfer such custody from the sheriff to the gaoler; and consequently, if, after a prisoner, whether he has come from the prison or having been admitted to bail has surrendered in court to take his trial, has been tried, acquitted, and ordered to be discharged, the warders unlawfully detain him, the governor of the prison is responsible for the illegal act of the warders, although he may not have been present in court or have ordered or directed it. The plaintiff was committed to quarter sessions on a charge of felony; he was admitted to bail, he surrendered, took his trial, and was acquitted, and was ordered by the chairman of the court to be discharged; whereupon the warders who were in charge of the prisoners for trial, instead of allowing the plaintiff to go, took him to the cells below the court and detained him for a considerable time, and questioned him as to his age, parentage, and other			

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shall in respect of all lands and buildings acquired by them under the powers of this Act be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such lands and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant, and shall continue liable to and pay all such consolidated sewer and other rates and contributions until the undertaking shall be completed and assessed or liable to be assessed to the before-mentioned rates and contributions, or until such of the said lands and buildings as may not be required for the purposes of the undertaking shall have been otherwise duly assessed or liable to be assessed and become liable to the before-mentioned rates and contributions." The railway company acquired certain land under this Act upon which buildings formerly existed but had been pulled down before the railway company had acquired any interest in the land. Held, that the railway company were not liable to be rated in respect of these buildings under sect. 69. Held further, that as the objection raised by the respondents as to their liability went to the jurisdiction to rate, that objection could be entertained by the justices upon an application for a distress warrant. (*Churchwardens of St. Stephen, apps. v. Great Northern and City Railway Company, resps.*) ... 390

Metropolis—Woolwich—Partial exemption of land covered with water—Continuation of exemption under London Government Act 1899—Land covered with water not separately assessed in valuation list—Appeal to quarter sessions against rate—Right to appeal without objecting before assessment committee to valuation list.—Prior to the London Government Act 1899 the district of Woolwich was subject as to rating to the Public Health Act 1875, and general district rates therein were made under sect. 211 of that Act, under which the occupiers of land covered with water were assessed to general district rates at one-fourth only of the net annual value of such lands. The London Government Act 1899, in sect. 19, sub-sect. 1, provided that a scheme under the Act should provide for placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the Public Health Acts; and in sect. 10, sub-sect. 1, that a scheme under the Act should make provision for protecting the interests of owners and occupiers of any hereditament exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments; and a scheme was made and confirmed accordingly. The owners and occupiers of certain lands in Woolwich, part of which was land covered with water, and was, as such, prior to the Act of 1899, assessed at one-fourth of its net annual value only, were in 1900 assessed in one assessment for the whole hereditament, and in 1901 were rated to the full amount of the rate. They appealed to quarter sessions against the rate without having made any objection before the assessment committee against the valuation list as to the description of the hereditaments appearing therein, and without having asked for a division of the property, so as to show the part which was exempt. Held, that the partial exemption of land covered with water was preserved in Woolwich, so far as existing hereditaments were concerned, and that the occupiers of such lands were assessable only at one-fourth the net annual value of the lands. Held, also, that the occupiers were entitled to appeal to quarter sessions against the rate without having first objected before the assessment committee against the valuation list that the hereditaments ought to have been divided. (*London and India Docks Company, apps. v. Mayor, Aldermen, and Councillors of the Borough of Woolwich, resps.*) ... 619

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Sewage farm—Lease to tenant—Sewage works on farm—Occupation by sewerage board.—The S. M. D. Board acquired a sewage farm, and laid down thereon certain carriers and other sewage works and plant. They leased the farm to one C., reserving the right of entry thereon for the purpose of constructing, maintaining, altering, and repairing the works as might be requisite for using the farm as a sewage farm. C. was to irrigate by means of the works on the farm, and was to keep the pipes and carriers properly flushed and cleaned. The board kept the works in repair, and from time to time their surveyor and agents went on the land to see that the sewage was properly distributed and treated, and to do repairs. Held, that the board were rightly held not to be in occupation of these carriers and other sewage works and plant, and so not legally rateable in respect thereof. (*Stourbridge Main Drainage Board, apps. v. Seisdon Union, resps.*) ... 415

REGISTRATION OF VOTERS.

Claimant's wife a pauper lunatic—Parochial relief—"Medical and surgical assistance."—The relief given to a pauper lunatic in a public asylum at the expense of the poor rate is parochial relief, and whether it is "medical and surgical assistance" within sect. 4 of the Medical Relief Disqualification Removal Act 1885 is in every case a question of fact for the revising barrister to decide. In deciding such question the length of time during which the lunatic has received relief and the fact that no payment has been made by the lunatic's relatives in respect of such relief are material. A. was in every respect qualified for registration as a voter save that his wife was a pauper lunatic who had been supported at the expense of the poor rate in the county asylum of G. for several years. Previous to her becoming lunatic she had lived with and been supported by A., and if she recovered she would again live with and be supported by him. Held, that it was a question of fact whether the relief given to A.'s wife was "medical or surgical assistance" within sect. 4 of the Medical Relief Disqualification Removal Act 1885, and there was evidence on which the revising barrister could find that it was not such assistance. (*Kirkhouse v. Blakeway*) ... 19

Qualification—"Occupier as owner or tenant"—Wife owner—Husband ratepayer.—A resided with his wife B. in a house of which B. was the owner. A. paid all the rates and taxes of the house and provided for the household generally. There was no other evidence that A. occupied as B.'s tenant. A. applied to be put on the register of voters as "resident occupier as . . . tenant" of the house, within sect. 3 of the Representation of the People Act 1867. Held, that, while if A. and B. had not been husband and wife the evidence might be sufficient to give rise to a presumption that A. occupied as tenant of B., the fact that A. and B. were husband and wife explained why A. resided in B.'s house and prevented any such presumption from arising. (*Hall v. Michelmore*) ... 17

REVENUE.

Customs—Customs officer—Search of ship—Obstructing officer—Reasonableness of search—Right of magistrate to judge of—Service of notice of appeal and case—Sufficiency of service.—Where a person is summoned under sect. 12, sub-sect. 5, of the Customs and Inland Revenue Act 1881, for obstructing a customs officer in execution of his duty while on board a ship for the purpose of searching the same, the magistrate has no jurisdiction to inquire into the reasonableness or unreasonableness of the search, or to dismiss the information upon the ground that in his opinion the search was under the circumstances unreasonable, unless he finds that the search was a mere pretence for the purpose of justifying an interference or annoyance by the officer. The duty of

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deciding what search there shall be is by the Act imposed on the customs officer, and not on the magistrate. The notice of appeal and copy of the case stated by the magistrate could not be personally served on the defendant, who was a master mariner and was at sea, within three days after the receiving of the case by the appellant, but within the three days the appellant served the notice and copy of the case on the solicitor who had represented the defendant before the magistrate, but who had ceased to represent him in the matter, and efforts were made to have the defendant personally served on his return, and he was personally served with the notice and case some months afterwards on his return to the United Kingdom. Held, that the provisions of sect. 2 of the Summary Jurisdiction Act 1867, as to giving notice of appeal to the defendant, were sufficiently complied with to enable the court to hear the appeal in the absence of the defendant. (Anderson, app. v. Reid, resp.)	713	sect. 8 of the Finance Act 1900, the new excise duty on beer imposed by the latter Act may be added to the contract price of the beer where the contract or agreement for the sale or delivery of the beer duty paid was made before the passing of the Act. An agreement under which the purchaser is bound to buy his beer from a certain brewer, provided the latter is willing to sell it to him duty paid, at a certain price is not a contract for the sale or delivery of the beer within sect. 20. The contract for sale in such case is made only when the order for the delivery of beer is given to the brewer in pursuance of the conditional agreement, and, if such order was given after the passing of the Finance Act 1900, the brewer is not entitled under sect. 8 to add the new duty to the price payable by the purchaser though the conditional agreement was made before it. (Newbridge Rhondra Brewery Company v. Evans.)	453
Estate duty—Entailed estate—Money directed to be laid out in the purchase of land.—A testator left money to trustees with a direction to invest it in the purchase of land to be entailed in accordance with the Scotch law. By a codicil he gave the trustees a discretion to purchase land in England to be entailed according to English law. Held, that the money was not "entailed estate" within the meaning of the provisions in sect. 23 of the Finance Act 1894 applicable to Scotland, and was not liable as such to "settlement estate" duty. Per Lord Shand: Money so left could not under any circumstances be considered as "entailed estate" within the Act. Per Lord Macnaghten and Lord Robertson: But for the provision in the codicil, it would have been "entailed estate" within the Act. (Lord Advocate v. Stewart and another.)	603	Loan capital—Duty—Issue.—The L. Corporation having issued tenders for stock, on the 15th April 1899 the whole of such stock was duly allotted; and upon the amounts payable upon allotment being paid, provisional receipts were given which were exchanged for scrip certificates to bearer, all of which were issued before the 20th June 1899. The Finance Act 1899 came into operation on the 20th June 1899, and by sect 8 enacts that every corporation "shall before the issue" of any loan capital deliver a statement of the amount proposed to be secured by the issue, and that statement is taxable. Held, that the whole of the stock was issued before the 20th June 1899, and duty was not payable. (Attorney-General v. Mayor, &c., of Liverpool.)	306
Estate duty—Mortgage by life tenant and remaindermen—Indemnity to life tenant—Property passing at life tenant's death.—The life tenant of settled lands joined with the remaindermen in creating a mortgage on the lands. The money secured by the mortgage was entirely for the benefit of the remaindermen, and the life tenant did not covenant to pay either the mortgage debt or the interest thereon. By an indenture of even date with the mortgage, and made between the remaindermen and the life tenant, the former covenanted to indemnify the life tenant against any loss of profits of the settled land or any expenses or actions in respect of the mortgage, and assigned certain securities and charges on other lands as security for the performance of such covenants. Held, on the death of the life tenant, that, whether the settled land passed under sect. 1 of the Finance Act 1894 or was deemed to pass under sect. 2 (1 b) the estate duty must be assessed upon the principal value of the settled land, and not on such value less the amount of the mortgage debt. (Attorney-General v. Lord Montagu.) ...	57	Stamp duty—Railway company—Increase of amount of nominal share capital.—A railway company obtained a special Act authorising the rearrangement and consolidation of the several classes and denominations of the shares in their capital and of their loan and debenture stocks. The effect of the Act was to make no real addition to the value of their capital, but the face value of the stock was increased. Held, that there was an "increase of the amount of the nominal share capital" of the company within sect. 113 of the Stamp Act 1891, and that duty was payable under that section. (Midland Railway Company v. Attorney-General.)	206
Income tax—Insurance company—Interest received abroad.—An insurance company, having its head office in England, had branches and agencies abroad, and had foreign investments, the interest on which was not remitted to England, but was used in the business of the company abroad. Accounts were made up annually showing one entire business, and making no distinction between the income received and expenditure made in England, and that received and made abroad, but including all in one account. The profits out of which dividends were paid to the shareholders were calculated on the basis of this account. Held, that the interest on the foreign investments was not received by the company within the United Kingdom, within the meaning of the 4th case in sched. D to sect. 100 of the Income Tax Act 1842, and was not liable to income tax. (Gresham Life Assurance Society v. Bishop.)	693	Succession duty—Estate duty—Gift subject to annuity for two lives— <i>Bona fide</i> sale.—C. B. in pursuance of an arrangement with the L. M. Society paid the sum of 500 <i>l.</i> to the society, subject to an arrangement to pay him an annuity of 25 <i>l.</i> during his life, and after his death to his wife M. B. during her life. The commercial value of such annuity was 210 <i>l.</i> C. B. died on the 12th May 1895 and M. B. on the 5th May 1900. On claims by the Crown for estate duty on the death of C. B. and succession duty on the death of M. B.: Held, (1) that, although estate duty was payable under sect. 2 (1) (c) of the Finance Act 1894, so much of the amount as was purchase money could be deducted under sect. 3, sub-sect. 2, and so estate duty was only payable on 290 <i>l.</i> ; (2) that there was a <i>bona fide</i> sale, and so no succession duty was payable. (Attorney-General v. Johnson.)	296
Inland revenue—Beer—War tax—Conditional contract of sale—Incidence of tax.—By sect. 20 of the Customs Consolidation Act 1876, as applied by		RIGHT OF WAY. (See EASEMENT.)	
		SALE OF GOODS. Wrongful sale by servant—Innocent purchaser.—The appellants were timber merchants, and kept large quantities of timber warehoused in their name at the docks. The dock company were authorised to accept and act upon delivery orders signed by C., the appellants' manager, who had authority to sell timber in ordinary quantities to regular customers. C. from time to time fraudulently transferred timber belonging to the	

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- appellants to a fictitious purchaser, and then sold it to the respondents in the assumed name of such purchaser. The respondents bought and paid for the timber in good faith without any suspicion of fraud. They were not customers of the appellants, and did not know them in any way in the transaction. Held, that there was no holding out of C. by the appellants to the respondents as a person having authority to dispose of the timber, and that the respondents acquired no better title to the timber than that of C., who had stolen it, and were liable for the value of it to the appellants in an action of detinue. (*Farquharson Brothers and Co. v. King and Co.*) ... 810
- SCOTLAND, LAW OF.**
- Poor law—Deserted wife—Settlement.—By the law of Scotland a wife deserted by her husband is not in the position of a widow, and cannot acquire a settlement for herself, but is remitted to her husband's settlement. (*Parish Council of Rutherglen v. Parish Council of Glasgow.*) ... 607
- Testamentary disposition—Bequest "for such charitable or public purposes as my trustee thinks proper"—Vagueness and uncertainty.—By the law of Scotland a testator may in the disposition of his property select a particular class of individuals or objects, and then give to some person the power after his death of appropriating the property, or any part of it, to such particular individuals among that class as such person may select. The law of Scotland does not attach such a technical meaning to the word "charitable" as is given to it in England under the Act of Elizabeth (43 Eliz. c. 4). A testatrix by her will directed that, in the events which happened, one-half of the residue of her estate should be applied "for such charitable or public purposes as my trustee thinks proper." Held, that the words must be read disjunctively, and that the bequest was void for vagueness and uncertainty. (*Blair v. Duncan and another.*) ... 187
- SETTLED ESTATE.**
- Mansion-house—Dry rot—Rebuilding—Salvage.—A tenant for life of settled estate is entitled to repayment out of capital of instalments paid to a corporation in respect of the costs and expenses incurred by him in laying out, sewerage, paving, and flagging new streets on the estate, so far as such instalments represent capital, but he is not entitled to interest. Where the court is satisfied that the rebuilding of a mansion-house was necessary, the tenant for life is entitled to repayment to him by the trustees of one-half of the annual rental, but is not entitled to any further sum by way of salvage. (*Re Leigh's Settled Estate.*) ... 884
- Tenant for life and remainderman—Chattels—Annexation to freehold—Ornament—Removal—Tapestry.—Whether a chattel is so annexed to the freehold as to be intended as an improvement to it, and to pass with it, or is annexed only for the purpose of temporary use or ornament, so as to be removable, is a question to be decided upon the facts of the case. Valuable tapestries belonging to a tenant for life were fastened to the walls of the drawing-room in a mansion-house by fixing small strips of wood by means of nails and screws to the wood with which the walls were lined; canvas was then stretched over the strips of wood and nailed to them, and the tapestries were fastened to the canvas by very small tacks. Mouldings were fixed round the strips of wood by thin nails and screws, some of which penetrated the face of the wall. The tapestries were an essential feature of the general scheme of decoration of the room. Held, that the tapestries were fixed for purposes of ornament in the only way in which it was possible to use and enjoy them, and did not pass to the remainderman on the death of the tenant for life, but were removable by her executors. (*Leigh and others v. Taylor and others.*) ... 239
- SETTLED LAND.**
- Capital moneys—Improvements—Electric light installation—Additions to or alterations in buildings.—The improvements contemplated by sub-sect. (ii.) of sect. 13 of the Settled Land Act 1890 are structural additions to or alterations in the building; and the installation of a system of electric lighting and the necessary fittings are not structural additions or alterations, and their cost cannot therefore be defrayed out of capital moneys. (*Re Clarke's Settled Estates.*) ... 653
- Investment of capital moneys—Right to appoint broker—Tenant for life or trustees.—The trustees have the right to appoint the brokers, through whom investments of capital money under sect. 21 of the Settled Land Act 1882 are to be made, and not the tenant for life. (*Re Duke of Cleveland's Settled Estates.*) ... 678
- Lease—Tenant for life—"Best rent"—Personal claim of lessee against tenant for life—Waiver—Reduction of rent—Purchaser for value without notice—Doubtful title.—A lease granted by a tenant for life under the Settled Land Act 1882 was expressed to be made in consideration of a rent thereby reserved, but there was evidence that the tenant for life had been influenced by the abandonment by the lessee of a money claim against the tenant for life personally, and that the best rent that could be obtained had not been reserved. Six years afterwards the lessee sold the lease to H., who soon after entered into a contract to sell it to A. It was not proved that H. had any notice of any arrangement between the tenant for life and the original lessee. Held, the title was not such as the court would force on a purchaser, as it depended on disputed questions of fact upon which the decision of the court would not bind the remaindermen. (*Re Handman and Wilcor's Contract.*) ... 246
- Leasehold houses—Defective drainage—Requirements of sanitary authorities—Improvements—Repairs—Tenant for life and remaindermen.—Leasehold houses were settled upon trust out of the rents and profits to pay the head rents and perform the covenants reserved by and contained in the respective leases, and subject thereto upon trust for A. for life with remainder over. Held, that the tenant for life was only entitled to the balance of income remaining after the discharge of all the obligations imposed by the leases, and consequently that the expense of complying with notices to repair defective drainage, which under the covenants of the leases would be payable by the lessee, must be borne by the tenant for life, and not by the capital of the settled property. (*Re Partington; Reigh v. Kane.*) ... 194
- Tenant for life—Power of leasing—Mining lease—Varying minimum rent—Wayleave.—By an agreement, dated in Feb. 1900, the tenant for life of settled estates agreed with a colliery company to lease to them a seam of coal under the estates, known as the "Barnesley thick seam," for a term of sixty years from the 1st Jan. 1898. The questions were: First, whether the tenant for life had power under the provisions of the Settled Land Acts to grant a mining lease, reserving a varying minimum rent; secondly, whether he had power to insert in the lease a proviso for the ceasing of the minimum rent after all the demised minerals had been worked and paid for; thirdly, whether the lease might contain a wayleave for foreign coal to continue after ceasing of the minimum rent at a nominal rent. Held, that upon the evidence it was clear that the agreement was made honestly in the interests of all parties, and was the best that could be made for the development of the estate; and that there was nothing therein which could, as a matter of law, be considered to violate the requirements of the Settled Land Act 1882. (*Re Aldam's Settlement.*) ... 76, 510
- Tenant for life—Sale of option—Unauthorised by Settled Land Acts 1882 to 1890.—In 1887 a water company entered into a contract with a tenant for life, acting under the powers conferred by the

Settled Land Acts 1882 to 1890, for the purchase of a plot of settled land with the object of erecting thereon certain buildings for the purposes of their undertaking, and agreed to enter into a covenant not to build thereon or let it for building otherwise than for the purpose of their undertaking. They promoted a Bill in Parliament for power to erect the proposed buildings, which was thrown out before the conveyance was executed, and thereupon requested the vendor to agree to the omission from the conveyance of the covenant restrictive of building on the plot sold. The vendor, however, insisted on a conveyance in accordance with the contract, but entered into an agreement with the company, to which the trustees of the settlement were parties, to the effect that if the company should not require the land for the purposes of their undertaking and should desire to erect other buildings thereon or to sell or let the same and thereof should give notice to the vendor, then the vendor would on payment of 10% consent to the company building upon or selling the land without the restriction as to building contained in the conveyance, which agreement, although dated the day after the conveyance, was executed simultaneously and formed one transaction with it. The vendor died, and was succeeded by his son as tenant in tail of the settled land, who possessed lands adjoining the plot sold. The company then gave the notice and tendered to him 10% in accordance with the agreement, but he declined to give his consent, alleging that he was not bound thereby. On a special case stated by consent of the parties under Order XXXIV., r. 1: Held, that the vendor as tenant for life of the settled land had no power under the Settled Land Acts 1882 to 1890 to enter into such an agreement with the company, which therefore was not binding on his successors in title. (*Palmer v. Grand Junction Waterworks Company.*) ... 352

Trustee—Compromise with tenant for life—Condition of residence—Validity.—A testator gave his widow the use of his residence so long as she desired to make it her permanent place of residence and remained his widow, his estate to pay all rates, taxes, and outgoings in respect thereof, and to keep the house and grounds in tenable repair. Held, that, although the widow would forfeit her interest by voluntarily ceasing to reside apart from selling as tenant for life under the Settled Land Acts, the trustees of the will had power, by way of compromise, to enter into an agreement whereby they agreed to pay the widow out of the estate a fixed annual sum during widowhood, being less than the estimated value of the yearly benefits conferred upon her by the will, she also agreeing to give up such benefits, including her right of residence. (*Re Trenchard; Trenchard v. Trenchard.*) ... 196

SETTLEMENT.

Marriage settlement—Trustee—Discharge of one trustee without appointing a substitute.—The court has power under its inherent jurisdiction in administering the trusts of a settlement to discharge a trustee when there are other trustees remaining without appointing a trustee in the place of the retiring one, but it has not such power under the Trustee Act 1893. (*Re Chetwynd's Settlement; Scarisbrick v. Nevins.*) ... 216

Post-nuptial settlement—Recital of ante-nuptial parcel agreement—Husband's interest determinable on bankruptcy.—In Aug. 1872 A., being then an infant, married B. In Feb. 1873 a post-nuptial settlement was executed by A., who was still an infant, and B. The settlement was by deed, and contained a recital that previously to the marriage the husband agreed to make such settlement of the fortune of his wife as was thereafter contained; and a covenant by the husband with the trustees of the settlement that he and the wife, or the survivor of them, and all other necessary parties, would transfer to them, upon the trusts of the settlement, a share in certain

residuary estate to which his wife was entitled under the will of her father, in remainder expectant upon the death of the testator's widow, immediately it became an interest in possession. The trusts of the settlement were to pay the income of the trust fund to the wife for life for her separate use without power of anticipation, and after her death, if the husband should survive her and should not have become bankrupt or assigned or incumbered the income, to pay the income to the husband for life or until he should become bankrupt or assign or incur the income, with remainder to the children or other issue of the marriage as the husband and wife jointly or the survivor of them should by deed appoint, with remainder in default of appointment as therein mentioned. In 1877 the wife died intestate, having attained the age of twenty-three years, leaving the husband and three sons her surviving. In 1897 the husband purported to appoint two-thirds of the trust fund in favour of two of the sons, and at the same time surrendered to them his life interest in those two-thirds. In 1898 a receiving order was made against the husband, and he was adjudicated bankrupt. In 1899 the testator's widow died, and the fund accordingly fell into possession and was claimed by the official receiver as trustee in the husband's bankruptcy. Held, that there was nothing to show that the settlement was executed with intent to delay or defraud creditors; and that, disregarding the recital and treating the settlement as a voluntary settlement, it was not fraudulent within 13 Eliz. c. 5. But held that, with regard to the recital, although not sufficiently definite and precise to create an estoppel, it was as against the settlor and anybody claiming under him evidence of a parcel agreement before marriage between the settlor and his intended wife that such a settlement should be executed as was in fact executed, and was sufficient to satisfy sect. 4 of the Statute of Frauds. (*Re Holland; Gregg v. Holland.*) ... 542

Several estates in same settlement—Several charges—Tenant for life—Remaindermen—Interest accrued during life tenancy—Sale of part of settled estates—Payment off of charges and arrears of interest—Liability to make good arrears out of subsequent income.—Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing during the same life tenancy. Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates: Upon principle, therefore, a tenant for life of several estates included in the same devise remains liable as between himself and the remaindermen to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of a part of the property. (*Honywood v. Honywood.*) ... 214

(See ADVOWSON—VENDOR AND PURCHASER.)

SHIPPING.

Action in rem—Negligence—Putting out to sea to avoid collision—Loss of anchor and chain—Consumption of extra stores—Liability of wrongdoing vessel for losses incurred in consequence.—A steamship slipped her anchor and put out to sea in order to avoid a collision with another steamship, which had negligently been allowed to drag her anchor and cause danger of collision. Held, in an action *in rem*, that the plaintiffs were entitled to recover the value of the anchor and chain lost,

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- and the coals and stores consumed in consequence.
(*The Port Victoria*.) ... 804
- Charter-party—Demurrage—Ship to go "to a loading place as ordered"—Commencement of time—Lien—Keeping goods on ship—Demurrage.—By a charter-party it was provided that a ship should proceed to Santander, excluding San Salvador old tip "to a loading place as ordered" and there take on board a cargo. Held, that the ship could not be taken as an arrived ship for the purpose of the commencement of the lay days until she had arrived at the loading place as ordered, and that arrival at Santander was not sufficient. A shipowner who has a lien on the cargo for freight or demurrage, when he has the opportunity of unloading the cargo, cannot keep the cargo on the ship and then claim for the detention of the ship. (*Modesto Pineiro and Co. v. Dupre and Co.*) ... 560
- Charter-party—Discharge of Cargo—Demurrage—"Customary steamship dispatch"—"As fast as steamer can deliver"—"According to custom of port"—Delay through unavoidable causes—Obligation of receiver of cargo.—By a charter-party it was provided that a steamer should proceed to London and there deliver a cargo of timber, "the cargo to be discharged with customary steamship dispatch, as fast as the steamer can deliver . . . according to the custom of the port": and there was an express exception in respect of delay in discharging the cargo caused by a strike or lock-out. The vessel arrived at London and was ready to deliver the cargo, but the dock to which the defendants, the receivers of the cargo, directed her to proceed was so crowded that she could not enter the dock for some days, and further delay arose in obtaining a berth for discharging. The vessel could not have been more quickly discharged elsewhere in the port, and the defendants used all reasonable means to procure the discharge of the cargo, which could not in the circumstances have been discharged more quickly. Held, that the obligation of the defendants was only to use all reasonable means to procure the discharge of the cargo as quickly as was possible in the circumstances, and that, as they had performed that obligation, they were not liable for demurrage. (*Hulthen v. Stewart and Co.*) ... 397
- Charter-party—Sub-charter-party—Right of shipowner to sue indorsee of bill of lading for freight on cargo shipped under sub-charter-party.—The owners of the *W.* chartered her to *G.* under a charter-party, which provided that the master should sign bills of lading as presented, and that the charterers' liability should cease on shipment of the cargo, and gave the shipowners a lien for freight, dead freight, and demurrage. *G.* rechartered the vessel to *M. L.* under a charter-party which contained provisions similar to the original charter-party. *M. L.*, who had no notice of the original charter-party, shipped a cargo in pursuance of the second charter-party, and bills of lading were signed by the master as presented by which the cargo was to be delivered to the order or assigns of the shippers on payment of freight without recourse to shippers as per the second charter-party. Held, that the bills of lading were signed by the master as agent of the shipowners, and that the shipowners were entitled to sue the indorsees of the bills of lading for the freight due thereon. (*Wastwater Steamship Company Limited v. T. B. Neale and Co.*) ... 266
- Charter-party—Time charter at periodical payments in advance—Power reserved to owners on default of payment to withdraw vessel—Waiver—Estoppel—Evidence.—By a charter-party a ship was let for nine months, the charterers to pay for the hire of the ship at an agreed rate, fortnightly in advance, and in default of such payment the owners to have the faculty of withdrawing the ship from the service of the charterers. The owners were to pay the wages of captain and crew, but the charterers were to pay for coals, port-charges, &c., and the captain was to be under their orders and directions as regarded employment. After the charterers had had the use of the ship for two months they made default in making the fortnightly payment due on the 21st June. The ship was then on a voyage to *S.*, where she arrived on the 25th, and while there the captain telegraphed to *H.* to order the cargo to be ready. After lying two days at *S.* the ship started on the 27th for *H.* On the 28th the owners gave notice to the charterers of their withdrawal of the ship by reason of the charterers' default in the payment due on the 21st. Held, that upon these facts there was no evidence of any waiver by the shipowners of their right to withdraw the vessel, nor of any conduct on their part estopping them from insisting on their right. (*Re an Arbitration between Tyrer and Co. and Hessler and Co.*) ... 697
- Collision—Compulsory pilotage in London district—Ship carrying passengers—Constant trader.—The Order in Council of the 18th Feb. 1854, extending the exemptions from compulsory pilotage, contained in sect. 59 of 6 Geo. 4, c. 125, in so far as it deals with ships and vessels trading to ports between Boulogne inclusive and the Baltic, applies only to ships and vessels which are "constantly" trading between such ports. The words "ship or vessel trading" are descriptive of the vessel, and not merely of a particular voyage, and in order to constitute a constant trader within the meaning of sect. 59 and the Order in Council, it is not necessary that a vessel should be exclusively engaged in trading to ports between Boulogne and the Baltic. (*The Cayo Bonito*.) ... 867
- Collision—Fog—Moderate speed—Duty of vessel in vicinity of fog to stop on hearing whistle forward of the beam.—There is no obligation on a vessel not herself in a fog, under art. 16 of the Regulations for Preventing Collisions at Sea, to go at a moderate speed on account of fog being in the vicinity. Where a fog signal is heard forward of the beam, the position of which is not ascertained, there is a duty under art. 16 upon the vessel hearing it to stop and navigate with caution until danger is over, although she herself may not be in a fog. (*The Bernard Hall*.) ... 688
- Collision in dock—Dock company—Foreman's orders—Negligence—Costs.—The owners of a vessel are not liable for a collision solely due to the improper orders of a dock foreman which those in charge of her are bound by statute to obey and did properly obey. The owners of a steamship damaged by collision with a barge in dock instituted an action in the City of London Court against the owners of the barge, and afterwards joined as defendants the dock company to whose improper orders the owners of the barge alleged the collision was due. The dock company alleged the collision was due to the negligence of the barge. Judgment was given against both defendants, but, on appeal by both, the judgment against the owners of the barge was set aside. The court ordered the dock company to pay the costs of the plaintiffs and of the successful defendants both in the court below and of the appeal. (*The Mystery*.) ... 359
- Gravesend Reach, River Thames—Vessel at anchor in fairway—Bye-laws 8 and 33 of Thames Bye-laws—Proper application of Bye-law 38.—*Seemle*, that the obligation on steamers and sailing vessels under the 38th Thames Bye-law, when in the fairway and not under way, to ring a bell, does not apply in clear weather. (*The Rhein*.) ... 265
- Salvage—Apportionment—Special awards—Non-navigating portion of crew—Horsemen.—A large steamer carrying passengers, cargo, horses, and cattle, fell in during bad weather with a dismasted barque in the Atlantic, and, after taking off her crew and cutting away the wreckage of her masts, towed her to the Azores. The owners of the barque in settlement of the salvage claim paid £2500. to the owners of the steamer. In an action for apportionment: Held, that the owners were entitled to £1750. and the master to 5000.; that as special awards and according to their rating those of the crew who had taken off the crew of the barque should receive 1500., those who

- had cut away the wreckage 300*l.*, the boat's crew employed during that service 25*l.*, and the boat's crew engaged in passing ropes 75*l.*; and that of the remaining sum of 1025*l.* to be divided rateably amongst the whole crew; the non-navigating portion, consisting of the surgeon, purser, cooks, stewards, and stewardesses, should share as if rated at one-third of their actual rating, and the horsemen and foreman, who were in the employment of the owners and liable to be called upon to perform duties, at one-third of the rating of an A.B. (*The Minneapolis*.) ... 263
- Salvage—Associated insurance clubs—Agreement by owners, as insurers in clubs, to render mutual assistance—Notice to masters—Arbitration—Rights of master and crew.**—Where salvage services were rendered by one vessel to another, and both vessels were insured in associations under the articles of which compensation for salvage services was to be mutually settled by the committees of the associations: Held, that the master and crew of the salving vessel were not bound by such settlement, as they were not parties, and could not be taken to have acquiesced in it. (*The Margery*.)... 863
- Salvage—Lifeboat services—Services rendered by tug against wish of master of salved vessel—Award.**—A French steamship having fouled her propeller and become disabled was towed nearly one hundred miles into port by the steam lifeboat *H. P.* and two tugs, the *V.* and the *D.*; and the lifeboat *E. H.*, which was required by the rules of the National Lifeboat Institution to accompany the *H. P.*, remained fast astern of the steamship during the towage, but otherwise rendered no service. The *D.* assisted in the towage at the request of the master of the *V.*, but against the wish of the master of the steamship. The employment of a third tug was, in the circumstances, reasonable and prudent, but turned out to be unnecessary. Held, that the lifeboatmen in the *E. H.* and the tug *D.* were entitled to salvage remuneration. Where a salvor at the request of a co-salvor, but against the wish of the master of the salved vessel, renders salvage services in such circumstances that they ought to have been accepted, he is entitled to salvage remuneration. (*The Auguste Legembre*.) ... 358
- (See INSURANCE, MARINE.)
- SOLICITOR AND CLIENT.**
- Commission—Taxation—Surcharge—Disclosure to client—Independent advice.**—Solicitors were retained by O. to act for him in negotiating and carrying into effect the purchase of certain patent rights. The solicitors had obtained from the vendor a commission note, under which they were entitled to a certain commission in the event of their introducing a purchaser to him. This commission note was handed to O. by the solicitors, and remained in his possession for some days previously to the contract of sale being entered into. The purchase was carried into effect, and the solicitors, with the knowledge of O., recovered payment of 210*l.* as commission from the vendor. After this O. died, and the solicitors delivered a bill of costs to his executors, who procured an order for its taxation, and sought to charge the solicitors with the amount of the commission so received by them. Held, that the executors were not entitled to treat the 210*l.* as money had and received by the solicitors to O.'s use, or in any way to surcharge them. (*Re Haslam and Hier-Evans*.) 663
- Gift—Bargain—Deeds—Validity—Competent and independent advice.**—On the 15th May 1900 the plaintiff W. executed two deeds, by the first of which some real estate and other property was settled upon trust for W. for life, and after his death as to part in trust for his son and daughter, and as to one-tenth of the ultimate residue upon trust for the defendant C. his solicitor. By the second deed certain furniture and chattels were vested in trustees for sale, and out of the proceeds thereof the defendant C. was to receive 500*l.* The deeds were prepared in the office of the defendant C., but were submitted by the plaintiff to A., an independent solicitor. Held, that the plaintiff under the circumstances did not have the competent and independent advice required, and the deeds were voidable. On the 14th March 1901 the plaintiff executed a further deed supplemental to the first deed of the 15th May 1900, whereby the trusts of the former deed were in effect revoked, and the plaintiff assigned the whole of his property of every description present and future to his son and the defendant C. upon trust for his son and daughter and the defendant C. in equal shares in consideration of a covenant by them to pay the plaintiff an annuity of 500*l.* a year to be increased to 800*l.* in certain events. This deed was prepared by the defendant Tarbet, an independent solicitor. On the 13th July 1901 the plaintiff executed a further deed supplemental to the second deed of the 15th May 1900, whereby a portion of the furniture was to be purchased by the plaintiff's daughter at a valuation, and the residue was to be sold and the proceeds applied first in paying 200*l.* to the plaintiff in lieu of his life interest in the furniture under the former deed, and 425*l.* to the defendant C., and the residue to be divided equally between the son and the daughter of the plaintiff. This deed was prepared by independent solicitors, Tarbet acting on behalf of the plaintiff. Held, that the new scheme carried out by the deeds of 1901 was one of purchase and sale, and the plaintiff having deliberately, with competent and independent advice, executed the deeds for valuable consideration, could not now set them aside. (*Wright v. Carter*.) ... 110
- Lien—Partnership action—Receiver—Judgment creditors—Charging orders—Property recovered or preserved—Priority.**—In an action for dissolution of partnership a receiver had been appointed who realised the assets of the partners and paid the money into court, retaining a certain sum in hand. After the appointment of the receiver certain judgment creditors obtained charging orders in chambers whereby the assets in or to come to the hands of the receiver were charged with the payment of their judgment debts. The solicitor who acted for the plaintiff in the partnership action, and also in defending another action brought against the partners, claimed to have a charge in respect of his costs incurred in such actions on the moneys in court and in the hands of the receiver as being property recovered or preserved, in priority to the judgment creditors. Held, that the solicitor was entitled to have such charge in priority to the judgment creditors. Held, also, that the judgment creditors were not purchasers for value without notice within the meaning of sect. 28 of the Solicitors Act 1860. (*Ridd v. Thorne*.) ... 655
- Mortgage—Transfer of solicitor's own security—Insufficient security.**—In July 1892 the trustees of an indenture of settlement, dated the 3rd Sept. 1890, had a fund of 1100*l.* for investment. By an indenture dated the 15th Feb. 1877 a sum of 2100*l.* had been secured, but part of the mortgaged premises had been sold for 1000*l.* The balance consisted of three brick and stucco houses, held for ninety-nine years at a ground rent of 9*l.* 2*s.* 6*d.* S., the solicitor of the trustees, transferred this mortgage to the trustees and received the 1100*l.*, without explaining what he was doing. It was alleged that at this time the property, which was in one of the worst districts in the town, was only worth 200*l.*, and the evidence for the defence did not prove that it was worth more than 600*l.* in 1892. S. paid interest until his death, and this action was brought by the trustees claiming that the security should be realised and the balance made good by S.'s executor. The Trustee Act did not apply, it was said, as S. retained the money and converted it to his own use. For the defendant it was said the claim was one for negligence, and was barred by the Statute of Limitations. The money was not still held by a trustee. Even if S. ought to have had a valuation made, his omission to do so was a mere common

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law tort. Held, that the property was now, and also at the date of the transfer, an insufficient security for 1100*l.*, and that the solicitor had transferred a security belonging to himself with knowledge that to take the security involved a breach of trust; that the trustees never knew the facts, and that S. had received the 1100*l.* as cash, and that, the defendant admitting assets, an order must be made for the realisation of the security, and that the defendant must make up the deficiency and pay the costs of the action. (*Mitchinson v. Spencer.*) ... 618

Variation of settlement—Duty of solicitor—Independent advice—Husband and wife.—By a post-nuptial settlement made in 1890 certain funds, the property of the husband, were settled subject to the life interest of the husband's mother, upon trust for the husband for life, and after his death for the wife for life, and, after the death of the survivor, in trust for children, and in default of issue as the husband and wife jointly should appoint, or in default of such appointment as the survivor should appoint, and in default of appointment for the appellants, W. and S., absolutely. The solicitor who prepared the deed, and was one of the trustees under it, was the father of S., one of the ultimate beneficiaries. In 1891 the husband and his mother, wishing to prevent the possibility of the wife, if she survived, exercising her power of appointment in favour of a second husband, had a deed prepared by which the wife's interest, should she survive, was limited to her widowhood, and her power of appointment was excluded, and the husband was given a sole power of appointment. This deed was prepared by the same solicitor, who stated that he explained its effect to the wife, and she was told that it was intended to correct a "mistake" in the previous settlement, and executed it in that belief, without any independent advice. In 1893 the husband died without having exercised his power of appointment and without issue. In 1894 a deed was executed by which the widow's interest was extended to a life interest, but in other respects confirming the deed of 1891. In 1897 the widow married the respondent, and in 1898 commenced this action, claiming a declaration that the deed of 1891 was not binding upon her, so far as it deprived her of the power of appointment conferred on her by the deed of 1890, and that the deed of 1894 was not binding so far as it confirmed the deed of 1891. Held, that under the circumstances the deed of 1891 must be set aside. (*Willis and others v. Barron.*) ... 806

STAMP DUTY.

(See REVENUE.)

STATUTES OF LIMITATION.

Copyholds — Devise — Possession — Disability — Coverture—Elapse of thirty years—Will—Construction.—On the 26th Dec. 1869 H. H. B. died intestate leaving a widow, J. B.; two daughters, M. B. (now M. H.) and Henrietta H. B.; and a son, P. H. B. At the time of his death H. H. B. was possessed of certain copyhold tenements held of the manor of T. D. On the 7th Jan. 1870 J. B. died, having made a will on the 6th Jan. 1870 whereby she gave to her daughters M. B. (now M. H.) and Henrietta H. B. "all and singular the share and proportion of my late husband's estate that I take or to which I am entitled on his decease to be equally divided between them share and share alike; and I also give and bequeath to my two said daughters the sum of 500*l.* . . . to be divided between them share and share alike, and I make this provision for them in lieu of the various freehold and copyhold lands of my late husband which descend to my son on the intestacy of my late husband." At the time of the death of H. H. B. it was erroneously supposed that the copyholds in question devolved upon P. H. B. as the customary heir, whereas, in fact, they devolved upon J. B. as the customary heiress. Acting upon this assumption, the administrator of H. H. B.,

one G. C. H. (husband of M. H.), entered into possession of the copyholds and expended the rents—certainly from the time of the death of J. B., if not before—in the maintenance and education of P. H. B. until he became of age in 1877; and in 1878 handed to him the title deeds with an account. In 1871 a deed of enfranchisement had been executed in favour of P. H. B. by the lords of the manor in consideration of a sum of 138*l.*, expressed to be paid by him. On the 27th Nov. 1890 P. H. B. died, having remained in possession of the copyholds until his death. By his will P. H. B. appointed the defendants to be his executors and trustees, and gave all his real estate to them upon trust for sale and to stand possessed of the residue for the benefit of his nephew and niece L. S. H. and M. I. H. On the 25th Sept. 1900 the plaintiffs G. C. H. and M. H., having discovered that the copyholds did in fact devolve upon J. B., and not upon P. H. B., brought this action against the defendants for a declaration that M. H. was entitled under the will of J. B. to a moiety of the copyholds. Held, that the plaintiffs were barred by sect. 5 of the Real Property Limitation Act 1874, more than thirty years having elapsed between the death of J. B. and the commencement of this action. *Semble*, also, that upon the true construction of the will the copyholds did not pass to M. H. and Henrietta H. B., but devolved upon P. H. B. (*Hounsell v. Dunning.*) ... 382

Judgment—Part payment—Judgment obtained in England and sued upon in foreign country—Payment made under foreign judgment—Right to sue for balance of English judgment.—A part payment to take a case out of the statutes of limitation must be a part payment made under circumstances from which an admission of liability and a promise to pay the residue can be inferred. The plaintiff in the year 1884 obtained against the defendant, who was domiciled in the then South African Republic (the Transvaal), but who was temporarily in England, a judgment in the High Court in respect of money lent, and in 1886 he sued the defendant in the Transvaal courts on the English judgment, when the Transvaal court inquired into the original cause of action and gave judgment for a part only of the English judgment. The plaintiff took steps to enforce the Transvaal judgment by sequestration, and in 1889 payment was made to the plaintiff of the whole amount due on the Transvaal judgment, and the defendant's insolvency was rescinded. In an action commenced by the plaintiff in the year 1900 to recover the balance due on the English judgment: Held, that the period of limitation applicable was the twelve years limitation in sect. 8 of the Real Property Limitation Act 1874, and not the twenty years given in sect. 3 of 3 & 4 Will. 4, c. 42; that the payment made to the plaintiff in 1889, being a payment made, not on account of the English judgment obtained in 1884, but in satisfaction of the Transvaal judgment, was not such a part payment as would take the case out of the statute, and that the cause of action sued upon was therefore barred, though, if it had not been barred the defendant would not have been released by the insolvency proceedings in the Transvaal. (*Taylor v. Hollard.*) ... 228

Land Tax—Redemption—Capital sum paid for redemption—Yearly sum payable by way of interest—Recovery of—Lapse of time.—An action to recover the yearly sum payable under sect. 123 of the Land Tax Redemption Act 1802 to the person who has redeemed land tax, by way of interest upon the capital sum paid for redemption, is barred by sect. 1 or sect. 8 of the Real Property Limitation Act 1874 unless brought within the time thereby limited, either because it is "rent" within the meaning of sect. 1, or because the principal sum is a "sum of money charged upon land" within the meaning of sect. 8. (*Skene v. Cook.*) ... 319

Mortgage—Acknowledgment—Payment of interest "by the person by whom the same shall be payable

or his agent."—In 1879 the owner of a freehold estate mortgaged part thereof to certain trustees to secure a loan with interest at a specified rate. The mortgagor obtained the loan on behalf of and it was received by his son, who simultaneously with the execution of the mortgage executed a bond for a larger amount in favour of his father, conditioned to be void on payment by him to his father on demand of an amount which was precisely the same as the mortgage debt, with interest thereon at the same rate as was payable under the mortgage. The son having thus become bound to indemnify his father and the mortgaged estate against the mortgage debt and interest, it was arranged that he should pay the interest to the mortgagees through his solicitors. Accordingly the interest was duly paid in that way until 1892, when the son paid the amount of the mortgage debt to the solicitors, to be applied by them in repayment thereof. The solicitors misappropriated the money, although they continued to pay the interest until 1898. In the meantime—namely, in 1884—the mortgagor had conveyed the mortgaged estate to a purchaser for value "free from incumbrances." The mortgagor never paid any interest, and died in 1887. Until the solicitors failed in 1899 they had acted for all the parties; and on the position of affairs being discovered the mortgagees gave notice to the purchaser of the mortgaged estate to pay off the mortgage debt. Thereupon he brought an action for a declaration that, inasmuch as the mortgagor had paid no interest, the mortgage was barred by the Statutes of Limitations. The question was raised (*inter alia*) whether payment of interest by the mortgagor's son had kept the mortgage alive. Held, that as between the father and the son the latter was bound to indemnify the former; that, although there was no contract between the son and the mortgagees, there was a contract between the son and the mortgagor to pay interest on the mortgage debt; and, that being so, that there had been a payment of interest, which prevented the Statutes of Limitations from running. (Bradshaw v. Widdrington and Cust. Widdrington and Cust v. Bradshaw.) ... 726

STOCK EXCHANGE.

Broker and client—Wrongful closing of client's account—Measure of damages.—The defendants, who were stockbrokers, having agreed with their client, the plaintiff, to carry over certain shares on his behalf to the next settlement, wrongfully closed his account some time before that settlement. The plaintiff insisted upon the performance of the contract, and after the date of the settlement sued the defendants for damages for their breach of contract. The defendants contended that the damages ought to be assessed upon the prices obtainable at the time when the account was closed, in which case the damages would be only nominal. Held, that, as the plaintiff had a right to insist upon the contract being performed at the date of the settlement, the defendants were not entitled to have the damages assessed upon the prices obtainable at the time when the account was closed. (Michael v. Hart and Co.) ... 474

SUCCESSION DUTY.

(See REVENUE.)

TRADE MARK.

"Distinctive word"—"Disentitled to protection"—Disclaimer.—A trade mark in connection with jams was registered in 1887 by F. and Co., consisting of the word "Silverpan" with a copy of their written signature underneath. In 1900 some rivals in trade applied that the register might be rectified by the removal of the trade mark, or by the addition of a disclaimer of any right by F. and Co. to the exclusive use of the word "Silverpan." Held, that the word "Silverpan" was a distinctive word within the meaning of sect. 74 of the Patents, Designs, and Trade Marks Act 1883, and

ought to have been disclaimed, and the mark was ordered to be removed from the register. F. and Co. preferring that course to the entry of a disclaimer. Per Romer, L.J.: The word "distinctive" as used in sect. 74 of the Patents, Designs, and Trade Marks Act 1883 means something which at the time of registration is chosen by the applicant, and is *prima facie* suitable when used, to distinguish his goods from the goods of others. Per Cozens-Hardy, L.J.: Whether the court can order a disclaimer to be entered under sect. 74 after the registration of the trade mark is completed, *quære*. (Re Faulder and Co.'s Trade Mark.) ... 66

Infringement—Rectification of register.—Mark common to the trade—Improper use of words "trade mark"—Deceptive mark.—In an action by the plaintiffs, a firm of brewers, the owners of two registered trade marks, each consisting solely of a plain diamond, to restrain the defendants, also a brewing firm, from using in their trade a plain rectilinear ten-sided figure: Held, that the defendants' device did not so nearly resemble a diamond as to be calculated to deceive, and that the plaintiffs' trade marks had not been infringed. Upon motion by the defendants to remove the above marks from the register, and also certain registered labels of the plaintiffs, all of which bore *inter alia* the device of a diamond with the words trade mark on the diamond, and all of which, as well as the two above-mentioned, had been registered as old marks: Held, that all the marks must be removed from the register on the ground (a) that the device of a diamond was at their respective dates of registration common to the trade; and (b) as to the labels, that the words trade mark being on the diamond alone rendered them deceptive. There is no difference between marks used before 1875 and marks not used before 1875, where they are rendered deceptive by the improper insertion of the words "trade mark." (Baas, Ratcliff, and Gretton Limited v. Davenport and Sons Brewery Limited and Re Trade Marks of Baas, Ratcliff, and Gretton Limited.) ... 186

Old user—Concurrent rights—Three mark rule.—

Where it is sought to register, by virtue of the "three mark rule," a trade mark alleged to have been used before the 13th Aug. 1875, notwithstanding that a similar old trade mark is already on the register for the same goods, it must be proved that there was a substantial public user of the mark tendered for registration sufficient to confer upon the owner a concurrent right with the owner of the trade mark already registered. H., T., and Co., brewers, applied for leave to register a trade mark for beer, which they claimed to have used since 1872, and which consisted of a red diamond containing a representation of a lion with a fleur de lis. The application was opposed by B. and Co., brewers, who were the proprietors of a trade mark registered in 1876, which consisted of a red diamond, and had been very extensively used since several years prior to H., T., and Co.'s application. The evidence as to the applicants' user, though showing some sales under the mark, was not satisfactory as to its extent. Held (1) that the applicants' mark so nearly resembled the opponents' mark as to be calculated to deceive; (2) that the applicants had not shown a sufficient user of their mark to have acquired a concurrent right with the opponents; (3) that the opponents could have obtained an injunction against the applicants at the date of the passing of the Trade Marks Registration Act 1875, if the facts had been brought to their knowledge; (4) that registration must be refused with costs. (Re Hodson, Tessier, and Co.'s Trade Mark.) ... 183 n.

Rectification of register—Combination.—A trade

mark was registered in respect of cotton yarn and sewing cotton not on spools or reels, and the application stated: "The essential particular of the trade mark is the combination of devices, and we disclaim any right to the exclusive use of the

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- added matter, except in so far as it consists of our own name and address." The trade mark consisted of three labels, which appeared on the register. Held, that the essential particulars were sufficiently stated. (*Re A. and A. Crompton and Co.'s Trade Mark.*) ... 657
- Registration—Invented word—"Uneeda."—The word "Uneeda," being merely a putting together of three of the commonest of common English words, and a misspelling of the first of them without a change in the sound, is not "an invented word" within sect. 10 of the Patents, Designs, and Trade Marks Act 1888, and therefore cannot be registered under the Patents, Designs, and Trade Marks Act 1888. (*Re Uneeda Trade Mark.*) ... 439
- Removal—Old mark—Distinctive word—Patented article—Name of article manufactured—Onus of proof.—In 1872 an inventor took out a patent in the United States for a product from petroleum "named by me 'vaseline.'" In 1874 he took out a patent in England for a similar product which he described as "a material which I term 'vaseline.'" In 1877 he registered the word "vaseline" in England under sect. 10 of the Trade Marks Registration Act 1875 as an old mark. On an application to remove the mark from the register: Held (Cosens-Hardy, L.J. dissenting), that the language of both patents being ambiguous, as it might mean either that the name was given to the substance manufactured by the inventor or to the substance made according to the process described, the onus of proof was on the applicant for the removal of the trade mark to show that it meant the latter; that he had not discharged that onus and the mark ought not to be removed. Held, by Cosens-Hardy, L.J., that the word "vaseline" was an invented word to describe an invented thing; and therefore, as any one was at liberty to make the invented article, which was not protected by patent in England, and at liberty to call it by the name attributed to it by the inventor, the word ought not to have been registered as a trade mark under sect. 10 of the Trade Marks Registration Act 1875 as an old mark. Per Cosens-Hardy, L.J.: The principle applied by Fry, J. in *Linoleum Manufacturing Company v. Nairn* in the case of a patented article after the expiration of the patent cannot be limited to that case. (*Re Cheesbrough Manufacturing Company's Trade Mark "Vaseline"; Re Pearson's Application.*) ... 665
- TRADE NAME.
- Rival traders—Same name—Goods of same class—Misleading public—Right to trade under own name—Form of injunction.—In 1895 J. and J. C., an old firm at Coventry dealing in textile goods, was converted into a limited company, the plaintiffs in this action. The defendant, J. C., was one of the directors. He retired in 1898 and set up in the same class of business at Coventry as "J. C. and Co." Held, that the defendant could not be restrained from carrying on trade in his own name; but he must take reasonable precautions to clearly distinguish his goods from those of the plaintiffs, and to prevent the public being misled into the belief that the business carried on by him was that of the plaintiffs. (*J. and J. Cash Limited v. Joseph Cash.*) ... 211
- TRUSTEE.
- Breach of trust—Investment—Power to invest on mortgage in Ireland—Second mortgage—Improper investment.—The trustees of a marriage settlement were empowered to invest (*inter alia*) on real securities in Ireland, and to vary investments with the consent of the husband and wife. Without the consent of the wife, the trustees sold stock for 5000*l.* and invested the sum of 5000*l.* on a third sub-mortgage of a mortgage for 12,150*l.* on lands in Ireland; the lands were subject to two prior mortgages for 4700*l.* and 2460*l.*, and the mortgage for 12,150*l.* was subject to two prior sub-
- mortgages for 4000*l.* and 2153*l.* The trustees took no legal advice as to the propriety of the investment. At the time of the investment the greater part of the lands was in the possession of the mortgagor, who let the same for grazing purposes. A great fall in the value of the lands having taken place, the trustees were unable to realise the investment or to recover the sum of 5000*l.* Held, that the investment was a breach of trust, and that relief ought not to be granted under sect. 3 of the Judicial Trustees Act 1896. (*Chapman v. Browne.*) ... 744
- Breach of trust—Moneys employed by trustee in trade—Proper rate of interest.—If a trustee invests trust moneys in business with a view to benefiting the trust estate, he must account for the profit made by such investment, or at the option of the *cestui que trust* he must account for trade interest—i.e., 5 per cent. (*Re Davis; Davis v. Davis, Sander, and Rosenfelt.*) ... 523
- Fiduciary relation—Purchase by trustee of beneficiary's interest—Inadequate price—Concealment of valuation.—The appellant and his brother had vested interests in equal shares in property included in a settlement and a will, subject to their mother's life interest. The appellant was a trustee both under the settlement and the will. In the life time of their mother the brother offered to sell his interest to the appellant, but before the offer was accepted the mother died. The brother, who was in impecunious circumstances, again offered to sell his interest. At this time the appellant had before him a valuation of the trust estate which he did not disclose to his brother, and he agreed to purchase his share at a price considerably below the valuation. The brother afterwards became bankrupt. Held, that the trustee in the bankruptcy was entitled to have the sale set aside on payment to the appellant of the price which he had paid. (*Dougan v. Macpherson.*) ... 361
- Loss to estate—Fraud by solicitor's clerk—Trustees acting reasonably and honestly—Liability of trustee.—A trustee living in the country employed her London solicitors to act as her agents in the trust, the trust account being kept at a London bank. The solicitors kept the cheque and pass books, drawing cheques, and sending them to the trustee for her signature as required. A clerk to the solicitors by fraud obtained the trustee's signature to cheques for 129*l.*, inducing her to initial alterations of two of the cheques from order to bearer. He then cashed the cheques and absconded. Upon summons to make the trustee reimburse the 129*l.* to the trust estate: Held, that under the circumstances the trustee had acted reasonably, and was not liable to make good the loss to the estate. (*Re Smith; Smith v. Thompson.*) ... 401
- Trade creditors—Indemnity—Defaulting trustee—Subrogation.—By his will made in 1886 a testator empowered his trustees to carry on his business after his death, and to employ his estate therein. The trustees carried on the business for some years and incurred debts. An action was brought by beneficiaries against the trustees to administer the estate, and it was found that one of the trustees was a defaulter. The master certified what debts were properly incurred by the defendants in carrying on the business, and a summons was taken out in the action by creditors asking that the debts found due from the trustees to them might be paid out of moneys standing in court to the credit of the action. Held, that the applicants were entitled to payment out of the trust estate, notwithstanding that one of the trustees was a defaulter. (*Re Frith; Newton v. Rolfe.*) ... 212
- (See SETTLED LAND.)
- VACCINATION.
- Failure to vaccinate—Power of vaccination officer to prosecute without the authority and against the order of guardians—Power of justices to convict

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without proof that notice was sent to, and public vaccinator visited, the child's home.—A vaccination officer is entitled, as vaccination officer, to prosecute a parent who has failed to have his child vaccinated according to law, though the guardians have not instructed or have forbidden him to prosecute. In such a prosecution it is not a condition precedent to a conviction that the vaccination officer should prove that the notice to the parent and the visit of the public vaccinator to the home of the child directed by sect. 1 (3) of the Vaccination Act 1898 were in fact sent and made. (<i>Moore, app. v. Keyte, resp.</i>)	532	Contract to buy plot on building estate—Deposit—Balance to be paid on completion of certain houses by vendor—Non-completion within time stipulated—Rescission—Right of purchaser to a lien on the estate for the deposit against the assignee of the vendor.—By an agreement between S. of the one part and the plaintiffs of the other part, S. agreed to sell and the plaintiffs to purchase a public-house plot for 500 <i>l.</i> , 200 <i>l.</i> to be paid by way of deposit, and the balance as soon as 300 houses should have been erected on the estate; if not erected within two years, the plaintiffs might cancel the agreement and claim the return of the deposit without interest. The 200 <i>l.</i> was duly paid. By divers means assignments the estate came into the hands of the defendant, who bought with notice of the agreement. The houses were not erected within the stipulated time, and thereupon the plaintiffs gave notice to rescind the agreement. Held, that the estate was subject to a lien for the amount of the deposit; and that the plaintiffs were entitled to enforce that claim against the assignee of the vendor. (<i>Whitbread and Co. Limited v. Watt.</i>)	395
VENDOR AND PURCHASER.		Equitable mortgage—Memorandum and deposit of title-deeds—Sale by mortgagor—Notice—Forged receipt on memorandum—Purchaser with legal estate and possession of title-deeds—Priority.—J. T., the purchaser of two leasehold houses, applied to his solicitor, C. P., to find him 450 <i>l.</i> to complete his purchase. The plaintiff, another client of C. P., found the money, and J. T. signed a memorandum of deposit in favour of the plaintiff for the money so advanced and charged the houses comprised in the title-deeds deposited by way of equitable mortgage with the repayment of the loan with interest. The title-deeds remained with C. P. as plaintiff's solicitor. Subsequently J. T. contracted to sell the two houses to the defendant, C. P. acting as his solicitor in the matter of the sale. The abstract of title did not disclose the equitable mortgage; but, on searching, the defendant's solicitors discovered its existence and required the same to be discharged. The purchase was completed, and an assignment of the property by the vendor to the defendant passing the legal estate was executed, and at the same time the memorandum of deposit with what purported to be a receipt by the plaintiff for all moneys due on the security was handed to the defendant's solicitor together with the title-deeds. The signature to the receipt was not that of the plaintiff, but a forgery committed by C. P. Held, that the purchaser having the legal estate and possession of the title-deeds was not entitled to hold the property free from the mortgage, and that the equitable mortgagee was not deprived of his priority. (<i>Jared v. Clements.</i>)	887
Contract for sale of lease—Underlease—Outstanding day—Declaration of trust.—By an indenture made in 1865 a lease was granted to J. G. P. for a term of ninety-nine years from the 25th March 1865 at a rent of 5 <i>l.</i> 16 <i>s.</i> 4 <i>d.</i> The lease became vested in H., who on the 6th Aug. 1885 granted S. H. an underlease for the whole of the term, less eleven days, at a rent of 12 <i>l.</i> H. then mortgaged for the whole term, less one day, of which there was a declaration of trust, and on the 29th Sept. 1896 the mortgagees sold to W. S. The vendors were the legal personal representatives of W. S., and the purchaser had entered into a contract to buy what was described in the particulars as "an improved leasehold ground rent of 8 <i>l.</i> 3 <i>s.</i> 8 <i>d.</i> arising out of a ground rent for 12 <i>l.</i> amply secured on property held on lease . . . having fifty-three years unexpired in March, and subject to an original ground rent of 5 <i>l.</i> 16 <i>s.</i> 4 <i>d.</i> " The conditions provided that the title should commence with an indenture of underlease dated the 6th Aug. 1885, and that the purchaser should not question the validity of the underlease, but should assume a good title was vested in W. S. for the residue of the term. The purchaser contended that he was entitled to an assignment of the original lease, and that, as there was an outstanding day, he was entitled to a declaration that the vendor had not made out a good title, and to the return of his deposit. The vendor said that he had only contracted to sell the term for which the ground rent of 12 <i>l.</i> was payable. The purchaser, moreover, had delivered no requisitions, and it was submitted that the objection was out of time. Held, (1) that the objection was not out of time, as the objection was one of conveyance and not of title; (2) that what was contracted to be sold was the improved ground rent for the whole term during which it was payable. <i>Semble</i> , even if the contract had been to assign the whole of the original term, the vendor could have enforced the contract, as there was a declaration of trust of the last day of the term. (<i>Re Scott and Eave's Contract.</i>)	617	Land register—Conditions annexed—Modification of conditions—Persons "principally interested."—The persons "principally interested" in the enforcement of conditions annexed to land registered under the Land Transfer Acts within the meaning of sect. 84 of the Land Transfer Act 1875 are all parties who have bought with notice of the conditions and upon whom they are binding; and either their consent must be obtained to any modification of the conditions or it must be proved to the satisfaction of the court that any such modification will be beneficial to them. (<i>Ground Rent Development Company Limited v. West.</i>)	403
Contract for sale of real estate—Delay in completion—Default of vendor—Specific performance—Damages—Interest on unpaid purchase money.—By an agreement of the 21st Sept. 1900, G. agreed to sell to J. certain real estate at P., the sale to be completed on the 22nd Oct. 1900. The sale was not in fact completed until the 1st April 1901. This action was commenced on the 6th March 1901 for specific performance of the agreement for sale and for damages in connection with the delay in completion which had been caused by reason of G.'s failure to take reasonable pains to perform his contract and not from any defect of title. Held, that, a considerable part of the delay having arisen from the default of the vendor in doing what he reasonably could have done to fulfil the contract, the plaintiffs were entitled, in addition to specific performance, to reasonable damages, having regard to the measure as laid down in <i>Jaques v. Millar</i> (37 L. T. Rep. 151; 6 Ch. Div. 153) and followed in <i>Royal Bristol Permanent Building Society v. Bomash</i> (87 L. T. Rep. 179; 35 Ch. Div. 390), for the delay and for not having had vacant possession. (<i>Jones v. Gardiner.</i>)	74	Misdescription—Erasure of name in mortgage deed—Married woman mortgagee—Reconveyance—Bare trustee.—In a mortgage deed of freehold property executed only by the mortgagees the Christian name of one of the mortgagees was incorrect. After execution the incorrect name was erased and the correct names substituted therefor. The consideration for the mortgage, being moneys advanced by trustees, was, subsequently to 1893, repaid to the sole surviving trustee, a married woman, who reconveyed the property to the mortgagors. Upon a vendor and purchaser summons for a declaration that a good title had been shown to the property in question: Held,	

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- (1) that the alteration was not material and did not avoid the deed; and (2) that the married woman on payment of the mortgage money became a bare trustee for the mortgagors, and could therefore convey as a *femme sole* under sect. 16 of the Trustee Act 1893. (*Re Howgate and Osborn.*) ... 180
- Settlement—Power of sale given by settlement to trustees—Power of sale under Settled Land Acts to tenant for life—Conflict between powers—Persons having powers of tenant for life—Settlement of separate undivided shares—Persons together constituting tenant for life.—A testator who died in 1886, by his will gave all his real and residuary personal estate to trustees upon trust to stand possessed thereof as to one-fifth part for each of his four married daughters and for the children of a deceased daughter, the share of each daughter to be retained upon trust for her for her life for her separate use without power of anticipation, and after her decease as she should appoint, with a gift over, probably, void for remoteness. By his will the testator empowered his trustees to sell all or any part of his real and personal estate. The trustees proposed to sell leaseholds forming part of his estate. Upon summons to determine whether the exercise of their power of sale by the trustees required the consent of any person: Held, (1) that there was a direct conflict between the power given by the will to the trustees to sell the entirety and the powers of the tenants for life or the persons having the powers of a tenant for life to sell their shares under the Settled Land Acts within the meaning of sect. 56 (2) of the Settled Land Act 1882; (2) that that section was applicable not only to tenants for life, but also to persons having the powers of tenants for life; and (3) that the tenants for life of the separate undivided shares did not together constitute the tenant for life for the purposes of the Settled Land Act 1882 within the meaning of sect. 6 (2) of the Settled Land Act 1884, and that consequently the exercise of the power of sale given to the trustees by the will required the consent of every person beneficially interested under the will who was tenant for life or entitled to exercise the powers of tenant for life, within the meaning of the Settled Land Acts, of any shares of the testator's estate. (*Re Osborne and Bright's Limited.*) ... 178**
- Title—Adverse rights—Inquiry of tenants as to whom they paid their rent—Constructive notice.—A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; but actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights. H. executed a conveyance of freehold property to one G., an auctioneer, which purported to be made in consideration of 12,000. It was assumed (although not proved) that no part of the purchase money was in fact paid, and that H. remained the true owner of the property. The tenants of the property continued to pay their rents to W., a house agent who collected them on behalf of H. G. obtained advances to himself on the security of the property, and executed legal mortgages of it to the defendants. The defendants had no express notice that G. was trustee of the property on behalf of H., or that H. was in receipt of the rents, but a valuer who surveyed the property on their behalf, inquired of the tenants as to whom they paid their rents, and discovered that they paid them to W. He was not, however, told on whose behalf W. received them. H. and G. had since died. The plaintiff, who was H.'s widow and tenant for life under his will, brought an action against the defendants to have the conveyance delivered up to be cancelled. Held, that it is not the duty of a purchaser or mortgagee to inquire of the tenants as to whom they pay their rents, either under sect. 3 of the Conveyancing Act 1882 or under the law as it stood independently of that Act, and the action must be dismissed. (*Hunt v. Luck.*) ... 68**
- Will — Real estate — Special executors — General executors.—A. C. by his will appointed certain executors as to his property in Australia and certain general executors of his will. The executors entered into a contract for the sale to the London County Council of certain freehold property in London. It was contended by the London County Council that under sects. 1 and 2 (2) of the Land Transfer Act 1897 (60 & 61 Vict. c. 65) it was not sufficient that the general executors alone should join in the sale, and that they could not make a good title to the property. Held, that a good title could be made by the general executors alone. (*Re Cohen's Executors and London County Council.*) ... 73**
- VOTERS, REGISTRATION OF.**
(See REGISTRATION OF VOTERS.)
- WATERCOURSE.**
Artificial stream—Riparian owners—Abstraction and fouling of water by superior riparian owner—Right by presumed grant or prescription to flow of water and reasonable enjoyment.—The plaintiffs were owners of a mill situate upon an artificial cut or channel, whereby a certain portion of the water of a river was carried from a point in its course for a distance of about a mile and a half before rejoining the river. The water in this channel passed first the defendants' factory and about 200 yards lower down a factory of the plaintiffs closely adjoining their mill. The inflow of water from the river was regulated by means of an artificial structure with removable boards, which was, and always had been, under the control of the mill-owner, upon whom also had fallen the task of keeping the bed of the cut clean and clear. The defendants carried on at their factory, which was on the site of an old tannery, the business of fellmongers and skin rug manufacturers, and used for the purposes of their business the water coming down the artificial channel. The plaintiffs alleged that the defendants in the course of their business, by the washing, soaking, and scouring of sheep and other skins in the stream after they had been previously subjected to dyeing processes, and by returning into the stream the effluent liquid which had been used in the various processes of manufacture, polluted and fouled the stream in the cut; and that they also abstracted water therefrom to such an extent as to seriously interfere with and diminish the flow thereof to the plaintiff's mill and factory. The plaintiffs accordingly brought an action to restrain the defendants from (1) fouling or polluting the stream in the cut, (2) diverting or abstracting the water, and (3) obstructing or diminishing the flow of the stream. Held, that there had been an unjustifiable pollution of the stream; but that as to the abstraction of water, what had been done by the defendants had not been done in violation of the plaintiffs' rights as riparian owners, there being no evidence that they had abstracted any larger quantity of water than was reasonable. (*Baily and Co. v. Clark, Son, and Morland Limited.*) ... 309
- WILL.**
Bequest of sum "sufficient to pay and discharge all estate duty"—Claim of limited owner to charge settled estates in respect of estate duty.—A testator, by a codicil to his will executed after the passing of the Finance Act 1894, bequeathed to his eldest son, to whom entailed estates would pass on the testator's death, a sum of money "sufficient to pay and discharge all estate duty" which might be payable by him. The residuary legatee claimed that the legacy was impressed with a trust to pay the estate duty, and that the legatee consequently lost his right to recoup himself by a charge on the settled estates under sect. 9 (6) of the Act, the object of the gift being to discharge the estate duty, and so to free the settled estates from liability. The legatee, on the other hand, claimed that the legacy was one for his own benefit, being

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- a gift to him measured by the amount which he would have to pay for estate duty. Held (*dissentient* Stirling, L.J.), that, there being no words indicative of a desire on the part of the testator to give the legatee absolute property, the inference could not be drawn that he should take the legacy unfettered by any purpose of the testator; and that this was not a legacy with a motive added, but an imperative direction, the purpose here, as distinguished from a motive, being the discharge of the estate duty. (*Re Mexborough; Savile v. Mexborough.*) ... 331
- Construction—Bequest to testator's son's wife—Nomination—Not lawfully married—Misdescription—Valid bequest.—A testator bequeathed a sum of 5000*l.* upon trust to pay the income thereof to his son F. during his life, and after his death to pay such income to his (*i.e.*, his son's) wife L. during her life. F. and L. were not lawfully married, although they represented themselves and were reputed as being so. P. had written to the testator informing him that he had married L., but the testator had not seen or had any direct communication with L. There was no question of fraud in obtaining the bequest. Held, that the bequest was to a legatee named with an additional description which was not satisfied, and that as the name described the object of the gift with sufficient certainty, the additional description which was untrue would be rejected, and that the bequest was valid. (*Anderson v. Berkley.*) ... 443
- Construction—Charitable gift—Secret trust—Trust for benefit of public, but so that they should acquire no rights.—A testator, who died on the 4th May 1900, by a codicil to his will bequeathed a museum and grounds and also the sum of 300*l.* per annum, charged on certain other of his estates, for the future maintenance of the museum and grounds to his eldest son and his heirs male; and directed that the museum and grounds should be kept in a good state of preservation. The testator also appointed two persons trustees only for the purposes, so far as necessary, in connection with the future maintenance of the museum and grounds. The question was raised whether the eldest son was beneficially entitled to the museum and grounds, or whether there was a secret trust in favour of the public. It appeared from the evidence that the testator during his life laid out the grounds and established the museum and allowed the public to have access thereto under certain restrictions, free of charge, always, however, reserving his private rights and his right to close the museum and grounds against the public. It also appeared that the testator informed his son of his wish that the museum and grounds should be maintained and the public allowed access thereto, and that the son accepted the gift with that knowledge; but that the testator always insisted that the public were to acquire no rights. Held, that the intention of the testator was that the museum and grounds should go as part of his estate, the maintaining thereof by his eldest son to be done voluntarily and distinct from the wish of the testator from whom he took the property; that this gift was absolutely inconsistent with a secret trust; and that the terms of the gift did not create a charitable trust. (*Re Pitt-Rivers; Scott v. Pitt-Rivers.*) ... 6
- Construction—Charitable legacy—Gift to institution which never existed—General charitable intention.—A testatrix made bequests to charitable institutions for the blind, orphans, deaf and dumb, sick, &c., and, amongst them, to "the Home for the Homeless, 27, Red Lion-square, London." She declared that in the event of any question arising as to the designation of any of the charitable institutions thereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it was intended to benefit, the decision should rest absolutely with her executor; and she directed that the residue of her estate should be divided rateably amongst "the various charitable institutions which are beneficiaries under this instrument." At the date of the will there was not, and there never had previously been, in London any charitable institution known as "the Home for the Homeless." Held, that there was sufficient on the face of the will to show a general charitable intention on the part of the testatrix, and that the legacy did not lapse. Held, also, that the residue was to be divided rateably among the institutions named in the will, which did exist, including the institution or authority which would administer the legacy in question. (*Re Davis; Hannon v. Hillyer.*) ... 292
- Construction—Exception of eldest son for time being entitled to possession of specified estate—Sale of specified estate before death of the testator.—A testator by his will, made in 1855, devised his real estate to A. for life, with remainder to every son and sons of A. born in the testator's lifetime or in due time after, other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits of certain estates at C., after the decease of A. as tenant for life, or for any greater estate or interest. A's eldest son on coming of age became entitled as tenant in tail on A.'s death to the C. estates. In 1869 he joined A. in executing a disentailing deed, under which the C. estates were sold, and the purchase money received by trustees upon trusts under which he took certain benefits. He afterwards became bankrupt, and his interest under the trust was purchased by A., who subsequently died. The testator died in 1875. Held, that the words of the exception must be construed according to their ordinary and natural meaning, and as at the death of the testator A.'s eldest son was not entitled either to the possession or the rents and profits of the C. estates, he was not excluded from taking under the will. (*Law Union and Crown Insurance Company v. Hill and another.*) ... 773
- Construction—"Furniture and other personal effects"—Effects connected with business—Tenant's fixtures.—A testator, who carried on the R. Hotel as a yearly tenant and resided on the premises, bequeathed "all the furniture and other personal effects belonging to me and which at the date of my death are at the R. Hotel aforesaid" to W. Held, that all the furniture and personal effects at R. Hotel, whether used in connection with the business or not, passed to W., but not the tenant's fixtures. (*Re Seton Smith; Burnard v. Waite.*) ... 322
- Construction—Gift of income of residue to children for life subject to annuity to widow—Death of widow—Advances—Hotchpot—Interest on advances.—A testator by his will and codicil, dated the 5th May 1880 and the 12th July 1883 respectively, after giving certain legacies, devised and bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of 2000*l.* to his widow during her life and, subject thereto, to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children; and then upon trusts therein expressed. The testator provided that, as to certain advances already made to some of his children, and as to any future advances to his children exceeding at any one time the sum of 1000*l.*, these advances should be treated as capital of the original shares, and be brought into hotchpot and accounted for accordingly. The testator died on the 3rd July 1887, and left surviving him six children; of whom three had received advances, and three had not. The widow died in March 1900. Held, that, in bringing the advances into hotchpot for the purpose of determining the respective shares of the six children, the shares of the advanced children must respectively be debited with 4 per cent. on the amount of their respective advances from the testator's death down to the time when the estate ought, or should be deemed, to have been divided. (*Re Hargreaves; Hargreaves v. Hargreaves.*) ... 43
- Construction—Gift of income to two persons "so that each shall receive half during their lives"—

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- Gift over—Death of one person—Implied gift to the other.—By his will a testator gave the income of his residuary estate to E. W. G. and H. H. G. "in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives." After "their deaths" the income was given over to other persons. Held, that on the death of E. W. G., H. H. G. took by implication the income of the whole fund during her life. (*Re Telfair; Garrioch v. Barclay.*) ... 496
- Construction—Gift to A. and B. and the children of C.—Gift divisible into thirds—No class gift.—By his will, dated the 7th June 1870, a testator bequeathed his residuary personal estate to trustees upon trust for sale and conversion and upon certain trusts for the benefit of his daughter for life, and for her issue (all of which trusts failed), and the will then continued as follows: "And in case there shall be no child of my said daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, then I direct and declare that my said trustees or trustee shall stand possessed of the said residuary trust fund in trust for the said George Barker, his sister, Mary Barker, and the children now living of the said Richard Hollings who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one in equal shares, the share or shares of any of them being female to be for her or their sole and separate use." The testator died on the 28th June 1870. There were four children of Richard Hollings living at the date of the death of the testator, all of whom attained the age of twenty-one years. Farwell, J. was of opinion that the gift was a class gift within the meaning of *Romer L.J.* in the judgment of the Court of Appeal in *Re Moss; Kingsbury v. Walter* (31 L. T. Rep. 139; (1899) 2 Ch. 314), and accordingly his Lordship decided that the words "who being male . . . separate use" referred as much to George and Mary Barker as to the children of Richard Hollings. The learned judge therefore made a declaration that the investments representing the residuary trust fund were divisible into equal sixths between George and Mary Barker and the children of Richard Hollings. On appeal: Held (*dissentiente Stirling, L.J.*), that the intention of the testator was that the investments representing the residuary trust fund should be divided into equal thirds (one of such thirds being again divisible into fourths) between George Barker, Mary Barker, and the children of Richard Hollings; that those persons did not constitute a class, they not being united or connected by any common tie; and that the gift was therefore not a class gift. (*Capes v. Dalton.*) ... 129
- Construction—Gift to children—Gift over on death coupled with a contingency—Residuary estate—Divesting clause—"Die leaving issue"—Period of defeasibility.—A testator who died in Jan. 1900, by his will, dated in Dec. 1889, devised and bequeathed his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income in or towards the maintenance, education, and advancement of his children until the youngest who should be living should attain the age of twenty-one years or, being a daughter, should attain that age or marry. Subject to the trusts and powers thereinbefore contained the testator directed that the trust fund and the income thereof and all accumulations of income, or so much thereof as should not have become vested or been applied pursuant to his will should be held in trust "for all my children, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue, such issue shall take his or her deceased parent's share equally as tenants in common." Held, that there was nothing in the context of this will to prevent the rule laid down by the House of Lords in *O'Mahoney v. Burdett* (31 L. T. Rep. 705; L. Rep. 7 E. & I. App. 388) from applying; and that, therefore, the children who survived the testator would only become entitled to vested indefeasible interests if and when they should die without leaving issue. (*Re Schnadhorst; Sandkuhl v. Schnadhorst.*) ... 426
- Construction—Gift to widow—Gift over of balance, "if any," of money.—A testator bequeathed the residue of his estate to his wife for her sole use and benefit so long as she should remain his widow. In the event of her remarriage he directed that the balance, if any, of money and farm stock left, not to exceed 400*l.*, should be divided between his brothers and sisters. Held, that the widow took absolutely except as to a sum of 400*l.*, which went over upon her marrying again, in the event of there being a balance of unexpended residue to that amount on the day of her second marriage. (*Re Rowland; Jones v. Rowland.*) ... 78
- Construction—Heirlooms—Settlement—Absolute interest—Chattels to descend as heirlooms "as far as the rules of law and equity will permit."—A testatrix, who died in Oct. 1891, by her will, dated in May 1891, bequeathed certain jewellery to her son until he should die, and after his death to each and every of the persons who should in turn succeed to the title and dignity of Viscount H., or any other title or dignity which might be granted to or assumed by any person for the time being entitled to the title and dignity of Viscount H., severally and successively as they should in turn succeed to such title and dignity, her intention being that the jewellery should "descend as heirlooms as far as the rules of law and equity will permit." The son survived the testatrix, and entered into possession of the chattels. He died in March 1896, being succeeded in the title by his son, who thus became fourth Viscount H. He married, but had not any issue. The heir-presumptive to the title was one of the brothers, who was unmarried. The question was whether the fourth Viscount H. was entitled absolutely, or for life only, or otherwise, to the chattels bequeathed by the testatrix to descend as heirlooms with the title of Viscount H. Held, that the fourth Viscount H. was entitled absolutely to the chattels. (*Re Hill; Hill v. Hill.*) ... 146, 336
- Direction to pay debts—Executor according to the tenor—Consent of residuary legatee—Grant of probate.—A testatrix by her will directed G. to pay all her just debts and made M. her residuary legatee. G. applied for probate of the will as executor according to the tenor. This was refused in the registry on the ground that the person who claims to be executor according to the tenor must not only have some duty to perform, but there must also be a gift to him. On application to the court, and with the consent of the residuary legatee, the grant was made. (*In the Goods of Pamela Cook.*) 537
- Gift to females with restraint on anticipation—Rule against perpetuities—Restraint on anticipation valid as to shares of females born in the testator's lifetime though void as to shares of those born afterwards.—A testator who had vested property in trustees upon trust for his daughters for life with remainder for their children directed that the provisions for his daughters and their children, being females, should be for their respective separate use without power of anticipation. Held, that the restraint on anticipation imposed on the shares of the female children of the testator's daughters was valid as to the shares of those born in the testator's lifetime, though void as to the shares of those born afterwards. (*Re Ferneley's Trusts.*) ... 413
- Limitation to "right heirs" of testator—Co-heiresses—Joint tenancy or coparcenary.—By virtue of sect. 3 of the Inheritance Act 1833, where property is devised to the testator's "right heirs," his heir-at-law takes the property as devisee and not by descent. If the testator leaves co-heiresses they will take under the devise as joint tenants and not

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as coparceners, as coparcenary is an incident of an estate taken by descent, and not of an estate taken by purchase. (<i>Owen v. Gibbons.</i>) ...	571	did not survive the testator. (<i>Re Benjamin; Neville v. Benjamin.</i>) ...	387
Portions—Mortgage—Legal charge—Equitable charge—Priority.—A testator by his will charged all his real estate with payment of three portions to the children of each of his three daughters. Two of the portions having become raisable, under an order of the court the whole of the testator's real estate was mortgaged, subject to any charges subsisting thereon under the will, to raise the two portions. The third portion had not yet become raisable. Upon action brought by the mortgagee to determine the respective priorities: Held, that the third portion, although as yet only charged in equity, ranked <i>pari passu</i> with the mortgagee's legal charge. (<i>Nightingale v. Reynolds.</i>) ...	703	Probate—Codicil—Earlier will—Reference to destroyed will—Probate omitting reference.—A testator executed a will and two codicils thereto. Upon the execution of a later will the first three documents were destroyed. Subsequently one codicil was executed which was expressly declared to be a codicil of the second will, and afterwards another codicil which referred to the earlier destroyed will and codicils. Upon motion by the executors probate was granted of the second will and the two codicils subsequently executed, omitting from the latter of the two codicils the words referring to the former destroyed will and codicils. (<i>In the Goods of Alfred Reade.</i>) ...	268
Power—Married woman—Will—General power—Administration with the will annexed.—A married woman, who died during her husband's lifetime, had a general power of appointment over a fund of personalty, in which the husband had a life interest. In exercise of that power she by will appointed the fund to her brother and sister upon trust to pay a legacy, and divide the residue among certain persons, and she appointed her brother and sister executor and executrix. The wife died in 1882, the husband died in 1900, and the brother and sister died without proving the will. Letters of administration were granted on the 31st May 1900. The question raised was whether the administrator could give a good receipt for the appointed fund. Held, that the administrator could give a good receipt. (<i>Re Peacock; Kelcey v. Harrison.</i>) ...	414	Probate—Grant—Action for revocation on ground of fraud—Staying proceedings— <i>Res judicata</i> —Jurisdiction of court.—Although the court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the judgment which raise a reasonable probability of the action succeeding, yet it cannot be laid down as a hard and fast rule that the evidence thus produced must be of such a character that it would be evidence in the action itself. If the facts alleged to have been discovered are so evidenced and so material as to make it reasonably probable that the action will succeed, the action ought not to be stayed. Where an action is an independent proceeding to set aside a judgment on the ground that it was obtained by fraud, it is maintainable when that judgment has been procured by the fraud of a party to the action. But a mere general allegation of fraud, without particulars, cannot avail. The limitation that a judgment can only be set aside, if at all, against those who procured it by fraud, does not apply to a probate action, the will being either good or bad against all the world. The plaintiff in an action against executors claimed, on the ground of fraud, to revoke the probate of a will which had been decreed to have been proved in solemn form of law. The defendants moved to stay the proceedings and to dismiss the action. Held, that the evidence of the alleged fraud was insufficient; and that, therefore, the action ought to be stayed as being frivolous and vexatious, and the statement of claim struck out as disclosing no cause of action. (<i>Birch v. Birch.</i>) ...	118, 364
Power of appointment—Remoteness—Election—Covenant to exercise power in a particular way—Costs.—By his will, made in 1863, W. B. gave property upon trust for his son A. B., and his children or issue as A. B. should by will appoint, and, in default of appointment, for the children equally. A. B. in 1893, on his second marriage, covenanted with the trustees of his marriage settlement to exercise the power in the manner therein expressed. By his will A. B., in exercise of the power, made an appointment in favour of his son A. E. B. for life, and at A. E. B.'s decease for his children then living, and a similar appointment in favour of his daughter G. for life, and for her children. The appointment subsequent to the life interest being void for remoteness: Held, that the plaintiff A. E. B. and the daughter G. were bound to elect as between their life interest in the property of A. B. and the property which would devolve on them in default of appointment; the covenant to exercise the power of appointment in a particular way was void; and the costs of all parties would be allowed out of the estate, "as between solicitor and client." Those words were still necessary, notwithstanding rule 10 of the Rules of Court 1902. (<i>Re Bradshaw; Bradshaw v. Bradshaw.</i>) ...	253	Probate—Soldier's will— <i>In expedition</i> —Letter to friend—Mobilisation.—A soldier is held to be in actual military service as soon as the order for mobilisation has been given. If, therefore, a letter is written after the order for mobilisation, and such letter can be construed as a testamentary document, the court will hold it to be a valid soldier's will, even though the letter itself contains an intimation of an intention to draw up a more formal document at a later period. (<i>In the Goods of William Knee; Gattward v. Knee.</i>) ...	119
Presumption of death—Legatee—Disappearance nine months before testator's death—Not since heard of—Elapse of nine years.—By his will D. B. gave his residuary estate to trustees upon trust for sale and conversion, and to divide the proceeds into as many shares as he should have children who should be living at the date of his death, or should have died in his lifetime leaving children living at his death, and to appropriate one share to each child respectively. On the 25th June 1893 D. B. died. D. B. had had thirteen children, of whom twelve were living at his death. The remaining one, P. D. B., had not been heard of since the 1st Sept. 1892. On a summons being taken out by the trustees of D. B.'s will to determine in what manner the share, to which P. D. B. would have been entitled if alive at the testator's death, should be dealt with, the court held upon the evidence that P. D. B. must be presumed to be dead, and directed that, in the absence of evidence to show that P. D. B. was alive at the death of the testator, the share should be divided by the trustees upon the footing that P. D. B.		Probate—Soldier's will—Letter.—The privilege of making a valid soldier's will is not dependent upon the military position or the education of the testator. (<i>In the Goods of May; May v. May.</i>) ...	120
		Probate—Testatrix not of sound disposing mind—Will pronounced against—Executors and residuary legatees—Costs—Practice.—Where executors, who are also residuary legatees, propound the will of a testatrix who is afterwards found by a jury not to have been of sound testamentary capacity at the date of the execution of the will, and the executors themselves have had every opportunity of forming an opinion as to her testamentary capacity and have been fully conversant with her affairs, the court will not interfere with the general rule that costs should follow the event, and the executors will be ordered to pay the costs of the defendant. They will not, however, be called upon to pay the costs of any of the parties cited, if the interests of such parties are	

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- practically identical with those of the defendant. (Twist and others v. Tye.) ... 259
- Probate—Two wills—Power of appointment—Exercise by will—Subsequent will—No clause of revocation—No reference to power—By what words power held to be exercised—Implied revocation.—A testator made a will, reciting therein a power of appointment, and purporting to exercise that power. He subsequently made a second will. The second will contained no clause of revocation, and no reference to the power, but the testator purported to "give, devise, bequeath, and appoint," all his real and personal estate. It was held, under the circumstances of the case, that the power was sufficiently exercised by the use of the word "appoint," and that the first will was, by implication, revoked by the second. (*Kent v. Kent and others.*) ... 536
- Real estate—Devise—Condition precedent—Condition subsequent—"To take and use the name of Greenwood only"—Death—Insanity—Act of God—Impossibility.—The testator J. N. G. by his will devised his real estate to trustees upon trust for his daughter J. G. during her life; and, after her decease, for the children or remoter issue born in the lifetime of J. G. in such shares as J. G. should by deed or will appoint, and, in default of such appointment, for the children of J. G. as tenants in common. And, if J. G. should have no children, the testator devised his real estate to his cousin W. A. N. on condition that W. A. N. should take and use the name of Greenwood only. The testator died on the 11th Aug. 1853. W. A. N. died on the 6th Nov. 1855 intestate, leaving W. N. his heir. W. A. N. had not during his life taken the name of Greenwood. J. G. was born on the 30th June 1843 and was married, but had no issue. On the administrator of W. N. seeking a declaration that, in the event of J. G. dying without having issue, he would be entitled to the real estate of the testator: Held, that, even if the condition that W. A. N. should take and use the name of Greenwood only was a condition subsequent, the fact of W. A. N. not having complied with the condition during his life disentitled the administrator; and that although during the last eighteen months of his life W. A. N. suffered from insanity. *Quære*, whether the condition was not a condition precedent. (*Re Greenwood; Goodhart v. Woodhead.*) 500
- (See VENDOR AND PURCHASER.)
- WORKMEN'S COMPENSATION ACT 1897.**
- Employer and workman—Injury by accident—Compensation—Admission of liability—Duty of widow to take out letters of administration—Subsequent application to court—Compensation paid into court—Costs—Stay of proceedings.—A workman, who was accidentally killed in the course of his employment, died intestate, leaving a widow and children, who as his dependants were entitled to be paid compensation by his employers under the Workmen's Compensation Act 1897. The amount of compensation was agreed upon between the widow and the employers, but the employers refused to pay this amount to her unless she first took out letters of administration. The widow refused this condition and commenced proceedings against the employers to obtain compensation under the Act. The employers paid the agreed amount of compensation into court. The County Court judge ordered the employers to pay to the widow the costs of her application up to the date of the payment into court. Against this order the employers appealed. Held, that the employers were not entitled to insist on the widow taking out letters of administration before they paid over to her the agreed amount of compensation. Held, also, that the proceedings for compensation having been rightly commenced, the County Court judge had jurisdiction to order the employers to pay the widow the costs of her application up to the date of the payment into court. (*Clatworthy v. R. and H. Green Limited.*) ... 702
- Employer and workman—Injury by accident—Compensation—"Arising out of the employment"—Wrongful act of fellow workman.—The plaintiff was employed in the works of the defendants with a number of other boys. One of the boys while "larking" pushed another boy into a pit, who then in anger threw at him a piece of iron which was lying in the pit. The iron missed the boy at whom it was thrown, but hit the plaintiff, who was properly engaged in his work, and seriously injured him. Held, that the accident did not arise "out of" the employment, and that the plaintiff was not entitled to compensation under the Workmen's Compensation Act 1897. (*Armitage v. Lancashire and Yorkshire Railway Company.*) ... 583
- Employer and workman—Injury by accident—Compensation—Death—Cause of death—Result of accident.—A workman received an injury to his foot by accident arising out of and in the course of his employment, and after an interval of more than a fortnight erysipelas supervened and caused his death. The County Court judge held that his widow was not entitled to compensation under the Workmen's Compensation Act 1897, because death was not the natural and probable consequence of the injury and therefore did not result from the injury. Held, that death might "result from the injury" although it was not a natural and probable consequence of the injury, and that, if death did in fact result from the injury, compensation was payable. (*Dunham v. Clare.*) ... 751
- Employer and workman—Injury by accident—Compensation—Employment—Building being repaired—"Scaffolding"—Ladder.—A building exceeding 30ft. in height was being repaired by means of a ladder, the lower end of which rested on the ground and the upper end against the parapet of the building. A workman employed on the work fell from the ladder and was injured. The County Court judge held that the building was not being repaired "by means of a scaffolding," and that the workman was not entitled to compensation under the Workmen's Compensation Act 1897. Held, that the County Court judge had properly found that the building was not being repaired "by means of a scaffolding," within the meaning of sect. 7 (1) of the Workmen's Compensation Act 1897. (*Marshall v. Rudeforth.*) ... 752
- Employer and workman—Injury by accident—Compensation—"Engineering work"—"Railroad"—Construction of tramway line.—The word "railroad," as used in the definition of "engineering work" in sect. 7 of the Workmen's Compensation Act 1897, is not synonymous with the word "railway," as defined in the same section; and it includes the running lines of a tramway laid along a public highway under the authority of a private Act of Parliament incorporating Parts 2 and 3 of the Tramways Act 1870. (*Fletcher v. London United Tramways Company Limited.*) ... 700
- Employer and workman—Injury by accident—Compensation—Review of weekly payment—Application by employers—Date from which weekly payment may be altered.—Employers who were making weekly payments as compensation under the Workmen's Compensation Act 1897 to an injured workman, filed an application for a review of such weekly payment on the ground that the workman's incapacity to work had diminished. Held, that the County Court judge had jurisdiction to inquire at what date since the filing of the application the workman's incapacity had diminished, and to make an award accordingly. (*Francis Morton and Co. v. Woodward.*) ... 878
- Employer and workman—Injury by accident—Compensation—Undertaker—Sub-contractor.—In the case of a building, a sub-contractor may be an "undertaker" within the meaning of the Workmen's Compensation Act 1897, and consequently where a workman employed by the sub-contractor has been injured by an accident in the course of his employment, and has recovered compensation from the principal contractor, such principal contractor is entitled to be indemnified by the sub-contractor. (*Cooper and Crane v. Wright.*) ... 776
- Employer and workman—Injury by accident—Factory—"Employment by the undertakers in or

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about a factory" in sect. 7, sub-sect. (1), of the Workmen's Compensation Act 1897 means employment in or about their own factory; and therefore in a case in which the respondents, who were engineers, had contracted to put a new wheel, made in their own factory, to an engine in a factory occupied by other persons, and in the course of fixing the wheel an accident took place by which one of their workmen was injured: Held, that they were not liable to make compensation. (Wrigley v. William Whittaker and Sons.)... 775		the course of his employment by the negligence of a third person, obtained an award under the Workmen's Compensation Act 1897 against his employer. He then brought an action against the third person claiming damages for pain and suffering, and the expenses he had been put to, and the balance of his wages. Held, that the action would not lie by virtue of sect. 6 of the Workmen's Compensation Act 1897. (Tong v. Great Northern Railway Company.) 802	
Employer and workman—Injury owing to negligence of third person—Compensation—Action against third person.—A workman, having been injured in		WRIT.	
		(See PRACTICE.)	

THE LAW TIMES REPORTS:

COMPRISING

All the Cases Argued and Decided

IN THE

HOUSE OF LORDS, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
THE SUPREME COURT OF JUDICATURE, AND THE
RAILWAY AND CANAL COMMISSION COURT.

FROM MARCH TO AUGUST 1902.

[CT. OF APP.]

MCHEANE v. GYLES.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Dec. 19, 1901.

(Before WILLIAMS, ROMER, and COZENS-
HARDY, L.JJ.)

MCHEANE v. GYLES. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Third-party notice—Service out of the jurisdiction—Jurisdiction of court—Third party domiciled in Ireland—Claim for contribution in respect of breach of trust committed in Ireland by third party's testator—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 3—Rules of Court 1883, Order XI., r. 1; Order XVI., rr. 11, 48.

By a settlement made in Ireland and dated in 1874 A. and B. were appointed trustees of the sum of 1000l. upon and subject to the trusts and powers thereafter expressed. In 1875 A. and B. lent the whole of the trust fund upon an alleged contributory second mortgage executed in Ireland of land situate in that country, which was subsequently sold for a sum insufficient to meet any portion of the 1000l. secured thereon. In 1877 B. died, and his will was proved by his widow in Ireland. She was domiciled and resided there.

In 1901 an action was brought by the sole beneficiary under the settlement, seeking to make A., as the survivor of the two trustees thereof, liable for the alleged breach of trust. A. was staying in England, and was duly served there. A. obtained leave to issue and serve a third-party notice upon B.'s widow, claiming contribution

from her on the ground that her husband as co-trustee was equally liable with him.

Held, that the court had no jurisdiction in this case to order service of the third-party notice out of the jurisdiction.

Decision of Buckley, J. reversed.

THOMAS JONES, who resided in Ireland, by his will, dated the 21st March 1862, bequeathed to his trustees the sum of 1000l. in trust for his eldest daughter Sarah Elizabeth Jones during her life. And in case she should marry, it was the testator's wish that such sum should be vested in trustees for the benefit of his daughter during her life, and from and after her decease in trust for the issue of his daughter in such shares and proportions as she should by deed or will direct or appoint.

The testator died on the 19th Oct. 1863, and his will was subsequently proved in Ireland.

Thomas Shaw McCheane and Sarah Elizabeth Jones intermarried on the 12th Aug. 1865, and were domiciled and resided in Ireland.

By an indenture of settlement, dated the 17th Dec. 1874 and made in Ireland in pursuance of ante-nuptial articles of agreement, Thomas Shaw McCheane and Sarah Elizabeth McCheane appointed Walter Gyles and John Cronyn trustees of the sum of 1000l. (which had been duly paid to them by the then personal representative of the testator) and the investments for the time being representing the same upon and for the several trusts and purposes in and by the testator's will contained and declared of and concerning the legacy of 1000l. The settlement did not contain any investment clause.

Sarah Elizabeth McCheane had one son only—viz., the plaintiff—and by a deed poll, dated the 26th March 1901, she irrevocably appointed that all and singular the trust fund should belong to and be held in trust for the plaintiff absolutely, and she thereby assigned unto the plaintiff all her interest in the trust fund.

(a) Reported by E. A. SORATCHLEY, Esq., Barrister-at-Law,
Vol. LXXXVI., 2207.

In April 1875 the trustees lent the whole of the trust fund on an alleged contributory second mortgage executed in Ireland of land situate in that country.

In 1877 John Cronyn died, and his will was proved by his widow in Ireland.

It appeared that the property upon which the trust fund was lent had been sold for a sum insufficient to pay the amount of the first mortgage, and that the trust fund had therefore been lost.

The plaintiff contended that the trustees were guilty of a breach of trust in lending the trust fund on a contributory second mortgage, and that Walter Gyles, as the surviving trustee, was liable to replace the same with interest.

The plaintiff accordingly brought an action against Walter Gyles, claiming a declaration that he was guilty of a breach of trust, and asking for payment by the defendant of the sum of 1000*l.*, together with interest thereon for six years prior to the issue of the writ in the action.

Walter Gyles entered an appearance to the action, having been duly served with the writ while staying in England, and, being advised that the widow of John Cronyn, as his legal personal representative, was liable to contribute to any sum that he, Walter Gyles, might be ordered to pay, applied *ex parte* to Byrne, J., under Order XVI., r. 48, for leave to issue and serve such representative with a third-party notice claiming contribution over against her; or, alternatively, desired a direction that such representative should be added as a defendant to the action.

John Cronyn's widow lived permanently and was domiciled in Ireland.

Sect. 24 of the Judicature Act 1873 enacts that

In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered in the High Court of Justice and the Court of Appeal respectively according to the rules following: . . .

(8) The said courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.

Order XI. provides as follows:

1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

2. Where leave is asked from the court or a judge to serve a writ, under the last preceding rule, in Scotland or in Ireland, if it shall appear to the court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be) the court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriff's Courts, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively.

Order XVI., r. 48, provides that

Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice (hereinafter called the third-party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court or a judge, be served within the time limited for delivering his defence. Such notice may be in the form or to the effect of the form No. 1 in appendix B, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

Byrne, J. gave leave to issue the third-party notice.

John Cronyn's widow having been duly served with the writ, statement of claim, and third-party notice, and having entered a conditional appearance, moved to set aside the order for leave to serve such notice out of the jurisdiction.

It was alleged that the estate of John Cronyn had been fully administered.

On the 22nd Nov. 1901 Buckley, J. (sitting for Byrne, J.) refused the motion. His Lordship was of opinion that *Spiller v. Bristol Steam Navigation Company Limited* (50 L. T. Rep. 400, 419; 13 Q. B. Div. 96) was distinguishable; and that the principle of *Suaneas Shipping Company Limited v. Duncan, Fox, and Co.* (35 L. T. Rep. 879; 1 Q. B. Div. 644) applied to the present case.

From that decision John Cronyn's widow now appealed.

Butcher, K.C. and Lavington with them Darley) for the appellant.—There was, we submit, no jurisdiction to serve the third-party notice in the present case. If a plaintiff is unable to serve a writ out of the jurisdiction, he cannot serve a third-party notice. There are no rules which would authorise the plaintiff in the present case to serve the writ out of the jurisdiction, and therefore there is no power to serve the third-party notice. But, even assuming that there is such jurisdiction to serve a writ out of the jurisdiction, and consequently to serve a third-party notice, yet, having regard to the circumstances of the present case, the court in the exercise of its discretion will not allow such service, having regard to rule 2 of Order XI. It is clear that sub-rules (a) to (f) of rule 1 of Order XI. do not apply here. The question is whether sub-rule (g) can be said to do so. Order XI. is exhaustive, and the court cannot go beyond it. In *Re Salmon; Priest v. Uppleby* (61 L. T. Rep. 146; 42 Ch. Div. 351, at p. 363) Fry, L.J. said: "The scheme of the rules appears to me to be to make the proceeding against the

third party an independent proceeding in which the defendant is to be the actor." There is an important decision on rule 1, sub-rule (g), as to service of a third-party notice—viz. :

Spiller v. Bristol Steam Navigation Company Limited, 50 L. T. Rep. 400, 419; 13 Q. B. Div. 96.

That view was accepted by Smith and Day, JJ. in

Dubout et Compagnie v. Macpherson and Co., 61 L. T. Rep. 689; 23 Q. B. Div. 340.

A case cited against the present appellant in the court below was *Dickson v. Law and Davidson* (72 L. T. Rep. 680 (1895) 2 Ch. 62), but it is, we submit, a totally different case from the present. Another case cited in the court below was *Swansea Shipping Company Limited v. Duncan, Fox, and Co.* (35 L. T. Rep. 879; 1 Q. B. Div. 644). That, however, was under the Rules of Court before those of 1893, and it is not a decision against our contention, because rule 1 (g) was not considered at all, and consequently it is no authority upon the question whether that sub-rule applies to service of a third-party notice out of the jurisdiction. Buckley, J. was of opinion that *Spiller v. Bristol Steam Navigation Company Limited* (*ubi sup.*) was distinguishable, and that the principle of *Swansea Shipping Company Limited v. Duncan, Fox and Co.* (*ubi sup.*) applied to the present case. On the question of discretion there is the case of *Harvey v. Dougherty* (56 L. T. Rep. 322), but that was not a case of a third-party notice at all, and the circumstances of that case were, moreover, entirely different from the present.

Asbury, K.C. and *Austen-Cartmell* for the respondent.—If this is a case for the exercise of discretion, we ask this court not to interfere in the matter. [WILLIAMS, L.J.—The learned judge in the court below apparently came to the conclusion that he had jurisdiction.] If the appellant is right in the contention which has been put forward, no third-party notice can ever be served out of the jurisdiction in a case in which it might be most desirable to serve such a notice. [ROMER, L.J.—The court has power in a proper case to add a third party as a defendant.] Yes, under Order XVI., r. 11. But if we are within the rule as to service of a third-party notice out of the jurisdiction, this case is much stronger for such service than for the adding of the third party as a defendant to the action. And we submit that the court has jurisdiction to order such service under the rule in question.

No reply was called for.

WILLIAMS, L.J.—In this case the original order for service of the third-party notice out of the jurisdiction was made *ex parte* by Byrne, J. Then there was an application to discharge the order of Byrne, J. That came before Buckley, J., but he refused to discharge the order. The question which we have now to decide on the present appeal is whether or not the order for the service of the third-party notice out of the jurisdiction ought to have been made in this case. I have no doubt myself, I am sorry to say, that that order, having regard to the Orders and Rules which exist under the Judicature Acts, is an order that ought not to have been made. I say that I am sorry, because, speaking for myself, I cannot help

thinking that, having regard to the terms of the Judicature Act, there was really no reason why the Orders and Rules should not have been made differently. The terms of the Act seem to be such that the Rules might have been framed to cover such a case as this. And I think that, according to the spirit of the Act, when there was a cause or matter instituted in the High Court, if there were matters connected with and arising out of that cause or matter which could and conveniently might be determined in the original proceeding, then the intention of the Act was that the courts should have the power and the duty to include those matters in the original action. I cannot help thinking that the whole third-party procedure is the creature of the Judicature Act 1873, and in particular of sect. 24, which provides that "in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court and the Court of Appeal respectively according to the rules following." It then proceeds to deal with the rights and remedies of a plaintiff or a defendant. Sub-sect. 1 deals with the relief to be given to a plaintiff, and sub-sects. 2 and 3 with the relief to be given to defendants. I am not in any way expressing an opinion upon this matter—perhaps I had better not. But, speaking for myself, I cannot refrain from saying that in my opinion the intention of the Judicature Act was to make all these matters provided for in the sub-sections of sect. 24 incidental parts of the original action. And under these circumstances I should have thought that the spirit of the Act might very well have been carried out by making the original action—that is, the subject-matter of it—the test as to whether there should be notice served out of the jurisdiction, or as to whether notice should issue against a third party as provided for by rule 48 of Order XVI. But, however much I may think that might have been within the spirit of the Judicature Act, I am quite clear that, as the rules stand, service of a third-party notice out of the jurisdiction can only be properly sanctioned when the subject-matter of the claim of the defendant covered by the third-party notice is of such a character that if it had been made by an independent action an order for service of the writ out of the jurisdiction could have been properly made under Order XI., r. 1. It is not necessary for me now to go through all the lettered clauses of the rule. It is enough for me to say that it has not been seriously contended that the third-party notice covers any claim against the third party coming within any one of these lettered clauses except clause (g); and all that clause (g) really deals with is service of a writ in a case in which any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. Here it may very well be that Mrs. Cronyn is a necessary or proper party to an action brought by the plaintiff, but that is not the question. If there could be here a third-party notice properly served upon some person within the jurisdiction, then in all probability there might be a third-party notice served or someone who is outside the jurisdiction; but in my judgment there is not the slightest pretence for saying that clause (g) has any application at all to the third-party notice in this case. It is a third-party notice in the nature of

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an action which the defendant proposes to bring against the third party. Under these circumstances I think that the appeal must be allowed, and the order of the court below reversed.

ROMER, L.J.—I agree in thinking that this appeal must be allowed. To my mind the case is a very simple one, depending upon a few of the Rules of Court. In the first place, I will point out that we are not concerned here with any application by the plaintiff under Order XI., r. 1 (g), as to adding Mrs. Cronyn as a defendant to the action, and serving her out of the jurisdiction. Nor have we before us any application under Order XVI., r. 11, that Mrs. Cronyn may be added as a defendant. We could not decide any such application on the present occasion, for the simple reason that the plaintiff is not before us, and we could not make any order adding a defendant without hearing the plaintiff. I believe that the summons did in the first instance ask in the alternative that Mrs. Cronyn should be added as a defendant, and, so far as that goes, I think that it should still be open to the defendant to see whether he can make anything out of it, but that must go back to the judge to consider. That reduces the question to the simple one whether we can make an order for service of the third-party notice out of the jurisdiction. That depends upon Order XVI., r. 43, which provides that a copy of a third-party notice shall be filed and served according to the rules relating to the service of writs of summons. That includes the rules applicable to the service of writs out of the jurisdiction. Having once arrived at that point, what we have to consider is whether this third-party notice, if it were a writ of summons, would be capable of being served out of the jurisdiction upon a third party. In considering that, regard must be had not to the claim of the plaintiff in his writ of summons, but to the nature of the claim of the defendant against the third party. The notice here is of a claim by the defendant against a third party, and that must be treated as a writ of summons by the defendant seeking relief against the third party, and it must be seen whether it comes within the rules as to the service of writs out of the jurisdiction—that is, within Order XI., r. 1. If it does, then leave can be given for the service. If not, leave cannot be given. In my opinion it is plain here that there is no case for giving leave, because the case cannot be brought within any one of the provisions of Order XI., r. 1. For the purpose of determining whether service of a third-party notice out of the jurisdiction should be allowed, we have really nothing to do with the original action. When we come to consider that question we can only look at the nature of the claim and the position of the person who is to be served. The rules are really plain, and the matter is free from doubt.

COZENS-HARDY, L.J.—I agree. I will only add this, that in my opinion sub-sect. 3 of sect. 24 of the Judicature Act 1873 supports the view taken by my Lord that the third-party procedure was created by the Judicature Act. That subsection deals with third-party procedure, and gives the court power to give to a defendant all such relief relating to or connected with the original subject of the cause or matter, properly claimed by his pleading against any other person, whether already a party to the same cause or

matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose. The Act, therefore, treats the third-party procedure as analogous to a cause instituted by the defendant against the third party. Then in the Rules, which have the force of statutory authority, we find provisions on the subject of service out of the jurisdiction in Order XI., r. 1, and we must see what would be the proper procedure if the defendant had instituted a cause against the third party for the like purpose. If we consider it in that way, it is clear in the present case that the order for service out of the jurisdiction ought to be discharged. I say nothing with regard to Order XVI., r. 11, as that is not now before us. No doubt the judge might have in certain cases discretion to add a defendant even in the absence of the plaintiff, but such a discretion could only be exercised in very special circumstances. We have not to deal with any question of that kind here.

Appeal allowed.

Solicitors for the appellant, *Wansley, Bowen, and Co.*, agents for *J. A. French, Dublin*.
Solicitors for the respondent, *Bircham and Co.*

Jan. 13 and 14.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.J.J.)

WHITE v. HARROW.

HARROW v. MARYLEBONE DISTRICT PROPERTY COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Landlord and tenant—Lease—Express demise of lights—Covenant—Not to "object to any works to adjoining premises"—Obstruction of lights—Construction.

Under a lease, dated the 20th Sept. 1894, W. became the lessee of certain premises for a term expiring in 1932.

By a deed, dated the 3rd Aug. 1899, W. demised the premises to H. for a term of twenty-one years, "together with all . . . lights, easements, . . . and appurtenances to the said premises belonging." The deed contained a covenant by the lessee that he would not "object to any works to adjoining premises" that might be sanctioned by or on behalf of the lessor or the superior landlords or landlord. The lease also contained a covenant by the lessor for quiet enjoyment of the premises.

A company had acquired an interest in certain property adjoining to the demised premises and forming part of the same estate, and were proposing to erect thereon some buildings which, as H. alleged, would obstruct the access of light hitherto enjoyed by his premises. He accordingly brought an action to restrain the company from building so as to obstruct his light. The proposed buildings had been approved by the surveyor of the estate.

In these circumstances, W., who was interested in the company, brought an action against H. to

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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restrain him from objecting to the buildings then being erected by the company, on the ground that his action constituted a breach of the covenant; and he then moved, under sect. 24, subsect. 5, of the Judicature Act 1873 for a stay of proceedings in H.'s action.

Held, that the words "adjoining premises" did not extend to any buildings which were situated near enough to affect materially the demised premises by obstructing easements, but only to buildings which came into physical contact with the demised building; that "adjoining" meant adjoining in the sense in which it was used in the London Building Act 1894, and could not be used in the sense of "neighbouring"; and that therefore H. was not precluded on that ground from objecting to the erection of the buildings.

Decision of Joyce, J. (85 L. T. Rep. 677) reversed.

THE plaintiff White was the lessee, under a lease dated the 20th Sept. 1894, from the trustees of the Howard de Walden estate, of certain premises known as No. 24, High-street, Marylebone, for a term expiring in 1932.

By a deed, dated the 3rd Aug. 1899, the plaintiff White demised the house to the defendant Harrow for a term of twenty-one years, "together with all yards, areas, vaults, ways, lights, easements, watercourses, and appurtenances to the said premises belonging."

The lease contained a covenant (which it was the recognised practice to insert in all leases of property on the estate) by the lessee that he would not do anything which might "interfere with the quiet enjoyment of any adjoining or neighbouring premises," nor "object to any works to adjoining premises that may be sanctioned by or on behalf of the lessor or the superior landlords or landlord, nor claim any easement against the lessor or his superior landlords or landlord in, over, or upon any adjoining or neighbouring premises belonging to the lessor or his superior landlords or landlord by reason of any act or thing done or suffered by any tenant of such adjoining or neighbouring premises; and that, notwithstanding any actual or constructive notice of such act or thing to the lessor or his superior landlords or landlord." The lease also contained a covenant by the lessor for quiet enjoyment of the premises.

The Marylebone District Property Company had acquired from the trustees of the estate an interest in certain property adjoining to No. 24, High-street, and forming part of the same estate, and they were proposing to erect thereon some buildings which, as the defendant Harrow alleged, would obstruct the access of light hitherto enjoyed by his premises.

He accordingly brought an action to restrain the company from building so as to obstruct his light.

The plans of the proposed buildings had been approved by the surveyor of the Howard de Walden estate.

In these circumstances the plaintiff White, who was a director of the company, brought an action against the defendant Harrow for an injunction to restrain him from objecting to the buildings then being erected by the company, on the ground that his action constituted a breach of the covenant above set forth, and from claiming any easement of light over the proposed buildings.

The plaintiff White subsequently moved, at the instance of the court, under sect. 24, subsect. 5, of the Judicature Act 1873, for a stay of proceedings in the action brought by the defendant Harrow against the company. For the purposes of the motion it was admitted that the proposed buildings would interfere with the defendant Harrow's lights.

On the 29th Nov. 1901 the motion came on to be heard before Joyce, J., when his Lordship decided (85 L. T. Rep. 677) that the covenant was a covenant which precluded the lessee from raising objection to any building works on the adjoining premises which might have been sanctioned by the lessor or superior landlord; and that the proceedings by the defendant Harrow against the company would, therefore, be stayed.

From that decision the defendant Harrow now appealed.

Further evidence was adduced to show the exact state of the buildings when the lease was granted.

Younger, K.C. and Edward Ford for the appellant.—The covenant in the present case has not been broken, for it ought not to be construed in such a way as practically to enable the lessor to take away from the lessee that which had been expressly demised to him—viz., the right to light. This is especially so since the lease contains a covenant by the lessor for quiet enjoyment of the demised premises. Where a lease is ambiguous, a covenant of this kind ought to be construed most strongly against the covenantor:

Leech v. Schweder, 30 L. T. Rep. 586; L. Rep. 9 Ch. App. 463.

Premises may be "adjoining" though they are not contiguous:

Ind, Coope, and Co. Limited v. Hamblin, 81 L. T. Rep. 779; on appeal, 84 Ib. 168.

In the present covenant the word "adjoining" is associated with the word "neighbouring." In a covenant by a lessor not to allow a certain trade to be carried on in the "adjoining premises," the word "adjoining" was confined to the two houses on either side of the demised premises, although the lessor was at the time of the lease the owner of a block of buildings of which these formed part only:

Vale and Sons v. Moorgate-street and Broad-street Buildings Limited and Albert Baker and Co. Limited, 80 L. T. Rep. 487.

They referred also to the London Building Act 1894.

Hughes, K.C. and Wace for the respondent.

[WILLIAMS, L.J. referred to *Bright v. Walker* (1 Cr. M. & R. 211.)]

No reply was called for.

WILLIAMS, L.J.—This case turns upon the construction of covenants in a lease. It is said that the construction of those covenants is such as to preclude the lessee (Mr. Harrow) from objecting to the erection of certain buildings which, when erected, will (I am to take it for the purposes of this appeal) substantially obstruct certain lights existing in the demised premises at the time of the demise. The covenant in question runs as follows: [His Lordship read the covenant above set forth, and continued:] It is said that the words "adjoining premises" extend not only to buildings which come in physical contact with

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the demised building, but also to any buildings which are situated near enough to the demised building for works done on the premises so situate to affect materially the demised premises by obstructing easements enjoyed by the demised premises at the date of the demise. I cannot agree to this construction. I think that "adjoining" means adjoining in the sense in which the word is used in the London Building Act 1894. It is plain from the use in other parts of the lease of the wider expression "adjoining or neighbouring" that the word "adjoining" cannot be used in this covenant in the sense of "neighbouring." A narrower meaning must be put on the word "adjoining." I believe that in this covenant "adjoining" is used in the sense of "in physical contact with." It is said that thus to interpret the word is to make the covenant of no practical effect, but so construed it would plainly have the effect of relieving the lessor from the necessity of obtaining on behalf of himself or the superior landlord the consent of the lessee as occupier to works proposed to be done to "adjoining premises," according to the provisions of the London Building Act 1894, s. 90. It was argued that the intention of the covenant was to prevent the lessee objecting to the obstruction of an easement by the erection of buildings by the lessor or the superior landlord. Now, in the first place, if this were the intention it would be easy to say so in plain terms, and this has not been done, although easements are expressly dealt with in the latter part of the covenant. In my judgment we ought not to construe a covenant as giving a lessor the power to derogate from his own grant if the words are fairly capable of another construction. Then, as to the latter part of the covenant, I see nothing in this case to lead me to suppose that the easement of lights arose by reason of any act or thing done or suffered by any tenant of adjoining or neighbouring premises. It may very well be that the right of light arose by reason of something done or suffered by the lessor or his superior landlord, and I am by no means clear that the claim which the lessee is precluded from making has any relation to ancient lights acquired by enjoyment prior to the date of the lease. We are not deciding on any facts. We construe the first part of the covenant on the admitted facts. The application of the second part of the covenant must be determined when the facts have been found. The result is that the appeal must be allowed, with costs here and in the court below.

STIRLING and COZENS-HARDY, L.JJ. concurred.

Appeal allowed.

Solicitors for the appellant, *Cooper and Baks.*
Solicitor for the respondent, *Samuel Lithgow.*

Jan. 28 and 29.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re PITT-RIVERS; SCOTT v. PITT-RIVERS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Charitable gift—Secret trust—Trust for benefit of public, but so that they should acquire no rights.

A testator, who died on the 4th May 1900, by a codicil to his will bequeathed a museum and grounds and also the sum of 300l. per annum, charged on certain other of his estates, for the future maintenance of the museum and grounds to his eldest son and his heirs male; and directed that the museum and grounds should be kept in a good state of preservation. The testator also appointed two persons trustees only for the purposes, so far as necessary, in connection with the future maintenance of the museum and grounds.

The question was raised whether the eldest son was beneficially entitled to the museum and grounds, or whether there was a secret trust in favour of the public.

It appeared from the evidence that the testator during his life laid out the grounds and established the museum and allowed the public to have access thereto under certain restrictions, free of charge, always, however, reserving his private rights and his right to close the museum and grounds against the public. It also appeared that the testator informed his son of his wish that the museum and grounds should be maintained and the public allowed access thereto, and that the son accepted the gift with that knowledge; but that the testator always insisted that the public were to acquire no rights.

Held, that the intention of the testator was that the museum and grounds should go as part of his estate, the maintaining thereof by his eldest son to be done voluntarily and distinct from the wish of the testator from whom he took the property; that this gift was absolutely inconsistent with a secret trust; and that the terms of the gift did not create a charitable trust.

Decision of Kekewich, J. (84 L. T. Rep. 110) reversed.

GENERAL AUGUSTUS PITT-RIVERS, who resided at Rushmore, on the borders of Wiltshire and Dorsetshire, by his will, dated the 12th June 1892, after appointing executors and trustees, devised his freehold hereditaments in the counties of Dorset, Hants, and Wilts, or elsewhere in England—which devise included a museum at Farnham, and certain grounds known as the Larmer grounds—to his trustees upon trusts to raise out of the income thereof certain rent-charges in favour of his widow and children; and subject thereto he devised his estates to his first and other sons successively for life and then in tail male.

By a codicil to his will, dated the 20th Nov. 1899, the testator made the following bequests:

(1) I bequeath my museum at Farnham, in the county of Dorset, together with its contents, and the objects of curiosity in my house at Rushmore, which are intended to be placed in the said museum, to my eldest son, Alexander Edward Lane Fox Pitt [afterwards Pitt-Rivers] and his heirs male.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

(2) I bequeath my Larmer grounds, in the parishes of Farnham Royal and Tollard Royal, in the counties of Wilts and Dorset, to my said eldest son, Alexander Edward Lane Fox Pitt, and his heirs male.

(3) I also bequeath unto my said eldest son, Alexander Edward Lane Fox Pitt, and his heirs male the sum of 300*l.* per annum; the said sum of 300*l.* per annum is to be o the future maintenance of the said museum and Larmer grounds with the articles of interest therein and thereon.

(4) I direct that the said museum and Larmer grounds, with the articles of interest therein and thereon, shall be kept in a good state of preservation; and I further direct that the said sum of 300*l.* is to be a further charge upon my estates in the counties of Wilts and Dorset.

(5) I appoint my son-in-law, John Lubbock, Bart. [afterwards the Right Hon. John Baron Avebury] . . . and Charles Heroules Read . . . to be the trustees only for the purposes, so far as necessary, in connection with the future maintenance of the said museum, Larmer grounds, and the objects of interest therein and thereon.

The testator made several other codicils to his will not material to be referred to. He died on the 4th May 1900.

It appeared that the testator had purchased a house adjoining his Rushmore estate, known as the Gipsy School, and converted it into a museum, placed in the charge of a caretaker, for exhibiting articles and specimens which he had collected, including relics of antiquarian and archaeological interest found at Rushmore.

Another part of the Rushmore estate, consisting of about eight acres and known as the Larmer grounds, was laid out by the testator as pleasure grounds.

In these grounds the testator had built a theatre, where concerts and dramatic recitals were given at the testator's expense, and he also provided a band which played every Sunday afternoon in the summer months.

The museum and Larmer grounds were open to the public free of charge; but the testator insisted that the privilege of admission should not be enjoyed as of right, and he put up notices in the Larmer grounds stating that the grounds were private property, and that persons found trespassing therein would be prosecuted, and that the gate to the grounds would be kept locked once in every year from sunrise to sunset.

The testator had had frequent conversations and correspondence with his eldest son and with his solicitors, Messrs. Creech and Son and Messrs. Farrer and Co., with reference to the disposition of the museum and Larmer grounds; and the question arose whether the effect of these conversations was that there was a secret trust that the museum and Larmer grounds should be maintained and used for the benefit of the public.

A summons was accordingly taken out by the acting executor of the will and codicils of the testator, to which his eldest son Alexander Pitt-Rivers, Henry George Pitt-Rivers (his eldest son, an infant), and Lord Avebury and C. H. Read, the so-called trustees of the codicil, were made defendants.

The summons asked: (1) Whether the defendant Alexander Pitt-Rivers took an estate tail or any other and what estate in the museum and Larmer grounds, and whether beneficially or upon any and what trusts; (2) whether the same

defendant took any and what estate, and whether beneficially or upon any and what trusts, in the contents of the museum at Farnham and the objects of curiosity at Rushmore; (3) whether any and what articles at Rushmore passed under the gift in the first clause of the codicil; (4) what estate, and whether beneficially or upon any and what trusts, the same defendant took in the 300*l.* per annum bequeathed by the third clause of the codicil; (5) whether the defendants Lord Avebury and C. H. Read took any and what estate in the museum and its contents and the objects of curiosity mentioned in the first clause of the codicil, and the Larmer grounds and the objects of interest therein and thereon, and the annuity of 300*l.* respectively, or any and which of them, and whether they were under any and what duties in connection with the future maintenance of the museum, Larmer grounds, and the objects of interest therein and thereon; and (6) whether the gifts of the museum and its contents and the objects of curiosity at Rushmore, and of the Larmer grounds, and of the annuity of 300*l.* respectively, or any of them, failed as infringing the rule against perpetuities or otherwise.

The defendant Alexander Pitt-Rivers, while expressing his willingness to carry out the testator's wishes, disputed the claim of the public to any rights over the museum and Larmer grounds.

The summons was adjourned into court and came on to be heard before Kekewich, J. in Dec. 1900 and Jan. 1901.

Evidence was adduced to show the intentions of the testator with respect to the maintenance of the museum and Larmer grounds after his death. It was common ground that the intention of the testator to be inferred from conversations and correspondence which had passed between him and his eldest son and the solicitors who had framed the codicil of the 20th Nov. 1899 was that the museum and Larmer grounds should be maintained by the son in the same way as theretofore, but that the public should not enjoy any further privileges than they had been allowed in the testator's lifetime. There was, however, a slight discrepancy in the evidence upon the question whether the testator had intended to impose a secret trust upon his son or to leave the matter to his discretion.

On the 28th Jan. 1901 Kekewich, J., in a considered judgment, decided (84 L. T. Rep. 110) that the museum and Larmer grounds were given to the defendant Alexander Pitt-Rivers as tenant in tail and the 300*l.* as personal estate to him absolutely, but, on the evidence, subject to a secret trust which must be enforced for the benefit of the public. His Lordship therefore declared that the gifts made by the codicil to the defendant Alexander Pitt-Rivers were made to and accepted by him for the express purpose that the museum and Larmer grounds should be used and maintained as in the lifetime of the testator and, despite the testator's intention that the public should acquire no rights, for the benefit of the public; and that the defendant and those claiming under him held the property subject to a trust for such user and maintenance. The learned judge also declared that the two persons appointed trustees took no estate or interest in any of the properties given by the codicil, and had no duties to perform.

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From that decision the defendant Alexander Pitt-Rivers now appealed.

Haldane, K.C. and P. Ogden Lawrence, K.C. (with them *W. M. Cann*) for the appellant.—It is not established by the evidence that any trust for the benefit of the public to maintain and use the museum and grounds as in the testator's lifetime was imposed by him upon his eldest son and accepted by that son. All that the testator did was to express a hope that the son would do this. The fact that the testator reserved to himself private rights over the museum and grounds is inconsistent with the existence of a charitable trust. The principle of the case of *Hughes v. Stubbs* (1 Hare, 476) is applicable to the present case. [COZENS-HARDY, L.J.—I do not see what bearing that authority has upon the case now before us.] We cite it for the criterion of the Vice-Chancellor upon the question of charitable trusts, and the same principle is, we submit, to be applied here. They referred also to

McCormick v. Grogan, L. Rep. 4 E. & I. App. 82;
Jones v. Badley, 19 L. T. Rep. 106; L. Rep. 3 Ch. App. 362.

Sir *Robert Finlay* (A.-G.) and *R. J. Parker* for the Crown.

Warrington, K.C. and *P. S. Stokes* for the heir expectant.

Benshaw, K.C. and *F. L. Wright* for the trustees of the codicil.

No reply was called for.

WILLIAMS, L.J.—The question in this case is whether by reason of what happened between the testator and his son, Mr. Pitt-Rivers, a trust has been created which is binding on the conscience of Mr. Pitt-Rivers, and therefore enforceable in equity against him. There is no suggestion here that a trust has been created by the codicil of the 20th Nov., which is the codicil that we have to consider in this case. The suggestion here is that there has been such a distinct promise made by Mr. Pitt-Rivers to the testator, his father—in consideration of which his father may be taken either to have executed the codicil, or to have refrained subsequently from revoking it—that that promise will be enforced against Mr. Pitt-Rivers. In order to constitute such a promise binding upon the person who has taken a benefit under the will, it is absolutely necessary that the trust should be communicated to the donee, and that he should accept it. We have, therefore, to see here whether there is such a promise proved. It has been discussed very often what are the essentials which are necessary in order to induce the courts to give effect to a trust which has not been expressed in the way in which the Wills Act requires that testamentary intentions should be expressed. But I am happy to say that in this case one has not to go into any fine questions about that at all. One is really relieved by the evidence from the necessity of so doing. I suppose one may state shortly and concisely that the court never gives the go-by, if I may use the expression, to the provisions of the Wills Act by enforcing upon anyone testamentary intentions which have not been expressed in the shape and form required by that Act, except for the prevention of fraud. That is the only ground upon which it can be done. But I am not going here to enter into any sort of question as to how distinct the promise need be

in order to induce the court to enforce that promise, and the trust arising under it. I will deal with this promise, because the evidence enables me to dispose of this case if I do so, as if it were a mere question between A. and B., whether the bargain was entered into, and I do not look for any greater distinctness than one generally has to employ when one is asking one's self, apart from questions under the Wills Act, "Aye or no, is the promise established here?" In my judgment no such promise has been established here as can be enforced as a trust on the conscience of Mr. Pitt-Rivers, the son. Really if you look at the evidence of the conversation in the father's room on the 20th Dec., whether you take the evidence of the son himself, or take the evidence of the two Messrs. Creech—Mr. Creech the elder and Mr. Creech the younger—it does not seem to me possible to come to the conclusion that there was here an express promise in words. Indeed, as far as I understood the arguments, it was hardly suggested that there was. If you look at the conversation, all that can be inferred properly from the evidence of those three witnesses, to my mind is that the son said to his father that he would continue to use this property in this way for the amusement and the enjoyment of the public in the same way as his father had done. I will treat the words, therefore, as being ambiguous. What was the meaning of his continuing to deal with the property in the same way as his father had done. It might mean possibly that he would continue as the owner of the property of his own free will and voluntarily to entertain the public and allow the public to use this property in the same way as his father had done as a matter of grace. If it meant that, I do not suppose anyone would say that there was any promise of such a kind as to create a trust. Or, it might possibly mean that he would, apart from his own will, but as part of the wish of his father, treat this property as trust property dedicated to the use and amusement of the public. I am assuming that the evidence shows a conversation which might mean either one of those things. In my own personal opinion I think that really the balance of evidence is very much in favour of the first interpretation of the evidence which I have mentioned. But it is said that, if you bear in mind that the son here not only had the conversation with his father, but that he also heard the letters read which had passed between Messrs. Farrer and Co. and Messrs. Creech, writing on behalf of the testator, you ought then to read the words, in the light of those letters, as words spoken between persons who were bearing those letters in mind. It is said that then you will come to the conclusion that the intention of the father was not to be content with anything which should depend upon hope or goodwill, or anything of the sort, but to place the property in such a position that really his son would by law be compellable to continue to appropriate the property to these purposes. Here, again, I can only say that even if one imputes to the son and the father here—the son is really the essential person—that he did carry this correspondence in his head, I then should not come to the conclusion that by this conversation he promised his father that he would so deal with the property, because I really do not draw that conclusion myself from the

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correspondence. It seems to me that the father was extremely anxious that the property should remain the property of the owner of Rushmore, and that anything that was done with the property should be done by the owner of Rushmore voluntarily; that is, by his own will, as distinct from the will of the testator, from whom he took the property. In order really to understand the correspondence between Messrs. Farrer and Co. and Messrs. Creech, one should bear in mind what the father says in the letter which was written, I think, some five years before the codicil was executed. He had had a letter from the son, in which the son says: "My dear father, I quite agree with you that it would be a pity if the museum was left away from the property. It would be a great bore for the owner of Rushmore to have a hostile county council show so near. I see clearly that the holder of the property after your time will have very little to spend if he can keep the place together. You say that I am always perfectly indifferent to business. How do you know? The only little business I have had to do has been done here. I am always very glad to hear what you propose to do with the property, but I do not know how I am to make it my business. I certainly think that the museum ought to be the property of the owner of Rushmore, as it would be a record of diggings, &c., that have taken place on the estate." The answer of the father to that, dated the 3rd Aug. 1894, contains this passage: "I am glad to see by your letter received to-day that you take a reasonable view of my wishes in regard to the museum and other establishments here. I shall be glad to feel that it is not necessary for me to make special provisions for the keeping up of these things, which would deprive the owner of Rushmore of the pleasure and credit of keeping them up of his own free will, and make the people of the neighbourhood gradually come to look upon them as a right. Whereas, my great object is that the estate, viewed as an institution for the benefit of its surroundings, should continue to be regarded as voluntarily contributing to the pleasure and benefit of the people about." It seems to me that that letter makes it perfectly plain that the testator at that moment was determined, if he could, to leave this property with the museum and other things upon it in the hands of the owner of Rushmore in such a way, that anything that was done with it for the amusement or benefit of the people would be something done of his own free will for those people. And it seems to me that that is absolutely inconsistent with the trust which we are now asked to say the son promised the father he would carry out. On the other hand, there is no doubt that the father, having that wish, also had a strong desire to have some certainty that his son would really keep up the museum in the way in which he could wish it to be kept up, and would spend enough money upon it. In that state of mind he draws the codicil himself. Before this correspondence takes place, I do not really see the slightest ground for suggesting that he had in any way departed from his views as expressed in the letter of the 3rd Aug. 1894, from which I have just read an extract. Being in that state of mind the testator then draws that codicil. Upon that, if the son had then been called into the father's room without there being any correspondence

with Messrs. Farrer at all, and had been asked whether he approved of his father's will, I cannot conceive that anybody would have said that by saying that he approved he thereby made any promise creating a trust, the result of which would be to prevent him, as the owner of Rushmore, from keeping up the museum and that state of things of his own free will. But it is said that this correspondence with Messrs. Farrer makes the difference. I do not wish to go at length through it; it really is not necessary. But Messrs. Farrer suggest that really the best way for him would be to express a hope, which they tell him will not be legally binding, and then trust that his son will be inclined, acting for himself, to follow out the same course. Then when the testator is not satisfied with that, because, no doubt, it does not seem to bind the son sufficiently firmly, Messrs. Farrer point out to him the other alternative. But it is Scylla and Charybdis. It is plain that that which the father was so set upon—that the people should have no rights at all whatsoever, that the owner of Rushmore for the time being should do these things and get the credit of doing these things of his own free will, would be impossible if the alternative suggestion which Messrs. Farrer pointed out was carried out; that is to say, if he had the intervention of trustees who should obtain the necessary leave from the court. Then when that correspondence has been read, the father has read to the son the codicil which had been previously drawn for him by Messrs. Creech, whether at his dictation or not I am not quite sure. We are asked to say that in consequence then of the son having promised the father that he would continue things as they were in his father's lifetime, a trust has been created which the court ought to enforce; that is to say, a trust has been created by the giving by the son of a promise which it would be unconscionable for the son not to perform. I cannot agree. I find no such promise at all. The only promise I do find is a promise which to my mind is much more consistent with the absence of a trust like that which is suggested here, than it is with the presence of it. I think therefore that the decision of Kekewich, J. was wrong, and that it ought to be reversed.

STIELING, L.J.—I am of the same opinion. In this case Kekewich, J. in the first place decided that the codicil as it stands created no trust, but simply contained absolute gifts in favour of the testator's son. But he held that it appeared from the evidence that the testator communicated the existence of this codicil to the son, and at the same time disclosed to him his wishes with reference to the property, and exacted from the son an assurance that those wishes should be fulfilled. Under these circumstances he came to the conclusion that a trust had been created which could be enforced as against the son at the instance of the Attorney-General as representing the public. Now, what were the wishes which were thus communicated to the son? In the first place the learned judge says this: "He"—that is, the testator—"certainly did intend him"—that is the son—"to maintain the museum and grounds, and to allow the public access thereto, and the son certainly accepted the gift of both with the assurance that this should be done." Then he adds this: "While

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giving the property already mentioned to the son for the purpose of maintaining the museum and grounds as heretofore, the testator insisted that the public should have no rights." I think that the conclusions of fact at which the learned judge arrived as stated by him are justified by the evidence. The learned judge then proceeded to consider what was the effect of the communication of the wishes so found, with the result which I have stated; and he came to the conclusion that a trust had been created which could be enforced. With the utmost respect I am unable to agree with that conclusion on that state of facts. It seems to me that when once you arrive at the conclusion that the public were to have no rights, it is impossible to say that an effectual trust has been created. And, looking at the whole evidence, which I shall not go into, I think that what the testator meant really to do was that which, in the Irish case of *McCormick v. Grogan* (*ubi sup.*) the Lord Justice of Appeal stated to have been the object of the testator, whose bequests were the subject of consideration in that case. He considered there that the purpose was to set up, after the decease of the testator, not a trustee, but, as it were, a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect. The truth is that the testator, though he had with the utmost liberality afforded admission to the public to the museum and grounds, yet had anxiously guarded throughout his whole life against the public acquiring any rights against him. It appears from the evidence that he was equally anxious that no such rights should be acquired by the public against his successor, and I think the result is that he was satisfied by his son and successor undertaking an honourable obligation to carry on the museum and the grounds, which had been thrown open to the public during the testator's lifetime, in the same manner, and to the same extent, and no further, as the testator himself had done. I agree, therefore, that the appeal ought to be allowed.

COZENS-HARDY, L.J.—I agree, and I have very little to add. It seems to me that the testator's wish, as expressed by him to his son, was inconsistent with the true idea of a charity. The public were to have no rights. It may be that he desired to create that which, not being in the view of the law a charity, would be void as a perpetuity. But I cannot see that the son is in any way bound to do more than to agree to hold the property upon the terms verbally expressed to him by the testator, and these terms do not create a charitable trust.

Appeal allowed.

Solicitor for the appellant, C. R. Woolley.

Solicitors for the respondents, *The Solicitor to the Treasury*; Kennedy, Hughes, and Ponsonby; Tatham and Pym.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 29, Nov. 27, 28, 29, Dec. 3, 1901, and Jan. 18, 1902.

(Before FARWELL, J.)

BOND v. BARROW HEMATITE STEEL COMPANY LIMITED. (a)

Company—Actual and estimated losses of capital—Preference shareholders having no votes—Balances to credit of profit and loss accounts—Whether available for restoration of such losses or for payment of dividends to such shareholders.

Preference shareholders created by special resolution claimed dividends and arrears of dividends on their shares out of profits of the company in the years 1898-1900. The profit for 1898 had been carried to reserve or carried forward. That for 1899 had been carried forward pending the decision on an application for reduction of capital, which was refused on the ground that these sums were applicable to make good the loss of capital, partly actual and partly estimated, which the company alleged had been sustained. The profit for 1900 was provisionally carried forward.

Held, (1) on the construction of the articles and special resolutions, that the resolutions did not alter the articles, and that these conferred no further rights than a priority in the payment of dividends; (2) that there were no profits out of which payment could be made. That that depended on the circumstances of each case, the nature of the company, and the evidence of competent witnesses. Fixed capital might in some cases be sunk, while circulating capital must be kept up. That the actual loss was of this kind, and, as to the estimated loss, the plaintiffs had failed to show that it was fixed capital which in a company of this nature might be sunk. In no case had the court compelled directors to pay dividends when they had expressed an opinion that the state of the accounts did not admit of such payment. That the action failed therefore, and would be dismissed with costs.

In this case the defendant company was incorporated in 1864 with a capital of 150,000*l.*, which had since been first increased and subsequently reduced, and at the hearing stood at 1,528,275*l.*, divided into 150,000 ordinary shares of 7*l.* 10*s.* each, 377 8*l.* per cent. preference shares of 75*l.* each, and 50,000 6*l.* per cent. preference shares of 7*l.* 10*s.* each.

The plaintiffs were the holders of some of each of these classes of preference shares, and they claimed on behalf of themselves and all other the holders of preference shares to be paid the dividends and arrears of dividends on their shares out of the profits which they alleged the company had made in the years 1898, 1899, and 1900.

No dividend had been paid on the 8*l.* per cent. preference shares since 1898, or on the 6*l.* per cent. preference shares since 1896.

The preference shareholders had no votes in respect of these shares.

(a) Reported by A. W. CHASTEE, Esq., Barrister-at-Law.

The profit and loss account for the year 1898 showed a balance, described as "net profit for the year 1898," of 65,803*l.* 7*s.* 3*d.*, and of this 20,000*l.* was carried to the reserve fund, making it 40,000*l.*, and 10,418*l.* 10*s.* carried forward.

The profit and loss account for 1899 showed a balance, described as "net profit for the year 1899," of 89,018*l.* 17*s.* 6*d.*, and this was carried forward pending the decision of the court on an application for the reduction of the capital of the company referred to below.

The profit and loss account for 1900 showed a balance of 157,605*l.* 12*s.* 10*d.*, which was provisionally brought forward.

The report for the year 1898 contained the following statement: "The shareholders are aware, both from the balance-sheets themselves and the auditor's certificates which have accompanied them, that for some years past no depreciation has been written off the amount at debit of land, buildings, works, fixed plant, and mining leases. The directors have carefully considered the matter, and, having regard to the fact that many of these assets are more or less of a wasting character, they are of opinion that the time has arrived when a careful revision of their value should be made. It is, however, a subject which in all its bearings requires most mature consideration, and the deliberations of the directors are not sufficiently advanced at the present time for them to submit any recommendation to the shareholders."

Accordingly in 1899 special resolutions were passed for the reduction of the capital of the company.

The petition for the confirmation of these resolutions came before the court in Aug. 1900 (83 L. T. Rep. 397; (1900) 2 Ch. 846). It was opposed by some of the preference shareholders, and the petition was dismissed by Cozens-Hardy, J., and that decision was confirmed by the Court of Appeal (85 L. T. Rep. 493).

Some, but not all, of the present plaintiffs appeared and opposed that petition, and it was dismissed on the ground that the alleged loss had not been proved to the satisfaction of the court, and also by Cozens-Hardy, J. on the ground that the amount standing to the credit of the reserve fund and the 89,018*l.* 17*s.* 6*d.* profit in 1899 were applicable to make good loss of capital so far as the same would extend.

The plaintiffs in the present action were now claiming that these sums and the balance to the credit of profit and loss account in 1900 were not so applicable, but belonged to them by contract, and it was argued on behalf of the defendants that the order of Cozens-Hardy, J. created an estoppel, and that in his Lordship's opinion was possibly correct so far as regarded any of the plaintiffs who appeared and opposed the petition. But this was not pleaded, and, as there were other plaintiffs who did not appear on the petition and who could sue on behalf of others who had not opposed the petition, his Lordship did not think it necessary to express a concluded opinion on the point. Nor did he regard the decision of Cozens-Hardy, J. as a precedent disposing of this case, for the points argued before him were not before that learned judge, and that by no fault of the plaintiffs, because the contentions that they now raised could not have been put forward by them in support of their opposition to the

petition, but were adverse to such opposition, and should, if urged at all, have been urged by the company.

Jenkins, K.C. and Kirby for the plaintiffs.—We ask for a declaration that the profits might be applied in paying the dividends on the preference shares. No such dividends have been paid since 1898 and 1896 on the two classes of such shares. The defendants contend that losses on capital account must first be made good. We say, first, loss of capital does not matter. There are profits; and, secondly, you cannot divert profits to capital losses. The defendants petitioned the court to write 25 per cent. off capital all round. See

Re Barrow Hematite Steel Company, 59 L. T. Rep. 500; 39 Ch. Div. 582.

The petition was opposed by preference shareholders, but they failed as there was no preference as to capital. The question is, Can the defendants credit the reserve fund in priority to the preference shares? We disclaim any charge of fraud. If the defendants are right, their motive is immaterial. We only ask for 94,000*l.* Therefore it may not be necessary to consider whether we have a right to complain of carrying sums to depreciation account. Can the defendants withhold from us the amount by which the capital should be reduced? We submit not:

Lee v. Neuchâtel Asphalts Company, 61 L. T. Rep. 11; 41 Ch. Div. 1.

[*FARWELL, J.*—I have not got to determine what are profits; it is a question of construction of articles. Assuming there are profits, can you insist on dividend, and perhaps ruin the company? *Eady, K.C.*—We propose to show there are no profits from the auditor's certificate.] We say we have nothing to do with depreciation of capital. [*Eady, K.C.*—In the case before Cozens-Hardy, J. the preference shareholders insisted that the reserve and profit and loss balance should be applied in reduction of capital, and now they want to have it as dividend. The second point in that case which we are appealing is the apportionment of reduction rateably.] It is admitted there is nothing to prevent paying dividend out of profits. But does the company reserve power to apply profits to reserve. That is a question of construction which is not covered by authority. See

Fisher v. Black and White Publishing Company, 84 L. T. Rep. 305; (1901) 1 Ch. 174.

All through the judgment of Cozens-Hardy, J. run the words "profits available for dividend." The contracts with us were made by special resolution in 1872 and 1876. Did they provide that the directors' powers to reserve should override the preference dividend? As to the 8 per cent. shares, the word "interest" shows that there should be no deduction against the preference shares. As regards the 6 per cent. shares, the word "dividend" is used, but the resolution defines the deductions that are to be made in the case of net profits. You do not allow depreciation or reserve. [*FARWELL, J.*—Is that clear? Look at the auditor's note—that is, the balance-sheet. I agree when you get your profit and loss you can allot it as you like. In the special resolutions you want to leave out "only" or read it "immediately."] Yes. The resolutions are set out in 39 Ch. Div. p. 585. [*FARWELL, J.*—You cannot dis-

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tinguish the 8 per cent. interest from the 6 per cent. dividend. The interest is a dividend.] Yes; but in art. 9 the word was used to get in front of the directors' powers over dividends. It is admitted the plaintiffs are holders of these shares. The defendants must make out losses and prove that there are no profits. They must also prove loss. They agreed to pay the 8 per cent. dividend, and have funds to meet it. Are you to read the contract to pay only if the directors recommend it? [FARWELL, J.—Surely you must provide for loss of plant and contingencies.] See

Dovey v. Cory, 85 L. T. Rep. 257; (1901) A. C. 477.

The only answer to our claim is that it is *ultra vires*. It is not a question of discretion. Of course the directors may apply profits to lost capital, but the reserve fund is not that:

Birch v. Cropper; *Re Bridgewater Navigation Company*, 61 L. T. Rep. 621; 14 App. Cas. 525.

[FARWELL, J.—Could not the company have authorised a reserve fund by special article?] Not as against us:

Fisher v. Black and White Publishing Company (*ubi sup.*).

[FARWELL, J.—The want of a reserve might paralyse the company. Your dividend is cumulative.] The defendants must prove loss:

Re Barrow Hematite Steel Company, 88 L. T. Rep. 397; 85 Ib. 493; (1900) 2 Ch. 852; (1901) 2 Ch. 746.

The mere fact of loss of fixed capital does not preclude paying a dividend:

Lee v. Neuchâtel Asphalte Company (*ubi sup.*);

Bolton v. Natal Land and Colonisation Company, 65 L. T. Rep. 786; (1892) 2 Ch. 124;

Lubbock v. British Bank of South America, 67 L. T. Rep. 74; (1892) 2 Ch. 198;

Verner v. General Commercial Investment Trust, 70 L. T. Rep. 516; (1894) 2 Ch. 239;

Wilmer v. Macnamara and Co., 72 L. T. Rep. 552; (1895) 2 Ch. 245;

Re National Bank of Wales, 79 L. T. Rep. 667; (1899) 2 Ch. 639;

Dovey v. Cory (*ubi sup.*).

Here the losses are on fixed capital. It is irrelevant to say there are no profits, and the question is what to do with them. [FARWELL, J.—One cannot say what are profits without experts.] *Lee v. Neuchâtel Asphalte Company* (*ubi sup.*) decides that you need not replace a wasting asset. *Verner's case* (*ubi sup.*) entitles you to disregard loss of fixed assets. In the *National Bank of Wales* case (*ubi sup.*) it was said you might throw profit and loss account losses on to capital. A reserve, if formed, ought to be used for equalising dividends. Our contract was equal to a debenture bond.

Eady, K.O., Butcher, K.O., and Cassel for the defendants.—The disclaimer of *mala fides* goes to the root of the matter. The claim is startling. No dividend in 1899 or 1900 was recommended or declared. The directors may apply the balance of profit and loss account to lost capital, depreciation, and reserve:

Re Barrow Hematite Steel Company (*ubi sup.*).

Are not directors bound to provide for lost capital? This last point is unnecessary if the other points are decided in our favour. [They read the valuation of 1899 as to depreciation.] There was no realised loss then known. [They referred to

proceedings for reduction of capital.] There the preference shareholders did not contend it was their money, so that they are now estopped. [FARWELL, J.—I do not agree as to that; they are not the same parties.] There is no dividend unless declared:

Lindley, 5th edit., pp. 35, 437.

It involves the exercise of discretion. That makes it a debt:

Re Severn and Wye and Severn Bridge Railway Company, 74 L. T. Rep. 219; (1896) 1 Ch. 559; *Burland v. Earle*, 18 Times L. Rep. 41.

Interest in the contract is a misnomer:

Re Sharpe, 65 L. T. Rep. 76; (1892) 1 Ch. 154.

There is a cumulative preferential charge. Net profits means after all deductions available for dividend:

Fisher v. Black and White Publishing Company (*ubi sup.*);

Are directors bound to make up capital in companies of this nature? Does a business man do so? See

Verner's case (*ubi sup.*);

Re National Bank of Wales (*ubi sup.*);

Lee v. Neuchâtel Asphalte Company (*ubi sup.*);

Lubbock v. British Bank of South America (*ubi sup.*).

You must look at all the circumstances:

Palmer, 7th edit., pl. 1, 551;

Wilmer v. Macnamara and Co. (*ubi sup.*);

Dovey v. Cory (*ubi sup.*).

The preference shareholders here have no special rights against ordinary shares other than priority. The special resolutions must alter the articles:

Imperial Hydropathic Company v. Hampson, 49 L. T. Rep. 150; 23 Ch. Div. 1;

Campbell's case, 29 L. T. Rep. 623; L. Rep. 9 Ch. 1.

Here they did not. As to "interest," see

Henry v. Great Northern Railway Company, 1 De G. & J. 606.

"Net profits" is ambiguous. As to resolutions being *ultra vires*, see

Ebbw Vale Company's case, 36 L. T. Rep. 308; 4 Ch. Div. 827.

Jenkins, K.O. in reply.—We rely on

Lee v. Neuchâtel Asphalte Company (*ubi sup.*);

Verner's case (*ubi sup.*);

National Bank of Wales (*ubi sup.*).

You may pay dividends, though not bound to do so:

Re Kingston Cotton Mill Company Limited, 74 L. T. Rep. 568; (1896) 1 Ch. 331.

Cur. adv. vult.

Jan. 18.—FARWELL, J. (after stating the facts as above set out, continued:—)The contention of the plaintiffs in this action is that they are entitled by contract to be paid a preferential dividend out of the balance to the credit of profit and loss in each year, and that the company cannot appropriate any part of such balance to reserve or carry over one shilling until they have been paid in full. There is no suggestion of want of *bona fides* on the part of the directors or the company. The defendants say that that is not in accordance with the special resolutions creating the preference shares, and that, if it is, the balance to the credit of profit and loss for any

year is not necessarily such profits of the company as are properly applicable to dividend, but that, if the court is satisfied by evidence that there have been ascertained losses and depreciations of capital assets exceeding the amount of the balance, these losses must be made good before any dividend can be paid. The first point depends on the construction of the original articles and the special resolutions creating the preference shares, for it is not contended that, if preference shareholders have such contractual rights as they claim, the company can by special resolutions deprive them of such rights or of any part thereof. Art. 43 is as follows: "Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, the forfeiture of shares on nonpayment of calls, or otherwise, as if it had been part of the original capital, except that it shall be lawful for the company in general meeting, by special resolution as aforesaid, to direct that the new shares shall have such priority in respect of dividends as it shall deem expedient." This article, in my opinion, provides that all new shares shall be subject in all respects to the provisions of the articles, except only that dividends payable on new shares may rank in priority to instead of *pari passu* with ordinary shares. For this purpose it is necessary only to introduce modifying words into art. 95 for the whole fasciculus of clauses relating to dividends—viz, 95 to 101—to apply. It is argued that the provisions as to declaration of dividend do not apply to shares on which a fixed preferential dividend is payable. I do not think so. The necessity for a declaration of a dividend is a condition precedent to an action to recover, as stated in general terms in Lindley on Companies, 5th edit., p. 437, and where the reserve fund article applies it is obvious that such a declaration is essential, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away. It is urged that this puts the preference shareholders at the mercy of the company. But they came in on these terms, and this argument does not carry much weight in an action such as this where *bona fides* is conceded. The opposite conclusion might enable preference shareholders to ruin the company, and would certainly lead to great inconvenience in enabling them to compel the payment out of the last penny without carrying forward any balance. Granted that it is a hardship to go without dividends for a time, this hardship presses more heavily on the ordinary shareholders, who have to wait till the preference shareholders receive all arrears before they can get anything. It was urged that art. 97, providing for a reserve fund, could not apply to preference shares because one of its objects is to equalise dividends. But I cannot see that the mention of one object which is not applicable is any reason for excluding those objects which are applicable, and which are really for the benefit of all the shareholders. On the articles as they stand I have no doubt that the true construction is that which I have stated. But it is contended that the special resolutions have created larger rights, and it was, in my opinion, competent to the company by such resolutions to alter art. 43. Now, the 8½ per cent.

preference shareholders were created by resolutions passed in 1872 in these terms: "1. This company will agree to purchase from the Barrow Rolling Mills Company Limited the two furnaces erected by that company and the land purchased by them, and any other property of which the rolling mills company may be possessed. 2. The consideration for the purchase shall be the sum of 37,700*l.* in preference shares of this company bearing interest at 8½ per cent. per annum from the 1st Jan. last, such preference shares to be issued to the present shareholders in the rolling mills company in proportion to their holdings. 3. The directors are authorised to issue preference shares to the amount of 37,700*l.* bearing interest at 8½ per cent. per annum in perpetuity for the purpose of carrying out the above agreement. 4. The holders of the above-mentioned preference shares shall be entitled to attend the general meetings of the company, but they shall not be entitled in virtue of such shares to vote or to interfere in any way in the company's proceedings, nor shall they in virtue of such shares be eligible as directors of the company." In my opinion there is nothing whatever in this to alter any of the articles as I have construed them. Stress has been laid on the word "interest," but, in my opinion, that word has slipped in *per incuriam* and should be read as "dividend," as indeed is done when this resolution is referred to in the special resolution of 1876 to which I shall refer presently. "Interest" is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course, and not by way of advance. Interest is compensation for delay in payment, and is not properly applied to a share of profit of trading, although it may be used as an inaccurate mode of expressing the measure of the share of such profits. It is impossible, in my opinion, to give to the word, used as it is in this case, so pregnant a meaning as the plaintiffs derive reading it as an equivalent of an alteration of the articles, and as creating a right overriding the valuable and possibly essential article providing for reserve funds. The 6½ per cent. preference shares present more difficulty. They were created by resolutions of 1876 as follows: "1. The capital of the company shall be and is hereby increased by the addition thereto of 50,000 preference shares of 10*s.* each, entitling the holder to a fixed dividend at the rate of 6½ per cent. per annum on the amount for the time being paid up in respect of such shares. 3. The holders of the said new preference shares shall be entitled to the dividend thereon only after payment of the interest from time to time payable in respect of mortgage and bond or debenture debts of the company, and after payment of a dividend at the rate of 8½ per cent. per annum on the preference shares of the company, amounting to 37,700*l.*, created by special resolutions passed and confirmed at extraordinary general meetings of the company in the year 1872; and, in case in any year the net profits of the company shall not be sufficient for the payment in full of the dividends of such new preference shares, the net profits of any subsequent year shall (after payment thereof of interest on the mortgage bond or debenture debts of the company and of dividends on the said 8½ per cent. preference shares) be applied in payment to the

holders of the said new preference shares of the amount by which the dividends in any previous year or years may have fallen short of the fixed rate of 6l. per cent." These resolutions are not very happily worded, but I have come to the conclusion that this one and the first resolution read together are merely a verbose statement of a bargain that the holders of the 6l. per cent. shares are to have a fixed 6l. per cent. cumulative preferential dividend, subject to the rights of the debenture-holders and the 8l. per cent. preference shareholders. I think that the words "only after payment, &c." are restrictive words equivalent to "subject to," and do not create new rights by rescinding the articles relating to declaration of dividend, reserve fund, and the like. The only difficulty I have felt has been created by the latter part of No. 3, beginning "the net profits of the company." I feel the difficulty of limiting the generality of the term "net profits," but, on the other hand, it is only the arrears to which this provision applies, and it would be strange that the preference shareholders should have to allow the reserve fund to be formed so far as their current year's dividend was concerned, but should be entitled to sweep up everything in respect of past arrears. I have come to the conclusion that the use of the words "net profits" is not sufficient to rescind the articles to which I have referred, but that the resolution must be read as subject to the provisions of those articles. For these reasons I think the plaintiffs' case fails. Another point has been taken by the defendants, and, as evidence has been adduced and considerable argument has been addressed to it, I feel bound to state the conclusion at which I have arrived with respect to it. The contention is that, even if the plaintiffs are right in their construction of the articles, it is said that the company cannot legally pay them the dividends that they claim, because there are no profits, so called, out of which they can be paid, and that payment, if made, would be made out of capital. It has been proved to my satisfaction (and, indeed, Mr. Jenkins very properly stated that he could not dispute that the result of the evidence was) that the company has sustained an actual ascertained and realised loss of capital to an amount exceeding 200,000l., and has also lost capital by estimate and valuation to an amount exceeding 50,000l. The various sums claimed by the plaintiffs as available to pay their dividends amount to about 240,000l. If, therefore, these ascertained and estimated losses have to be made good before any dividend can properly be paid, there are obviously no funds out of which to pay dividends. The defendants allege and the plaintiffs deny that the company are bound to make good these losses before paying any dividend. The question is one of very considerable difficulty on the authorities. But the result of these authorities is, in my opinion, that there is no hard-and-fast rule by which the company can determine what is capital and what profit. "The mode and manner in which a business is carried on and what [is usual, or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital": (per the Lord Chancellor in *Dovey v. Cory*, 85 L. T. Rep. 257; (1901) A. C. 486). "It may be safely said that what losses can be properly charged to capital and what to income is a

matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ": (see *Gregory v. Patchett*, 33 Beav. 595). "There is no hard-and-fast legal rule on the subject": (per Lindley, M.R. s.c. reported *sub nom. Re National Bank of Wales Limited*, 81 L. T. Rep. 363; (1899) 2 Ch. 629). It is, however, necessary to bear in mind that the two propositions—one that dividends must not be paid out of capital, and, second, that dividends may only be paid out of profits—are not identical, but diverse. The first is a requirement of the statutes and cannot be dispensed with. The latter is in table A, or in the articles of the particular company, and is one of the regulations of the company which has to be construed. A company which has a balance to the credit of profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to a suspense account or to reserve, and, if the assets subsequently increase in value, the amount neither has been nor will be part of the capital. If, therefore, the said balance of the year is used in paying dividend, such dividend is not paid out of capital, because the sum has never become capital, although it still remains a question whether it has been paid out of profits, or not. It has been pointed out by Lord Lindley in *Lee v. Neuchâtel Asphalte Company* (*ubi sup.*) that there is nothing in the statutes requiring a company to keep up the value of its capital assets to the level of its nominal capital. The requirement is merely negative that dividends shall not be paid out of capital, and the balance to the credit of profit and loss account does not automatically become part of the capital assets, because the value of the actual capital assets is depreciated to an amount equal to or exceeding such balance. The real question for determination, therefore, is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses. There is no single definition of the word "profits" which will fit all cases. Take, for instance, Professor Marshall's *Economics*, edit. 1883, p. 142: "The excess of receipts from business during the year over outlay for the business, the difference between the value of the stock and plant at the end and at the beginning of the year, being taken as part of the receipts or as part of the outlay according as there has been an increase or decrease of value." I am precluded from adopting this in its entirety by authorities which are binding on me, because in the definition "stock and plant" obviously include fixed and circulating capital as defined at p. 134 of the same treatise. See, e.g., per Lindley, L.J. in *Verner's case* (*ubi sup.*), where he says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up." I do not understand his Lordship to be laying down a general and universal rule that in every company fixed capital may be sunk and lost, but that there are companies in which that may be the case. All the authorities, however, agree, I think, that circulating capital must be

kept up. Now, in the present case the 200,000l. realised loss arises from the surrender of the leases of certain mines, by the pulling down of certain furnaces, and on the sale of certain cottages. The company is a smelting company on a very large scale, and for the convenience of its works and by way of economy they acquired leases of certain mines in order to supply themselves with their own ore instead of buying it as required. The ore was used exclusively for the purposes of the company's works. The mines were drowned out, and the cost of pumping them out was prohibitive. The company therefore surrendered the leases, pulled down the blast furnaces, and sold the cottages connected therewith. Now, the evidence before me is all on one side. The plaintiffs called none, and Sir David Dale and the defendants' other witnesses all agreed that in a company of this nature these items ought to come into account before any profit can be said to be earned. And my own opinion coincides with theirs, inasmuch as I think that the money invested in these items is properly regarded in this company as circulating capital. Suppose the company had bought enormous stocks of ore sufficient to last ten years. It could hardly be said that the true value of so much of this as remained from time to time ought not to be brought into the balance-sheet, and I can see no difference, for the purposes of the account, between ore *in situ* and ore so bought in advance. The blast furnaces and cottages are mere accessions to the ore, and resemble a building for burning the stores bought in advance already mentioned. There is more difficulty, in my opinion, as to the 50,000l. I think that the onus is on the plaintiffs to show that it is fixed capital, and that in a company of this nature such fixed capital may be sunk or lost. They have not done this, and the evidence, so far as it goes, is the other way. But this is not actual loss, but depreciation by estimate. The plaintiffs really relied on *Lee v. Neuchâtel Asphalte Company* (*ubi sup.*) as an authority for this proposition as a universal negative—viz., that no company owning wasting property need ever create a depreciation fund. In my opinion that is not the true result of the decision. It must be remembered that in that case there had been no loss of assets. The fixed assets were larger than at its formation (see p. 15), and the court decided nothing more than the particular proposition that some companies with wasting assets have no depreciation fund. For instance, I cannot think that it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent and distribute whole receipts in respect thereof as profits without replacing the 'capital expended in the purchase. It is for the court to determine in each case on the evidence whether the particular company ought or ought not to have such a fund. There is no doubt as to the opinion of the witnesses in this case, and, further, the opinion of the directors cannot be always disregarded. The courts have, no doubt, in many cases overruled directors who proposed to pay dividends, but I am not aware of any case in which the court has compelled them to pay when they have expressed their opinion that the state of the accounts did not admit of any such payment. In a matter depending on evidence and expert opinion, it would be a very strong measure for the court to override the directors in

such a manner. I make no distinction between realised loss and estimated loss, because the witnesses declined to recognise any such distinction, and also because the decided cases deal only with the distinction between floating and fixed capital and do not distinguish between realised and estimated loss, and it would serve no useful purpose for me to express an opinion on the subject. The result is that the action fails, and must be dismissed with costs.

Solicitors: Walker and Pettit; Currey, Holland, and Co.

Friday, Dec. 6, 1901.

(Before JOYCE, J.)

CHARRINGTON AND CO. LIMITED v. CAMP. (a)

Landlord and tenant—Public-house—Agreement for one year certain—Covenants—To preserve licences—To reside on premises—Premises closed—Breach of covenants—Licences in jeopardy—Receiver—Delivery of licences to receiver—Possession—Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), s. 14—Conveyancing and Law of Property Act 1892 (55 & 56 Vict. c. 13), s. 5.

Where the tenant of a public-house who has continued in possession under the terms of an agreement for one year certain, which has expired, shuts up the public-house and leaves the premises in breach of covenants by him (1) not to do any acts whereby the licences shall be jeopardised, (2) not to shut up the premises, but to reside therein, and (3) upon quitting the same to assign over all licences to the landlords or such persons as they may appoint, the court has jurisdiction to appoint, and will appoint, a receiver of the public-house for the purpose of preserving the licences, and will order possession to be given to him so far as necessary for that purpose.

By an agreement dated the 8th Sept. 1893, between the plaintiffs, Charrington and Co. (thereinafter called the landlords) of the one part, and the defendant Edward Camp (thereinafter called the tenant) of the other part, the landlords agreed to let unto the tenant from the 14th Sept. 1893 for one year subject to the covenants and conditions thereinafter contained, all that messuage or tenement and premises called or known by the name or sign of the Princess Royal, situate and being in John-street, Commercial Road East, in the county of London, with the appurtenants thereto belonging, at the annual rent of 84l., payable quarterly, as therein mentioned.

The agreement contained (*inter alia*) the following covenants and conditions:

And the tenant doth hereby covenant with the landlords that he will not do or cause or suffer to be done any act, deed, or thing whereby the licences to the said public-house, or any of them, may be jeopardised, indorsed, withheld, suspended, forfeited, or lost, but will renew the same from time to time at the appointed periods for so doing. And, further, that he will use and occupy the said house and premises as a public-house only, and will reside therein, and will not shut up the said premises or cause or suffer the same to be shut up or the trading therein to be suspended except during the period required or allowed by law. And, further,

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

that he will upon quitting the said premises assign over all licences belonging thereto to the landlords or to such person or persons as either of them may appoint, and will give all such notices and take all such steps as may be necessary or proper for the purpose of procuring the transfer of the same; and it is hereby lastly agreed that if the tenant shall neglect or refuse or omit to keep, comply with, and perform, or shall commit or suffer to be committed any breach of all and every or any of the articles, covenants, and agreements on his part hereinbefore contained . . . or if the licences to the said premises or any of them shall be jeopardised, indorsed, withheld, suspended, forfeited, or lost, then and in any of the said cases the tenancy created by this agreement shall forthwith cease and determine, and the landlords or either of them shall have full power and authority at once and without any notice, and without taking any legal proceedings whatsoever to re-enter upon the said premises or any part thereof in the name of the whole and to resume possession thereof, and to plead this agreement as their leave and licence for so doing.

On the 6th Nov. 1901 the plaintiffs, in accordance with the agreement, served the defendant with a three months' notice to quit.

The defendant continued in possession as tenant of the public-house until on or about the 18th Nov. 1901, when he closed the public-house and went away.

On the 20th Nov. 1901 the plaintiffs received from the defendant the following letter:

Princess Royal, John-street, Commercial-road.—Gentlemen,—Please do not send the beer as ordered, as I have received a notice from the Inland Revenue re the licence. As I am not able to pay it I am closing the house.—I remain, yours, &c., E. CAMP.

The plaintiffs on the 25th Nov. 1901 commenced an action to recover possession of the premises, and for the appointment of a receiver of the rents and profits thereof and of the licences belonging thereto.

On the 26th Nov. the plaintiffs moved *ex parte*, and an interim order was made for the appointment of a receiver of the premises, and for delivery up by the defendant to the receiver of all the stock in trade and effects of the business, and all books, papers, and licences relating thereto.

The plaintiffs now applied to have the order continued, and also for possession of the premises to be given to the receiver.

Sebastian, for the plaintiffs, stated the facts.

J. H. Boome for the defendant.—The plaintiffs have not complied with sect. 14 of the Conveyancing Act 1881 with regard to giving notice. Sect. 14 has been extended to an agreement for a lease by sect. 5 of the Conveyancing Act 1892, and applies to an agreement for a yearly tenancy. There is no case where a receiver has been appointed of a business. In *Foxwell v. Van Grutten* (75 L. T. Rep. 311, 368; (1897) 1 Ch. 64) and *John v. John* (79 L. T. Rep. 362; (1898) 2 Ch. 573) the title was in dispute. Here the relation of landlord and tenant still exists between the plaintiffs and defendant, and the licences, being part of the goodwill and property, the appointment of a receiver of them will oust the defendant.

Sebastian in reply.—Sect. 14 of the Conveyancing Act 1881, as extended by sect. 5 of the Conveyancing Act 1892, does not apply to such an agreement as this, which is not an agreement for a lease. When it is intended to apply to an

agreement for letting, it is stated in express terms (see sect. 18, sub-sect. 17, Conveyancing Act 1881). A receiver of rents can be appointed in an action for recovery of possession of leaseholds:

Gwatkin v. Bird, 52 L. J. 263, Q. B.;

Berry v. Keen, 51 L. J. 912, Ch.

Possession was given to the receiver of a public-house in *Ind, Coope, and Co. v. Mee* (1895) W. N. 8). In a proper case a receiver will be appointed pending the dispute when the defendant is in possession:

Foxwell v. Van Grutten (*ubi sup.*).

And the court will appoint one where it is just and convenient:

John v. John (*ubi sup.*).

JOYCE, J.—In this case the plaintiffs are Messrs. Charrington, the brewers, and the defendant is the tenant who was in possession of the Princess Royal public-house under the terms of an agreement with the plaintiffs which provided among other things that the tenancy should be determined by either party giving three months' notice, and which contained the following covenants: [His Lordship read the covenants above set out, and continued:] Now, the defendant being in possession under that agreement some time in November wrote this letter to the landlords. [His Lordship read the letter above set out, and proceeded:] Now, this is the very exact thing he covenanted or agreed or stipulated in the agreement he would not do. Thereupon the landlords commenced an action on the 25th Nov., and the claim indorsed on the writ is for possession of the public-house, the appointment of a receiver of the rents and profits of the hereditaments and of the licences belonging thereto, and for arrears of rent and other relief. Now, that action being instituted, Mr. Sebastian, on behalf of the plaintiffs, applied to me *ex parte* for the appointment of a receiver. What he asked exactly to appoint a receiver for, was the preservation of the licences. I do not recollect exactly what took place upon that occasion. At first I was under the impression that the plaintiffs were mortgagees, but Mr. Sebastian has disabused my mind of that. I am not clear as to what took place; but I am with regard to this, viz., that I intended to preserve the licences, the house having been shut up, as shown by the letter written by the defendant himself. An order for a receiver was made, and the application to-day is for the continuance of the receiver appointed by that *ex parte* order. Now, Mr. Boome appears to-day for the defendant, who has made an affidavit which really contains the same old story that one has read, I was going to say, scores of times, when the mortgagor or tenant of a public-house goes out, and the landlord seeks to preserve the licences or to obtain possession. In my experience the tenant always says he has been deceived on going in, and that he wants so much money back when he will go out. I have no reason to believe, and in fact I strongly suspect, that there is no foundation for such an allegation; but, however, that is what he says. He has gone out of the house, and the house being shut up it is perfectly clear that the licences are in great jeopardy. Mr. Boome has called my attention to the terms of the *ex parte* order as drawn up. I do not know whose fault it is, but certainly there has been some miscarriage about the order,

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because it does direct the defendant to deliver over to the receiver all the stock-in-trade and effects of the business, and all books, papers, and licences relating thereto. That is wrong except so far as it extends to the licences. There must have been some error in drawing it up, as I never intended to make such an order, and I do not think Mr. Sebastian intended to take it so. It has been put in the common form for the appointment of a receiver. Mr. Boome also contended that the plaintiffs, the brewers, could not possibly succeed in the action, because they had given no notice to the defendant under sect. 14 of the Conveyancing Act 1881. Mr. Sebastian has drawn my attention to the terms of that section and the other sections of the same Act, and also to the terms of sect. 5 of the Conveyancing Act 1892, but although I am not prepared to say what the court may determine about that on the trial, or that the plaintiffs will necessarily and certainly succeed in their action, as an action, for recovering possession, at the trial, yet I see a strong probability of them so doing. They have a good *prima facie* case, and there is a strong probability of their succeeding. That being so, and the licences being at stake and the defendant having shut up and left the house, what am I to do? The court has jurisdiction to make orders—a jurisdiction which it had not before the Judicature Act—for the preservation of property pending dispute, and to appoint receivers where it is just and convenient. Now, the really valuable things in dispute—the subject-matter of this action—are the licences. Those licences are all important to the property, and it is all important to the plaintiffs that those licences should be preserved, if they are going to recover at the end of the term or at the trial. The defendant moreover, has no object in preserving those licences, and I strongly suspect is not unwilling that the licences should be destroyed. He has also committed a most flagrant breach of the terms on which he held the property. What I intend, therefore now to do—and what I intended to do before—is to make such an order as will preserve those licences pending the dispute. I do not want to do more than that, but that is what I intend to do so far as I can. I think the order was quite right in appointing a receiver of the licences and in directing them to be handed over to the receiver. My difficulty is as to how far direct possession is to be handed over to the receiver. As the receiver is already in possession under an *ex parte* order, and the defendant is in the wrong in shutting up the house and going away, if it is necessary for the preservation of those licences in the hands of the receiver, that the receiver should have the rents and profits or possession of the premises, I am prepared to give it to him; but I only give it to him on the footing of its being necessary for the purpose of preserving the licences. As counsel for the defendant, assures me that it is necessary, the order which I make, is for possession for the purpose of preserving the premises as a licensed property pending the dispute. The defendant will be entitled to go upon the premises so long as he does not interfere with the possession of the receiver.

Solicitors: for the plaintiffs, *Loxley, Elam, and Gardner*; for the defendant, *Clifford, Turner, and Co.*

KING'S BENCH DIVISION.

Friday, Nov. 8, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HALL v. MICHELMORE. (a)

Registration of voters—Qualification—"Occupier as owner or tenant"—Wife owner—Husband ratepayer—Representation of the People Act 1867 (30 & 31 Vict. c. 102), s. 3.

A. resided with his wife B. in a house of which B. was the owner. A. paid all the rates and taxes of the house and provided for the household generally. There was no other evidence that A. occupied as B.'s tenant. A. applied to be put on the register of voters as "resident occupier as tenant" of the house, within sect. 3 of the Representation of the People Act 1867.

Held, that, while if A. and B. had not been husband and wife the evidence might be sufficient to give rise to a presumption that A. occupied as tenant of B., the fact that A. and B. were husband and wife explained why A. resided in B.'s house and prevented any such presumption from arising.

CASE stated by the revising barrister appointed to revise the list of voters for the Torquay division of the county of Devon.

At the hearing before the revising barrister it was proved or admitted that John Hall (hereinafter called the appellant) resided with his wife in a house of which the latter was the sole and separate owner, the wife's name appearing on the rate-book as the owner, and the appellant's name as the occupier of the house.

The appellant was the bread-winner; the furniture in the house belonged to him, the rates and all the expenses of maintaining the house and household were paid by him, the wife having no means of support save and except the value of her ownership in the house.

No agreement of tenancy had been entered into between the appellant and his wife, nor had any rent at any time been paid by him to her in respect of the said premises.

There were forty-seven other persons being either voters already upon the list or claimants to be inserted therein who were objected to under similar circumstances.

The revising barrister held that there was, upon the above facts, no evidence that the appellant occupied the qualifying premises as owner or tenant, and that therefore he was not entitled to remain upon the register in respect of the qualification of inhabitant occupier of a dwelling-house, and expunged the names of the appellant and of forty-five of the forty-seven other persons from the list, and disallowed the claims of the other two of such forty-seven persons.

Representation of the People Act 1867 (30 & 31 Vict. c. 102):

Sect. 3. Every man shall in and after the year 1868 be entitled to be registered as a voter and when registered to vote for a member or members to serve in Parliament for a borough who is qualified as follows (that is to say) . . . (2) Is on the last day of July in any year and has during the whole of the preceding twelve calendar months been an inhabitant occupier as owner or tenant of any dwelling-house within the borough.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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MAYHEW v. SUTTON.

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Percival Hughes for the appellant.—The appellant is on the rate-book and pays the rates. No point therefore arises on sub-sect. 3 of sect. 3. The sole point is whether or not he is "an inhabitant occupier as owner or tenant." I submit that he occupies under an implied tenancy sufficient to support his claim. In *Gillo's* case, which is reported with *Loveridge v. Gardner* and *Mathew's* case in *Smith's Registration Cases*, at p. 186, the claimant with his wife and family occupied a house with the claimant's mother, who was the owner. The claimant was the bread-winner, the mother having no other property than the house. It was held that the claimant did not occupy as tenant of his mother. The distinction between that case and this is that there the mother was on the rate-book; here it is the claimant.

The respondent did not appear.

Lord ALVERSTONE, C.J.—We do not think it is possible to reverse the decision of the revising barrister. It seems to me that this is an *à fortiori* case as compared with *Gillo's* case. The late Lord Chief Justice and my brothers Wright and Grantham decided in that case, where the son was living with the mother and was the bread-winner, that there were no evidence of tenancy or facts from which tenancy could be presumed, and that there was no proper qualification. There may be a case of a claimant occupying a house, a third person being the landlord and no rent being paid, where the revising barrister might come to the conclusion that the claimant's occupation could only be justified on the basis of some tenancy, and that there was, therefore, evidence from which he could infer a tenancy. In this case the house is the property of the wife; the husband not unnaturally lives with the wife; and it seems to us that on these bare facts being found—namely, that no agreement of tenancy had been entered into between the appellant and his wife, and that no rent had at any time been paid by him to her—it would be quite impossible for us to hold that there was evidence upon which we ought to overrule the barrister's decision that there were no facts here to justify him in holding that the claimant was an inhabitant as owner or tenant. Therefore the appeal must be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion also. I should think that there may be cases where without any rent being paid and without any express agreement of tenancy you have to account for the occupation of a person whom you find on the premises, and you may then infer that the person occupies as tenant at will in some way; but nothing of that kind arises when you can account for the occupation. Here you do account for the occupation. The appellant occupies it because his wife is the owner. That is why he is living there and in occupation. These circumstances absolutely negative any inference which might have arisen otherwise from your not being able to account for his presence there without holding that he was a tenant at will.

Appeal dismissed.

Solicitors for the appellant, *Brooks, Jenkins, and Co.*

Saturday, Nov. 9, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MAYHEW v. SUTTON. (a)

Highway — Light locomotive — Driven "to the common danger of passengers" — Locomotives on Highways Act 1896 (59 & 60 Vict. c. 36), s. 6 — Light Locomotives on Highways Order 1896, art. 4, s. 1.

Under art. 4, sect. 1, of the Light Locomotives on Highways Order 1896 it is an offence to drive a light locomotive on a highway "to the common danger of passengers."

A person who is shown to have driven a light locomotive on a highway at a fast pace may be guilty of the offence although there is no evidence to show that there were any passengers on the highway at the time he so drove it.

CASE stated by four justices of the peace for the county of Bucks.

On the 18th May 1901 an information, under art. 4, sect. 1, of the Light Locomotives on Highways Order 1896, was preferred by George Sutton, superintendent of police (hereinafter called the respondent), against Mark Mayhew (hereinafter called the appellant).

The information charged that on the 28th April 1901 the appellant, then being a person driving a light locomotive on a certain highway within the parish of Denham and called the Oxford-road, unlawfully drove the same to the common danger of passengers.

The evidence given at the hearing was as follows:—

One William Payne stated that about 7 p.m. on Sunday, the 28th April, he was on duty at Denham, and saw a motor car coming down Red Hill, on the Oxford-road, at a terrific pace. He walked into the centre of the road and held up both arms, and when the car came round the corner, about 340 yards from where he stood, the appellant, who was driving, could see him and drove straight up to him, and he just had time to step on one side when the car passed him, and the appellant brought the car to a standstill 60 yards away from where it had passed him.

No evidence was given that at the time in question there were any passengers or passenger on the Oxford-road, or that any passenger was endangered.

No evidence was tendered by the appellant, but it was argued on his behalf: (1) That, in the absence of affirmative evidence that at the time in question there were passengers on the highway who were endangered by reason of the speed at which the motor car was being driven, the offence charged was not made out, and the appellant could not be convicted; (2) that, in order to convict the appellant of the offence charged, the prosecution must prove that at the time in question there were passengers upon the highway. and, further, that such passengers were endangered: (*Stinson v. Browning*, 13 L. T. Rep. 799; *Hill v. Somerset*, 51 J. P. 742; *Smith v. Boon*, 84 L. T. Rep. 593.)

The justices found as a fact that the appellant was driving his motor car on the highway to the common danger of passengers, and that the appellant's contention that direct evidence of a

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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passenger being endangered was necessary to support a conviction was ill founded in law, and they convicted and fined the appellant,

Roger Wallace, K.C. (Samuel Fleming with him) for the appellant.—The charge here is driving the motor car “to the common danger of passengers.” In order that it may be sustained there must be evidence that there were passengers on the highway to be endangered. No such evidence was offered. I submit, then, that no case was made and the conviction is wrong. Under sect. 72 of the Highway Act 1835 it is an offence to make a fire within 50ft. of a public carriage-way “to the injury of such highway, or to the injury, interruption, or personal danger of any persons travelling thereon.” But in *Hill v. Somerset (sup.)* it was held that a conviction under this section was wrong where no evidence of any such injury was given. In *Smith v. Boon (sup.)* it was held that the driving of a motor tricycle through such a place as the High-street of Esher at the rate of eighteen or twenty miles an hour was driving at a speed “greater than is reasonable and proper, having regard to the traffic,” without direct evidence as to the traffic. That decision is, however, on the earlier words of this section, and besides the evidence showed that the highway on which the tricycle was running at this speed was the high street of a village, and this might be considered indirect evidence as to the traffic. Here there was no evidence that there was any but one passenger on the highway, and there cannot, I submit, be a conviction unless there were “passengers,” though I admit that if there were several passengers it would be enough to show that one was actually endangered.

The respondent did not appear.

Lord ALVERSTONE, C.J.—It is no part of our duty to consider whether and, if so, which of the regulations laid down by the lawful authority should be altered or modified. All we have to do is to apply the law. The regulation laid down by art. 4, sect. 1, of the order of 1896 is that the driver of a light locomotive when used on a highway shall not drive “at any speed greater than is reasonable and proper, having regard to the traffic on the highway, or so as to endanger the life or limb of any person or to the common danger of passengers.” In *Smith v. Boon* my brother Lawrance and I held that justices were justified in holding that the speed of a motor tricycle driven through the High-street of Esher at eighteen or twenty miles an hour was not “reasonable or proper, having regard to the traffic on the highway,” and that a conviction by them of the driver was good though there was no direct evidence before them that any particular person or vehicle using the highway was interrupted, interfered with, incommoded, or affected by reason of the speed at which the motor tricycle was driven. That was, it is true, a decision on the earlier words of the section, but counsel for the appellant has hardly attempted to argue that the principle of it does not apply to the words now in question. In my opinion, to drive a motor car at a “terrific” speed, as it was alleged that this one was here driven, may be “to the common danger of passengers” although no passengers were actually endangered. The collocation of words is sufficient to allow us to place such a construction

on the regulation. Counsel cited *Stinson v. Browning (sup.)* and *Hill v. Somerset (sup.)*. They do not affect the present case. On the evidence here, first, that the motor car was driven at such a speed that it could not be stopped for 60 yards after it passed the policeman, and, secondly, that from the corner it came round the driver had a clear view on the road of 340 yards, the justices might have reasonably found as a fact that the car was not driven to the common danger of passengers; but they have found as a fact that it was, and it is altogether impossible for us to say that as a matter of law they were wrong. There was evidence to support their finding, and, when that is so, there is no appeal from their finding on a question of fact.

DARLING, J.—Evidence was here given that the motor car was coming along the road at a terrific pace; but the appellant says that as a matter of law there can be no offence under the regulation unless there are two or more passengers on the road. I think the regulation means just what my Lord says it means.

CHANNELL, J.—I agree. *Appeal dismissed.*

Solicitors for the appellant, *Firth and Co.*

Nov. 8 and Dec. 16, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

KIRKHOUSE v. BLAKEWAY. (a)

Registration of voters—Claimant's wife a pauper lunatic—Parochial relief—“Medical and surgical assistance”—Medical Relief Disqualification Removal Act 1885 (48 & 49 Vict. c. 46) s. 4.

The relief given to a pauper lunatic in a public asylum at the expense of the poor rate is parochial relief, and whether it is “medical and surgical assistance” within sect. 4 of the Medical Relief Disqualification Removal Act 1885 is in every case a question of fact for the revising barrister to decide. In deciding such question the length of time during which the lunatic has received relief and the fact that no payment has been made by the lunatic's relatives in respect of such relief are material.

A. was in every respect qualified for registration as a voter save that his wife was a pauper lunatic who had been supported at the expense of the poor rate in the county asylum of G. for several years. Previous to her becoming lunatic she had lived with and been supported by A., and if she recovered she would again live with and be supported by him.

Held, that it was a question of fact whether the relief given to A.'s wife was “medical or surgical assistance” within sect. 4 of the Medical Relief Disqualification Removal Act 1885, and there was evidence on which the revising barrister could find that it was not such assistance.

CASE stated by the revising barrister for the city of Gloucester.

The appellant, William Kirkhouse, claimed to have his name inserted in the occupiers' list (division 1) for the parish of Gloucester.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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He was qualified in all respects to be placed on the said list except for the fact that his wife had been during the whole of the qualifying period maintained out of the poor rate of the parish as a pauper patient of the Gloucester County Lunatic Asylum. She was removed to the asylum in Sept. 1899 under a justice's order. The certificate was signed by a medical officer of the Gloucester Union.

Nine shillings a week was paid to the county authority by the overseers of Gloucester out of the poor rate for her maintenance, and it must be taken that nothing had been contributed by the claimant towards her maintenance.

It was contended on behalf of the claimant that the maintenance of the wife in the asylum was medical assistance within the meaning of the Medical Relief Disqualification Removal Act 1885 (48 & 49 Vict. c. 46), and that he was not thereby deprived of his right to be registered as a Parliamentary voter or as a burgess.

The revising barrister thought that the permanent maintenance of a lunatic or imbecile, which was this case, was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the statute. He thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance.

Three other persons—viz., Joseph Herbert, Richard Povey, and William James Walker—claimed to be inserted in the same list. The circumstances were identical with those in Kirkhouse's case, except the dates of the removal orders.

The wife of Joseph Herbert was removed on the 13th May 1901, and she had ever since remained in the asylum. The wife of Richard Povey was removed on the 11th Oct. 1900, and she had ever since remained in the asylum. The wife of William James Walker was removed on the 29th Dec. 1898, and she had ever since remained in the asylum.

The revising barrister rejected the claims of William Kirkhouse and of the three other persons to be inserted in the occupiers' list, division 1.

Kirkhouse appealed on behalf of himself and the other three persons.

Henry Terrell, K.C. (Percival Hughes with him).—I submit that the revising barrister's decision was wrong on two grounds. In the first place, I contend that, though this woman was supported out of the poor rates, nevertheless the relief she received, if it could be called relief, was not parochial relief at all. Parochial relief means relief in the nature of alms. Here the woman did not receive alms. When she became lunatic she was in no need of alms; her husband supported her. She was removed to the asylum, not because she was poor, but because she was mad. It was done in the public interest, just as a patient suffering from an infectious disease may be removed to a hospital for infectious diseases. She did not apply for relief. In the public interest she was removed. Assuming you are against me on that point, then I say the relief given was "medical and surgical assistance" within the Medical Relief Disqualification Removal Act 1885,

s. 4. As to that, the revising barrister has made a distinction between permanent lunacy and a passing attack of madness. But surely the length of the period during which relief is given cannot change its nature? There is nothing in the Act distinguishing between temporary and permanent medical relief.

The respondent did not appear.

Cur. adv. vult.

Dec. 16.—CHANNELL, J. read the following judgment:—This was an appeal on a case stated by the revising barrister for the city of Gloucester, and the question we have to consider is whether the barrister was right in disallowing the vote of the voter on the ground of his having received "parochial relief or other alms which by the law of Parliament disqualify." The voter's wife had been maintained for a period of about two years in the county lunatic asylum, at the expense of the union, and he had not paid anything towards her maintenance and support. It was contended on behalf of the voter that this was medical relief within the meaning of the Medical Relief Disqualification Removal Act 1885 (48 & 49 Vict. c. 46). The revising barrister stated that he thought that the permanent maintenance of a lunatic or imbecile, which was this case, was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the said statute. He thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance. We think that this is a finding of fact, and that there was evidence to support it, and that we cannot and ought not to disturb it. It seems to us that in all cases in which relief is given which is more or less of the nature both of medical relief and ordinary relief a question of fact arises for the decision of the revising barrister. Where in consequence of illness (and insanity is undoubtedly illness) a voter or a member of his family whom he is bound to support is given medical relief it is not the less medical relief within the statute because a certain amount of ordinary sustenance is given as well as medicine. And so where a pauper in a workhouse is removed to the infirmary in consequence of his illness, he would whilst in the infirmary still be receiving relief other than medical relief within the meaning of the statute. It would be a question of fact for the revising barrister in all such cases what the real character of the relief was and which kind was merely incidental to the other. Where a member of a voter's family is attacked with insanity and is in consequence removed to an asylum at the expense of the union, we should have no doubt, and the revising barrister in this case seems to have had no doubt, that the case was, in the first instance, one of medical relief. But where the insane person (being a person for whose support the voter is liable) remains permanently in the asylum and no payment is made by the voter, we think a question of fact arises as to whether the relief has not become ordinary relief as distinguished from medical. Where any payment is made, even although it is not as great as the cost to the union of the maintenance of the lunatic in the

asylum, the inference might fairly be drawn that there is no ordinary relief, but this is for the barrister. Where the maintenance has continued for a long time without any payment whatever, we cannot say that the barrister is wrong in coming to the conclusion that the voter is in receipt of relief other than medical relief. There appear to be no authorities in this country bearing on this question, but the view we have expressed appears to be that taken by the courts in Ireland: (see *Holland v. Porter*, Lawson's Notes of Registration Cases, 1898, 220, and *Crossan v. Holland*, Lawson's Notes, 1899, 304). This appeal must be dismissed, but as there was no appearance for the respondent there will be no costs.

Appeal dismissed.

Solicitors for the appellant, *Ayrton, Briscoe, and Barclay*.

Nov. 21 and 22, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. MAYOR, &C., OF STEPNEY. (a)

Local government—Abolished office—Compensation to officer—London Government Act 1899 (62 & 63 Vict. c. 14), s. 30—Local Government Act 1888 (51 & 52 Vict. s. 41), s. 120.

A local authority when assessing under sect. 120 of the Local Government Act 1888 the just compensation to be paid to an officer whose office has been abolished are bound to exercise their own judgment and discretion.

J., a solicitor, was clerk to the vestry of M. E., and also practised at his profession.

The duties and powers of such vestry were taken over by the corporation of S. under the London Government Act 1899, and the office of clerk was abolished under sect. 30 of that Act.

J. applied to the corporation of S. for compensation, to be assessed under sect. 120 of the Local Government Act 1888.

The corporation applied to the Treasury for information as to the principle on which they compensated officers whose offices were abolished, when such officers did not devote all their time to the duties of their offices.

The Treasury replied that the practice was to calculate the compensation as if the officers did so devote all their time, and then to deduct 25 per cent.

The corporation, without inquiring into the particular case and without exercising their own discretion in the matter, assessed the compensation to be paid to J. on this principle.

Held, that a mandamus lay against the corporation to direct them to consider and assess the compensation justly payable to J.

RULE nisi to show cause why a mandamus should not be directed to the mayor and corporation of Stepney ordering them to assess the compensation due to the prosecutor owing to the abolition of his office under the London Government Act 1899.

The prosecutor (Mr. Jutsum) was a solicitor who had filled since 1872 the office of clerk of the vestry of Mile End, an authority the powers and duties of which had been transferred to the

defendants under the London Government Act 1899.

While filling such office he had also carried on the private practice of his profession.

On the 9th Jan. 1901 the office of vestry clerk of Mile End was abolished by the defendants under the powers conferred upon them by sect. 30 (1) of the London Government Act 1899.

The prosecutor thereupon preferred a claim to compensation under sect. 30 (2) of that Act and the different provisions of earlier Acts thereby incorporated in the Act.

The finance committee of the Stepney Corporation, to which the claim was referred, made inquiries at the Treasury as to the practice there as to assessing compensation.

In reply to these inquiries it was stated that the practice in the administration of sect. 120 of the Local Government Act 1888 and sect. 31 of the Local Government Act 1894 was to calculate the compensation of an officer, the whole of whose time had not been devoted to his office, as though his whole time had been so devoted, but to deduct one-fourth of the amount thus arrived at.

The finance committee reported this to the corporation, and also reported that they were advised that the corporation were bound by the practice of the Treasury.

The prosecutor contended that the corporation were not so bound, and that if they acted simply on such practice they would not be carrying out the statutory duty imposed upon them by sect. 120 of the Local Government Act 1888, which was to inquire into all the circumstances affecting each particular claim and assess the compensation with regard to these.

The corporation adopted the report of the finance committee, and the compensation was assessed according to the Treasury practice.

London Government Act 1899 (62 & 63 Vict. c. 14):

Sect. 30 (1). Where the powers and duties of any authority are transferred by or under this Act to any borough council, the existing officers of that authority shall be transferred to and become the officers of that council. . . . The council may abolish the office of any such officer whose office they may deem unnecessary; but any officer . . . whose office is abolished shall be entitled to compensation under this Act. (2). Sub-sections four and seven of section eighty-one of the Local Government Act 1894 shall apply to the existing officers affected by this Act as if references in those sub-sections to the district council were references to the borough council. . . .

Local Government Act 1894 (56 & 57 Vict. c. 73): Sect. 84 (4) refers to the tenure under which existing officers continuing in office under the new authority shall hold their offices. . . . (7) makes sect. 120 of the Local Government Act 1888 applicable for the purpose of assessing compensation to existing officers.

Local Government Act 1888 (51 & 52 Vict. c. 41):

Sect. 120 (1). Every existing officer declared by this Act to be entitled to compensation, and every other existing officer, whether before mentioned in this Act or not, who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled to have compensation

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paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act, regard being had to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case, and the compensation shall not exceed the amount which, under the Acts and rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office.

Sub-sect. 2 provides for the delivery of a claim to the council by every person claiming compensation setting forth the facts as to his salary and office, together with a statutory declaration of the truth of such statement of facts.

Sub-sect. 3 directs the council to consider such statement and assess the just compensation.

Sub-sect. 4. If a claimant is aggrieved by the refusal of the county council to grant any compensation or by the amount of compensation assessed . . . the claimant . . . may within three months after the decision of the council appeal to the Treasury, who shall consider the case and determine whether any compensation and, if so, what amount ought to be granted to the claimant, and such determination shall be final.

Courthope-Munroe (Leese with him) showed cause.—In the first place, I submit that the council have no discretion in the matter. They are bound under sect. 120 (1) not to give more compensation than is given under the Acts and rules relating to Her Majesty's Civil Service, and here they have given the maximum the Treasury gives. [Lord ALVERSTONE, C.J.—Can you refer me to the Acts or rules under which the amount of compensation is fixed by the Treasury?] No. We are not in a position to obtain such rules if they exist, and I know of no Act on the subject. We did all we could in the matter. We inquired of the Treasury, and we acted on the information supplied. In the second place, I submit that this is not a case for a *mandamus*. A *mandamus* is never issued when there is an alternative remedy equally adequate. Here sect. 4 provides an alternative remedy—an appeal to the Treasury. To issue a *mandamus* here would be futile, since, whatever way the council decide, the ultimate decision lies with the Treasury, and we know that they will decide the matter as we have decided it. Moreover, where an Act of Parliament provides a special remedy for a right given by it, the holder of such right has no other remedy. Here the remedy given is by appeal to the Treasury, and I submit that that is the only remedy the prosecutor has :

Peebles v. Orncaldtwistle Urban District Council,
76 L. T. Rep. 315; (1897) 1 Q. B. 384;
Re Nathan, 12 Q. B. Div. 461.

Boydell Houghton in support of the rule.—As to the first point, there is no evidence that there are any rules or Acts which affect the matter. The council thought they were bound by the practice of the Treasury and followed it. But they were in no way bound by it. In the second place, there is no adequate remedy under sub-sect. 4. Before we appeal under that section we are entitled to a decision

under sub-sect. 1. Our point is that the council has refused jurisdiction; if so, a *mandamus* lies :

Reg. v. Marsham, 65 L. T. Rep. 778; (1892) 1 Q. B. 371;

Reg. v. St. Pancras Vestry, 63 L. T. Rep. 440; 24 Q. B. Div. 420.

Lord ALVERSTONE, C.J.—A great many points have been raised in argument on this rule which do not arise and which it is not necessary for us to consider, and we should be doing no more than repeating what I think is very clear law. It is now well established that if a tribunal, a body who are charged with the performance of a public duty, do not discharge such duty, a *mandamus* will lie to compel them to discharge it; or, if an inferior court does not entertain a case when it ought to entertain it, a *mandamus*, will lie to compel it to entertain it. I need not refer to the cases. Many have been mentioned. *Reg. v. Marsham* (sup.) is a case of the latter class; there are many cases with regard to the first class. It is equally clear that if an effective alternative remedy exists, the court has a discretion as to whether or not it will grant a *mandamus*; and, as a rule, it does not grant a *mandamus* where there is a sufficient alternative remedy. I had for a long time thought that Mr. Munroe had made good his point that under sub-sect. 4 of sect. 120 of the Local Government Act 1888 an appeal to the Treasury by a person aggrieved was a sufficient remedy; but on consideration we have come to the conclusion that it is better that the rule for a *mandamus* should be made absolute. The duty of the local authority is to have regard in fixing a compensation "to the condition on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act, and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case." I read all this in order to indicate that it is intended that the local authority shall themselves exercise their discretion and assess the compensation, having regard to all these matters. The important matters here would be the conditions on which the prosecutor's appointment was made and the nature of his office or employment. Then there comes the additional condition that the amount "shall not exceed the amount which under the Acts and rules relating to Her Majesty's Civil Service is paid to a person on abolition of office." If there were evidence before us to show that there was a statute or that there were statutory rules or—I go further—if there were binding rules of the public service applicable to this case, then we could not here say that the local authority had not considered all these matters. But on the materials before us it is quite plain that whether there be such rules or not—as to which we know nothing—the local authority have not acted in accordance with any rule, but inquired merely as to the practice which is applied. The practice which appears to be applied, and I have no doubt properly applied, in most cases is that there is a deduction of 25 per cent. made

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in the case of officers whose whole time is not engaged by their official work from the compensation which would be given them if their whole time had been so engaged. I think it is quite impossible to say that this practice, apart from any Act or rule, would make such an arbitrary deduction a sufficient regard to all the circumstances of the case, or the conditions on which the officer's appointment was made, or the nature of his office or employment. Therefore, apart from a statutory rule, *prima facie* it would be the duty of the local authority to consider for themselves what the deduction should be. In some cases it seems to me it might be very much more than 25 per cent., and in some very much less. That being so, *prima facie* it was the duty of the Stepney Council, apart from definitive rules, to have regard to and consider the particular case. Then it is said, and very forcibly said, by Mr. Munroe that he is a person aggrieved and that he can appeal, and he likened that not unnaturally and very cogently to cases where a tribunal had gone wrong in law, or had taken some point which the Court of Appeal, or the constituted tribunal of appeal, would deal with. If it had been the case, I should think his argument quite unanswerable; but it seems to me that this remedy is really a remedy against an improper exercise of discretion by the lower tribunal as well as an improper refusal, and that the Treasury on appeal have the right of considering the case and determining whether the amount should be altered. It seems to me that under ordinary circumstances the local authority ought, in the first place, to exercise their discretion upon the circumstances of the man's particular case and assess the compensation with regard to that, and that it is not quite an adequate remedy to say that the Treasury can fulfil the same function and discharge the same duty, even though they have not had the assistance of the discretion of the local authority. I wish it to be distinctly understood that I am not suggesting that the Treasury will not be perfectly competent to review or deal with the matter if an appeal is brought to them under sub-sect. 4; but I do think that in this case it was intended by the statute that the local authority should exercise its discretion upon the particular case for compensation, and that it was that discretion so exercised which should be the subject of the appeal, and that the person who was to appeal was to be a person who was aggrieved by the exercise of the discretion. If there were any evidence before us that the borough council had themselves thought that 25 per cent. was the right deduction or had exercised a discretion in that matter, I certainly should not have been a party to making the rule absolute; but in this case, as they have acted upon something which I think is in no way binding on them and it is not suggested by Mr. Munroe that they really exercised their discretion, I think that they ought to be ordered to entertain the case, having regard to the circumstances of the particular case, before any question of alternative remedy arises.

DARLING, J.—I am of the same opinion. I think that very much the most forcible answer made by Mr. Munroe to this application for a *mandamus* was that there was an equally adequate and equally convenient remedy provided by sub-sect. 4 of sect. 120 of the Local Govern-

ment Act 1888. That section is: "If a claimant is aggrieved by the refusal of the county council to grant any compensation or by the amount of the compensation," and so on, then there shall be "an appeal to the Treasury, who shall consider the case and determine whether any compensation and, if so, what amount ought to be granted." If here the borough council had really gone into the case and exercised their own judgment upon it and had refused the prosecutor any compensation, or had granted him an amount with which he was dissatisfied, and in that case instead of going to the Treasury he had come to us and asked for a *mandamus*, I think that we ought to have refused it, and to have said: "No, you shall not have a *mandamus* because you have got, at all events, an equally convenient and adequate remedy. Go to the Treasury." But I do not think that the council really did consider the matter at all for themselves. They came to the conclusion that because the section as to compensation said that they might grant compensation which "shall not exceed the amount which under the Acts and rules relating to Her Majesty's Civil Service is paid to a person on abolition of office," all they had to do was to write to the Treasury and find out what they were in the habit of giving, and that then simply to say "That is your compensation" would be practically an automatic act. As a matter of fact it has not been proved that they acted upon any rule of the Treasury at all, nor has it been proved that there was a rule. They acted upon what the Treasury told them was their practice. I do not think either that they acted on any judgment of their own. They borrowed a measure from somebody else to measure what they were to dole out without applying their judgment to what they were to give at all. Therefore I think that they have not taken the first step here which would entitle Mr. Jutsum to appeal to the Treasury, and our *mandamus* simply means that they must take that first step. If they do take that first step and arrive at precisely the same result for reasons which they do not give, it seems to me that we cannot interfere with that decision.

CHANNELL, J.—I agree, but I am not quite certain that I do so for the reasons that have been given. In the first place, I think that the *mandamus* ought to go because the local authority have not in fact exercised their discretion upon this matter. They have by a mistake thought that they were bound by a practice as though it were a rule. If it had been a rule under the Act it would have been binding upon them. They thought that the rule of practice was a rule by which they were bound, and consequently they exercised no discretion. In my opinion, if they had said, "We quite know that we are not bound by this absolutely, but we think it right to follow the Treasury practice," and had so followed it, I think they would have exercised their discretion and they would have been right; but they simply thought that they were bound when they were not bound. Consequently it is a case for a *mandamus* for them to exercise their discretion, unless there is some rule of this court under which we could not issue a *mandamus*. The one that has been suggested is that there is another adequate remedy. It is clearly settled that the court does not grant a prerogative *mandamus* when there is

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another remedy, if that other remedy is equally convenient and adequate. For a long time I was inclined to think that there was another remedy equally convenient and applicable to this case, and I now think there is another remedy. I do not entertain the least doubt myself that Mr. Jutsum might upon the present state of things appeal to the Treasury, and that he has another remedy. That is the point that I am not quite sure that we are all agreed upon. I think he has another remedy, but I do not think on the whole, after some consideration, that it is equally convenient, because I think that the local tribunal is the one that is best to investigate in the first instance the particular facts about this gentleman's employment. They will know much better than the Treasury can know, and it is preferable that they should investigate, in the first instance, the number of days or hours, whatever it may be, that he was employed in one and the number that he was employed in another. Although the applicant here can in the present state of things go to the Treasury and get them to decide finally the amount of the allowance which he ought to have—I think very likely he will have to go there, or someone will go there, in the end, and the Treasury will ultimately have to do it—yet I do not think that is an equally convenient remedy for the local authority, not having exercised their discretion, because if he goes now he will have to go without a preliminary investigation which might or might not be useful to him in going there. I do not myself think that the present case is one coming within the rule of which *Peebles v. Oswaldtwistle Urban District Council (sup.)* was one illustration—viz., that where an Act creates an obligation and enforces the performance in a specific manner as a general rule the performance cannot be enforced in any other manner. I do not think that rule applies to this case in question, where there are two rights and two different rights created by the statute—one a right to have compensation and another a different right to have adjudication upon the subject of that compensation. It is that latter one which is under consideration on this *mandamus*.

Rule made absolute.

Solicitors for the prosecutor, *Jutsum and Jones*.
Solicitor for the defendants, *Edward Betteley*.

KING'S BENCH DIVISION, IN BANKRUPTCY.

Monday, Jan. 27.

(Before WRIGHT, J.)

Re WEIBKING; Ex parte THE TRUSTEE v. HARTLEY. (a)

Bankruptcy—Mortgage—Power to mortgagee to enter if mortgagor "should become bankrupt"—Words not satisfied by "an act of bankruptcy."

Words in a contract which give a mortgagee a right to enter and take possession if the mortgagor "should become a bankrupt," are words of forfeiture, and must be construed strictly. They are not satisfied by an "act of bankruptcy."

THIS was a motion by the trustee in the bankruptcy of J. J. Weibking for a declaration that

an instrument in writing dated the 2nd Aug. 1901, made between the bankrupt and one Ann Hartley, assigning by way of mortgage a building agreement, did not operate to vest in the mortgagee any property in or right to the building plant, materials, and other chattels, brought on to the land by the bankrupt, and which were there at the commencement of the bankruptcy. In the alternative that the said plant and materials were property to which the trustee was entitled as being, at the commencement of the bankruptcy, in the order and disposition of the bankrupt under such circumstances that the bankrupt was the reputed owner thereof.

On the 23rd July the bankrupt entered into a building agreement with the North London Grounds Company Limited in respect of land of which the company was the freeholder.

It was provided that the agreement should not be assigned except for the purpose of temporary advances, and that all buildings, erections, materials and plant on the land could be taken possession of by the company in the event of default by the builder; and by another clause, that all materials and plant brought on the land were to be deemed to be annexed to the freehold.

By deed dated the 2nd Aug. 1901 the bankrupt assigned the building agreement to the respondent, by way of equitable mortgage, to secure advances, under which it was provided (*inter alia*) that if the builder should "become bankrupt" the mortgagee might enter upon and take possession of the land and buildings comprised in the building agreement.

On the 14th Aug. the bankrupt signed his bankruptcy petition, and on the same day the mortgagee entered.

On the 17th Aug. 1901 a receiving order was made against the bankrupt on his own petition followed by adjudication.

The North London Grounds Company Limited were not parties to this motion.

H. Reed, K.C., Muir Mackenzie, and A. A. Hudson for the trustee in bankruptcy.

Warmington, K.C. and Lewis Thomas for the respondent.

WRIGHT, J.—The mortgage gave no right to the chattels as such, but only passed to the mortgagee such right as the bankrupt had under his building agreement. In my opinion the mortgagee had a right to enter when the builder became a bankrupt. It seems to me, however, that such words in a contract should be construed strictly, being words of forfeiture. If, however, the words "become bankrupt" are satisfied by an act of bankruptcy the mortgagee entered rightfully. I hold that the mortgagor is not entitled to the property in question; but I do not see how I can give any relief to the trustee in bankruptcy in the absence of the freeholder. I cannot decide the question of reputed ownership in his absence.

Adjourned in order that if necessary the freeholder might be made a party.

Solicitors: *Braby and Macdonald; Moodie and Sons.*

IN BANK.]

Re RICHARDSON; Ex parte THOMPSON v. HUTTON.

[IN BANK.]

Monday, Jan. 27.
(Before WRIGHT, J.)

Re RICHARDSON; Ex parte THOMPSON v.
HUTTON.

Bankruptcy—Legacy—Direction giving legatee power to retain debt due to testator in or towards satisfaction of legacy—Specific legacy—Abatement.

The testator bequeathed to his son 10,000*l.*, and directed that as regards any money due to him at his decease from that legatee the same should (but not to an amount exceeding 10,000*l.*) be set off and retained in or towards satisfaction of the legacy. The legatee was indebted to the testator's estate, and the executors obtained judgment against him for 26,398*l.* 12*s.* 6*d.*, after giving credit for the amount of the legacy. The legatee became bankrupt, and the testator's estate proved insufficient to pay the legacies in full. The executors proved in the bankruptcy for 5356*l.* 1*s.* 2*d.*, the difference between the amount of the legacy of 10,000*l.* with which the bankrupt had been credited, and 4643*l.* 18*s.* 10*d.* the proportion due on abatement.

Held, that the legacy was not specific, and was subject to abatement, and that the proof must be admitted.

THIS was a motion by the executors of Thomas Richardson, deceased, by way of appeal from the decision of the trustee in the bankruptcy of Henry William Richardson, who had rejected their proof for 5356*l.* 1*s.* 2*d.*

Thomas Richardson by his will bequeathed to his son a pecuniary legacy of 10,000*l.*, which also directed that

As regards any money which shall be due to me at my decease from the said Henry William Richardson, the same shall (but not to an amount exceeding 10,000*l.*) be set off against and retained by him in or towards satisfaction of the legacy of 10,000*l.* hereinbefore given to him.

Another clause was as follows :

I expressly declare that any debt owing to me at my death by any person shall not be capable of being set off against any legacy or other benefit hereby or by any codicil hereto bequeathed or given to him or her for his or her benefit or to or for the benefit of a wife or husband, and no legacy or other benefit by this my will or any codicil hereto bequeathed or given to any person shall be deemed satisfaction of any debt owing from me to him or her.

At the time of Thomas Richardson's death Henry William Richardson owed his estate a large sum of money, and the appellants obtained judgment against him for 26,398*l.* 12*s.* 6*d.*, after giving credit for the legacy of 10,000*l.*

Henry William Richardson was subsequently adjudicated a bankrupt.

The estate of Thomas Richardson, chiefly owing to the default of the bankrupt, was so much reduced in value that the amount available for distribution among the legatees was insufficient for the payment in full of the legacies.

The executors of Thomas Richardson therefore proved in this bankruptcy for 5356*l.* 1*s.* 2*d.*, being the difference between the amount of the legacy of 10,000*l.* with which the bankrupt had been credited, and 4643*l.* 18*s.* 10*d.*, the proportion due on abatement.

Muir Mackenzie and J. S. Green for the executors of Thomas Richardson.—The bankrupt's estate is entitled only to credit for the actual amount of the legacy, and not for 10,000*l.*, and this proof was wrongly rejected. The words of the will plainly show that there is abatement, and 4643*l.* 18*s.* 10*d.* must therefore be inserted into the will as the legacy due to the bankrupt in place of 10,000*l.* :

Re Schweder's Estate, 65 L. T. Rep. 64; (1891) 3 Ch. 44 ;

Miller v. Huddlestons, 3 Mac. & G. 513.

Owen Thompson for the trustee in bankruptcy.—The proof was rightly rejected by the trustee. This legacy was a specific and demonstrative legacy. It also operated as a forgiveness of debt to the extent of 10,000*l.* No priority is claimed on the ground of relationship. Here is a specific gift of 10,000*l.* part of and payable out of a debt of 36,398*l.*, and it matters not whether the debt is due from the legatee or from an outsider. The testator directed this legatee to retain the amount of the legacy out of the debt. He referred to

Williams on Executors, 9th edit., p. 1029 ;
Campbell v. Graham, 1 Russ. & My. 453.

J. S. Green in reply.—The point is whether the testator intended to give the bankrupt a priority over the other legatees, and there is no indication of any such intention. A pecuniary is not a specific gift :

Blower v. Morrett, 2 Ves. Sen. 420.

WRIGHT, J.—The testator left his son, Henry William Richardson, 10,000*l.*, he also left legacies to his other children. He further directed that, "as regards any money which shall be due to me at my decease from the said Henry William Richardson, the same shall (but not to an amount exceeding 10,000*l.*) be set off against and retained by him in or towards satisfaction of the legacy of 10,000*l.* hereinbefore given him." The meaning of this clause is by no means clear, but I am unable to say that this is in a strict sense a specific legacy. I think that the governing intention of the testator was that the benefit of this legacy was to go only in reduction of the indebtedness of the legatee to his estate, and not for his benefit. If that is so this legacy has no priority, for it was not intended to be payable out of the debt only or in priority to the other legatees. It is therefore subject to abatement, and this proof must consequently be admitted.

Appeal allowed.

Solicitors: A. J. Harman; Waddy and Kelsey.

R. & C. COM.] LANCASHIRE BRICK, & CO., CO. v. LANCS. & YORKS. RAIL. CO. [R. & C. COM.]

RAILWAY AND CANAL COMMISSION COURT.

Thursday, Dec. 5, 1901.

(Before WRIGHT, J., Sir FREDERICK PEEL, and Viscount COBHAM.)

LANCASHIRE BRICK AND TERRA COTTA COMPANY (BAXENDEN) LIMITED v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY. (a)

Railways—Sidings on land adjoining railway—Communication between sidings and lines of railway—Right of adjoining owner to require communication—Gradient—"Inclined plane" Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), s. 76.

Upon an application under sect. 76 of the Railways Clauses Consolidation Act 1845, by the owners or occupiers of lands adjoining a railway to have a communication made between branch railways or sidings on their lands and the line of railway, the applicants have an absolute right to have such connection made, and the railway company are bound to open their rails for the purpose of making such communication unless one of the restrictions specified in the section applies; and upon such application under the section the question whether the applicants can or cannot claim to carry the traffic of persons other than themselves does not arise.

A gradient of 1 in 98 is not an "inclined plane" within the meaning of the restriction in the section under which the railway company are not bound to make such openings on an "inclined plane"; and the company cannot refuse to make such communication on the ground that at the proposed place of junction there is such a gradient. To be an inclined plane within the meaning of the restriction the gradient must be such as to be incompatible with the reasonable insertion of a junction at the place.

APPLICATION to the Railway and Canal Commission Court.

The application was as follows:—

The applicants manufactured bricks at Baxenden, in Lancashire, on land which adjoined the defendants' railway. They laid down on their land collateral branches of railway or sidings which communicated with the railway by additional lines of rail laid on the defendants' land.

The applicants' sidings and the defendants' additional lines were laid down at the cost of the applicants in pursuance of an agreement in writing made between the applicants and the defendants, and dated the 27th Sept. 1894, whereby it was mutually agreed as follows:

In consideration of the railway company laying down and completing for the accommodation of the siding owners at Baxenden the sidings delineated upon the plan hereto annexed (the siding owners having previously carried out all such earthwork and other works as are required to form the ground on the site of such sidings to a level of two feet below the level of the existing main line of railway) the siding owners will pay to the railway company before the work shall be commenced a sum equal to the estimated cost (to be fixed by the company's chief engineer) of laying down, making, and completing such sidings as aforesaid, and of all points and crossings, signal posts and signals, and all other appliances necessary and proper for the safe

use and working thereof. The said sidings, so far as the same are on the railway company's land, shall be used by the siding owners and other the owners or occupiers for the time being of the land in lease to the siding owners for the accommodation of their traffic only, unless with the consent of the railway company, and then only upon such terms and conditions as shall be agreed upon between the parties hereto. The siding owners will not permit any person or persons (except as aforesaid) to use the said sidings, so far as the same are on the railway company's land, or any part thereof, without the consent in writing of the railway company.

By this agreement it was also provided (*inter alia*) that the applicants or the defendants might at any time after the expiration of five years from the date thereof, on giving six calendar months notice in writing determine the agreement, and that thereupon so much of the lines of rail as were on the defendants' land should be removed.

The applicants by reason, and on the faith, of the facilities afforded by their siding and connection, had developed a large business which could not be carried on without such facilities.

On the 16th June 1900 the defendants gave to the applicants notice in writing to determine the agreement at the expiration of six calendar months therefrom.

Negotiations thereupon took place between the applicants and the defendants with reference to the terms upon which the siding should be used after the expiration of the notice, and the applicants claimed (*inter alia*) to be entitled to have so much of the siding or branch railways as were upon the applicant's land connected with the railway of the defendants under sect. 76 of the Railways Clauses Consolidation Act 1845.

By a letter dated the 2nd July 1901 the defendants gave to the applicants notice that they intended in fourteen days from the date of such notice "to sever the connection" between the applicants' siding and the defendants' railway, and "to remove the rails, points, &c.," from off the defendants' premises.

By a letter dated the 5th July 1901 the applicants gave to the defendants notice in the following terms:

It only remains for us to give you notice, by virtue of sect. 76 of the Railways Clauses Act 1845 (as we do hereby), that we require a communication from our private siding to your company's rails. As the present connection is safe as regards the public, without injury to the railway, and without inconvenience to the traffic thereon, we submit that to sever it would cause needless inconvenience and expense, so that, if you deny our right to the connection, we will, on hearing from you to that effect, at once take the necessary steps to test the question, and will ask you pending the decision to allow the physical communication to remain as it is.

On the 16th July 1901 the defendants began to remove the lines on their land which afforded communication between the sidings and the defendants' railway; and the defendants refused to afford to the applicants facilities for the receiving, forwarding, and delivering of traffic upon their railway to and from the applicants' siding.

The applicants alleged that the defendants, by refusing to afford such communication with their railway as aforesaid, contravened the provisions of sect. 76 of the Railways Clauses Consolidation Act 1845.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

R. & C. COM.] LANCASHIRE BRICK, &C., CO. v. LANC. & YORKS. RAIL. CO. [R. & C. COM.]

The applicants applied under sect. 2 of the Railway and Canal Traffic Act 1854, sects. 9 and 12 of the Railway and Canal Traffic Act 1888, and sect. 76 of the Railways Clauses Consolidation Act 1845, for (1) an order enjoining the defendants to renew the communication between the applicants' sidings and the defendants' railway as the same was heretofore used and enjoyed, or otherwise to make such openings in their lines of rails and lay down such additional lines of rails as may be necessary to effect communication between their sidings and the railway; (2) an order enjoining the defendants to afford to the applicants all reasonable facilities for the receiving, forwarding, and delivering of their traffic over the defendants' railway from and to the applicants' siding; and (3) 750*l.* damages.

The defendants, in their answer, replied (*inter alia*) as follows:

The point at which the applicants have requested the defendants to make openings in their line of railway, in order to make a communication with sidings on the applicants' land, is on an inclined plane, the gradient of which is one in ninety-six, and the defendants cannot be required to make the openings which the applicants have required them to make. The communications which the applicants require to be made, cannot be made for the purposes for which the applicants are entitled to require it to be made under sect. 76 of the Railways Clauses Act 1845, with safety to the public or without injury to the railway, or without inconvenience to the traffic thereon. The railway at the point at which it is proposed that the communication should be made is a railway over which a large volume of traffic passes, and any user by the applicants of the communication between their sidings and the defendants' railway for the purpose of bringing carriages to, from, or upon the railway, which is the only purpose for which the applicants are entitled to have the proposed communication made, would be dangerous to the public, and would seriously inconvenience the traffic on and using that portion of the defendants' railway. The applicants claim and intend that the proposed communication with the railway may and shall be used for the purpose not only of the applicants' traffic, but also of that of any other company or person whom they may permit to use the siding or their own land; and they further claim that the defendants will be bound to receive, forward, and deliver at, to, or from the siding by means of the communication the traffic of any such other company or person as well as the traffic of the applicants. The user of the communication by such other companies or persons would be dangerous to the public, injurious to the railway, and inconvenient to the traffic thereon, and the defendants could not with safety to the public, or without injury to the railway or inconvenience to the traffic thereon, receive, forward, and deliver at, from, or to, the siding by means of the communication the traffic of such other persons or companies as well as the traffic of the applicants. The defendants, in removing the lines forming the connection between their railway and the applicants' siding, were acting under the provisions of the agreement referred to, which the defendants are and always have been willing to renew upon the same terms, if the applicants would agree to restrict the user of the connecting lines to their own traffic.

Sect. 76 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) provides:

And be it enacted that this or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral

branches of railway to communicate with the railway for the purpose of bringing carriages to or from, or upon the railway, but under and subject to the provisions and restrictions of an Act passed in the sixth year of the reign of Her present Majesty, intitled "An Act for the better Regulation of Railways and for the Conveyance of Troops"; and the company shall, if required, at the expense of such owners and occupiers and other persons, and subject also to the provisions of the said last-mentioned Act, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public and without injury to the railway, and without inconvenience to the traffic thereon; and the company shall not take any rate or toll or other moneys for the passing of any passengers, goods, or other things along any branch so to be made by any such owner, or occupier, or other person; but this enactment shall be subject to the following restrictions and conditions; that is to say, no such branch railway shall run parallel to the railway; the company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge, nor in any tunnel. The persons making or using such branch railways shall be subject to all bye-laws and regulations of the company from time to time made with respect to passing upon or crossing the railway, and otherwise; and the persons making or using such branch railways shall be bound to construct, and from time to time, as need may require, to renew, the off-set plates and switches according to the most approved plan adopted by the company, and under the direction of their engineer.

Balfour Browne, K.C. and Whitehead for the applicants.—The applicants contend that as a matter of right they are entitled as adjoining owners to lay down a branch railway communicating with the defendants' line, and they are seeking to have established under sect. 76 a right to have this communication, which before they had under the agreement. The defendants say that they are not going to give us that connection if we are to bring on to their line by means of it any traffic except the applicants' own traffic. Sect. 76 is unlimited; it imposes upon the railway company the obligation to make a communication between their railway and what are called, not sidings, but branch railways, subject to certain restrictions. The branch railway must not run parallel to the railway; these sidings did not run parallel to the railway, but they join at two particular points, forming a loop. The communication would not interfere with any specific purpose of the railway, and that is admitted as it exists there already; it was not upon a bridge, or in any tunnel, but it is said it was on an inclined plane. An "inclined plane" in the section does not mean a mere gradient such as this. The real reason for inserting those words was that the words were always used, and are now used in various Provisional Orders to mean gradients worked by stationary engines. In most Acts it is defined as an inclined plane worked by stationary engines and by ropes, and a siding could not be made on a line worked by ropes. Therefore none of the restrictions in the section apply, and the railway company are bound under the section to make the communications asked for, and either to take up the traffic of the applicants at the sidings, or else to allow them to run with their own locomotives to the nearest station, which is clearly within their

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rights: (*Cowan and Sons v. North British Railway Company*, decided by the Second Division of the Court of Session, 3 Fraser, 677; *Powell Duffryn Steam Coal Company v. Taff Vale Railway Company*, 30 L. T. Rep. 208; L. Rep. 9 Ch. 331). The applicants are entitled to demand not only the connection, but also due and reasonable facilities for dealing with their traffic, and they claim also the right to carry the traffic of other persons. The section contemplates that the persons entitled to make the connection shall work it with their own vehicles and provide their own haulage and servants, no obligation being laid on the railway company except to permit them to enter upon and use the railway line, on payment of tolls under sect. 93. The applicants are prepared to run with their own locomotives and deliver traffic at the station, which they are entitled to do, or to allow the company to take it up at the sidings, and in either case they are entitled to the communication asked for.

C. A. Russell, K.C. (*E. Moon* with him) for the railway company.—The railway company are willing to deal with the applicants' traffic in the future as they have done in the past, subject to this, that they say that by inadvertence a clause was admitted into the agreement with the applicants which was different from and more favourable to them than that which appears in every other siding agreement, because it allowed the applicants to use the siding not only for their own traffic, but for the traffic of all their tenants. We are prepared to deal with the traffic of the applicants and of their tenants, the Nicholls Chemical Company, and to make a new agreement for that purpose, but the applicants do not accept that, and insist on their rights under sect. 76. The gradient at the point where the connection is asked for is an "inclined plane" within the meaning of the section. Such a gradient is not a mere nominal variation from the level; it is a variation which would seriously affect the working of the line, and cause considerable danger of trucks running away unless they are properly handled. Mathematically this is clearly an inclined plane, and the only right the section offers to a trader for the purpose of working his own traffic is a siding on to a running line at a point where there is no substantial variation from the level. Next, as the only right given by sect. 76 is a right to use the connection for the purpose of the trader himself running his own traffic in and out, to do so cannot be done in the present state of things "with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon," within the section. They are not entitled to have the connection if, when made, it would in fact be inconvenient to the traffic, and they could not by means of their own engines and trucks work any such traffic at this point without inconvenience to the traffic. The section only gives the right to the connection if it be shown that it can be used with safety, and the traffic there safely dealt with (*Richard v. Great Western Railway Company*, *Times*, the 24th Nov. 1900), and it is the user, the bringing of carriages to, from, or on the railway that would endanger the public. Upon that ground the court ought to say that the applicants have not got any right to a connection under sect. 76, for the use not only of themselves, but of all their tenants to whom they

may let part of their land. The decision in the Court of Session (*ubi sup.*) really bears out our construction of the section. Possibly there might be no danger or inconvenience to the traffic if the applicants' own traffic were the only traffic to be dealt with, but there would be inconvenience if they were free to increase the traffic indefinitely. The case of *Cobeldick v. London and North-Western Railway Company* (*Times*, the 28th Oct. 1890) was also referred to.

WRIGHT, J.—In this case, treating the application for the present as we must treat it as an application under sect. 76 of the Railways Clauses Act 1845 alone, we think that the applicants are clearly entitled to have such a connection made as that which they propose. No modifications of detail have been suggested by the railway company. The railway company have objected to the application on three grounds: first, that the place at which the connection is sought to be made is an inclined plane; secondly, that if used as the applicants intend, or propose to use it, the siding will interfere too seriously with their own traffic. These are the two grounds with which we must first deal. As regards the question of the inclined plane, I have a strong impression, which I think the rest of the court share, that if the matter were inquired into historically, as it might be, with the view of discovering what was the meaning of the term "inclined plane" in the Railways Clauses Act 1845, the result would be that we should obtain from the engineering witnesses who are alive now, that an inclined plane meant an inclined plane worked in a different way from ordinary sections of a railway which are worked by common locomotives. However that may be, we do not think this gradient or incline of 1 in 96, or 1 in 98 as it is now stated to be, can be an "inclined plane" within the meaning of the section. The section cannot possibly be understood as meaning that every mathematically inclined plane must be an impossible site for a siding. To be an inclined plane within the meaning of the section, it must be so inclined as to be incompatible with the reasonable insertion of a junction of this sort. The evidence here is that there are sidings with a connection of this kind at a considerable number of places on a gradient not materially worse than this, and that although such a gradient as is found in this case may require special precautions for the safe working of the traffic, no danger is found to exist if those proper precautions are taken. On the second point I do not think the question really arises on this section whether the applicants can or cannot carry traffic of persons other than themselves. If they have a right to do that, if they have a right to carry the traffic of those other persons, it seems to me that according to the doctrine laid down by the Court of Appeal in *Chancery in Hughes v. Chester and Holyhead Railway Company* (7 L. T. Rep. 197; 3 De G. F. & J. 352) the applicants have an absolute legal right to have a connection made, unless one of the statutory objections mentioned in the section would apply. Beyond the statutory objection of the inclined plane the only other one, I think, is based on the words "in places where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon." We have already, in the

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case of *Richard v. Great Western Railway Company* (*ubi sup.*), gone some way towards expressing an opinion that those words probably refer to what may be broadly described as a difficulty depending on the volume of traffic. They probably refer to difficulties which can be proved as existing at the time when the question arises and the time when the connection is made, and not to difficulties which, though non-existent then, may become existent by reason of the volume of traffic afterwards. We see no reason to take a different view now; but, in any case, I do not think it is proved that in any reasonable view of the meaning of the section there is such inconvenience to the traffic as ought to be taken into consideration here. It must be borne in mind that this is a passenger line, and the Board of Trade will not pass these openings and allow the points to be used, unless their inspector is satisfied that they can be used without danger to the public. It seems to me that the applicants are entitled to have this connection made, apart from any question as to the mode of dealing with it. Those are questions which we cannot deal with at present, and it may be that the railway company will find that there is no occasion to raise those questions. If they are raised, they can be easily put into shape for determination. With reference to what I have said, that it was not proved that there was here such inconvenience to the traffic as ought to be taken into account, if it is necessary to say anything further on that, it must be clearly understood that we should probably see great danger to the traffic if the sidings were to be run over by the siding owners with their own engines on to the main line. It is quite out of the question for this court at the present day to make any order, unless it is absolutely compelled to do so, which would have the effect of allowing siding owners to run with their own engines over these main lines. Running powers of that kind would be most dangerous in every respect in the hands of irresponsible persons.

Judgment for the applicants.

Solicitors for the applicants, *Neish, Howell, and Macfarlane*, for *B. T. Westwell*, Accrington.

Solicitors for the defendants, *Woodcock, Ryland, and Parker*, for *C. Moorhouse*, Manchester.

Dec. 5 and 13, 1901.

(Before WRIGHT, J., Sir FREDERICK PEEL, and Viscount COBHAM.)

LONDON AND INDIA DOCKS COMPANY (applicants)
v. GREAT EASTERN RAILWAY COMPANY AND
MIDLAND RAILWAY COMPANY (defendants). (a)

Railways—Through rates—Dock company—Railway lines on property of—Sidings for exchange of traffic connected with railways outside—Right of dock company as a "railway company" to apply for through rates—Regulation of Railways Act 1873 (36 & 37 Vict. c. 48), s. 3—Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25) s. 25.

The L. and I. Docks Company were the owners of certain docks in the port of L., and had the control and management of the Royal V. and A. Docks. Under their statutory powers the dock

company had constructed on their dock property lines of railway and a large exchange sidings for the exchange of traffic, having a junction at one end with the N. W. Branch of the G. E. Railway and connecting at the other end with the docks, and such sidings were authorised by an Act of Parliament to be constructed as being necessary and convenient for the reception and delivery of dock traffic passing from the docks to the N. W. Branch. The dock company conveyed the traffic by their own engines from the docks to these sidings, and there placed the trucks in order on lines appropriated to the different railways, so that traffic could be, and was, conveyed from the quay sides over the dock lines to the sidings, and thence by the G. E. and M. Railways to various places. The railways on the dock property were owned and worked by the dock company under Parliamentary authority, though there were no statutory tolls, and they formed a part of one continuous route from the system of the G. E. Railway to the quay sides.

Held (Sir Frederick Peel dissenting), that the sidings so set apart for the dock railway traffic were "railways," and the dock company a "railway company," within the meaning of sect. 25 of the Railway and Canal Traffic Act 1888, and that the dock company were therefore entitled to apply to the court under that section for an order for through rates for traffic passing over their lines of railway to various stations on the M. Railway.

APPLICATION to the Court of the Railway and Canal Commission.

The application was as follows:—

The applicants were the owners of certain docks in the port of London, and in particular they had vested in them the control and management of the docks known as the Royal Victoria and Albert Docks.

The docks had been constructed under the powers conferred by various Acts of Parliament, of which those most relevant to the present application are the London and Saint Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.) and the London and Saint Katharine Docks Company Act 1875 (38 & 39 Vict. c. cliii.).

Under the powers of these Acts the applicants (including under this term their predecessors in title) constructed lines of railway forming a junction with the lines of railway of the Great Eastern Railway Company and extending for a distance of three miles or thereabouts on either side of the Victoria and Albert Docks to the various warehouses and quays of these docks.

In particular they constructed at great cost a group of sidings known as the "exchange sidings," commencing at a distance of twenty-nine chains from the junction with the Great Eastern Railway. Such sidings were authorised to be constructed as being "necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, waggons, and engines used for purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich branch, so as to render unnecessary the shunting or stopping of such trains, carriages, waggons, or engines on the North Woolwich branch. The applicants conveyed traffic by means of their own engines and servants from all parts of the Vic-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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toria and Albert Docks to the exchange sidings and there placed the trucks containing it in train order on lines appropriated for the time to the traffic of the defendants and of the several other railway companies respectively conveying traffic from these docks.

The total length of the lines of railway constructed upon the Royal Victoria and Albert Docks for the purpose of bringing railway traffic to and from the Great Eastern Railway was about forty-five miles.

As regards the construction of the lines of railway and the carrying on upon them of the traffic referred to, the applicants were a railway company within the meaning of the Regulation of Railways Act 1873, and were entitled under that Act, as amended by the Railway and Canal Traffic Act 1888, to apply to the Court of the Railway and Canal Commission for the order hereinafter prayed for.

Under the terms of an agreement made on the 18th April 1864 between the dock companies of the one part and the London and North-Western Railway Company, the Great Eastern Railway Company, and the Great Northern Railway Company of the other part the applicants performed the service of loading the traffic referred to in the third paragraph and the further services therein mentioned for the all-round sum of 1s. 5d. per ton, and the applicants were willing to submit to the order of the court as proposed hereinunder which the terms of the agreement were made applicable to the through rates proposed. There was a large volume of traffic landed *ex ship* on to the quays of the Royal Victoria and Albert Docks and dispatched thence, either direct or after warehousing in the applicants' warehouses to stations on the Midland Railway. The defendants refused to quote appropriate or reasonable through rates to be charged upon such traffic. Instead thereof they charged the rates published in the rate-book of the defendants the Midland Railway Company at their Victoria Dock station. Such rates in respect of traffic classified in classes 1 to 5 of the Railway Clearing House classification included, in addition to charges in respect of station and service terminals, a charge for cartage in London over an area extending as far as Stroud Green on the north, Forest Gate and Galleons on the east, Wandsworth-road on the south, and Ladbroke-grove on the west, and varying in amount, according to class of traffic, between 3s. 9d. and 6s. 8d. per ton.

It was in the interest of the public that freighters should not be required to pay such sums for the service of cartage when, as was the fact in respect of the traffic hereinbefore referred to, no such service and no equivalent for such service was actually performed, and it was in the interest of the public that through rates, omitting charges for such services not rendered, should be quoted for the traffic in question.

The applicants wrote to the defendants on the 12th June 1901 proposing the through rates set out in the schedule hereto.

The applicants' letter was as follows:

To the General Managers of the Midland and Great Eastern Railway Companies.—Through Rates.—Royal Victoria and Albert Docks to Bedford, &c.—In accordance with the views expressed by the Court of the Railway and Canal Commission that the formal application for through rates now before the court should be

supplemented by a further application to be made by this company in their capacity of a railway company, I now beg to propose for your acceptance the through rates set out in the schedule appended hereto, which schedule shows also the route proposed and the apportionment of the rates. The services proposed to be rendered by this company are precisely those of the agreement of 1864, except as modified by the subsequent construction of the exchange sidings, and they are intended to be in every respect those performed by us at the present moment. The apportionment of the rate as regards the Midland and the Great Eastern Companies is that which it is understood is now in force between them. Kindly inform me in due course of any objection you may have to the proposed rate, route, or apportionment.

The schedule contained in five classes, as per Railway Clearing House classification, the through rates proposed by the London and India Docks Company for traffic passing over their lines of railway to certain stations on the Midland Railway—namely, to Bedford, Northampton, Leicester, Derby, Sheffield, and Nottingham.

The route proposed: To the exchange sidings, thence by the Great Eastern Railway to Tottenham, thence by the Tottenham and Hampstead Junction Railway to Junction Road, and thence by the Midland Railway to destination.

The above-mentioned class rates include the provision of station accommodation upon the dock premises, the service of loading and covering, conveyance to the dock company's exchange sidings, conveyance thence to destination and unloading, and also the service of carting within the ordinary cartage boundaries of the towns named.

The apportionment proposed: To the London and India Docks Company in respect of the following services—namely, haulage of empty trucks belonging to the Great Eastern Railway Company from the exchange sidings to the point of loading at warehouse, shed, or quay, as the case may be, the loading of the goods and the covering of the same with sheets provided by the said railway companies or either of them, and the haulage of the loaded trucks to the exchange sidings, 1s. 5d.; to the Great Eastern Railway Company, 1s.; to the Midland Railway Company, the remainder of the rate.

The defendants replied on the 21st June 1901 to the effect that they objected to the proposed through rates, as not being a due and reasonable facility in the interest of the public, to the amounts of the proposed rates, and to the proposed apportionment thereof; and, further, that the proposed through rates would, if sanctioned, create a preference in favour of the Victoria and Albert Docks over other London docks; that the proposed rates were not and could not be made applicable in both directions, and that the London and India Docks Company were not a railway company and were not entitled to propose through rates in the capacity of a railway company.

The applicants applied to the Court of the Railway and Canal Commission under the above-mentioned Acts, and more particularly under sect. 25 of the Railway and Canal Traffic Act 1888, for an order allowing the through rates, and the apportionment of the same, as proposed by the applicants and set out in the schedule appended to the application.

In their answer the Midland Railway Company alleged (*inter alia*) that the applicants were not a railway company, and were not entitled to require the defendants to quote the through rates pro-

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posed; that the proposed through rates were not required in the public interest as due and reasonable facilities for receiving, forwarding, or delivering traffic to which the through rates applied; that the defendants carried, and were willing to carry, traffic from the docks, quays, and warehouses to the places mentioned in the application at through charges which were lower than the charges which the railway company had power to make and were reasonable, and that the applicants were bound to perform part of the services for which these charges were made as the agents of the company for the sum of 1s. 5d. per ton under an agreement between the company and the applicants' predecessors in title, dated the 18th Dec. 1877; and that if the applicants were a railway company and entitled to require through rates, there were through rates already in force, and that the company could not be required to quote any other through rates, and that the proposed through rates were insufficient in amount.

The Great Eastern Railway Company answered (*inter alia*) that under an agreement made between the Midland and Great Eastern Railway Company, the Midland Railway Company exercise running powers over the Great Eastern Railway between the Royal Victoria Dock and the junction at Tottenham with the Tottenham and Hampstead Junction Railway; that the Midland Railway Company fix the through rates to the Royal Victoria Dock, and pay to the Great Eastern Railway Company for the use of their line a proportion of receipts.

When the application was first made to the court, the docks company were the only applicants; then a second application was made, in which the Mansion House Association on Railway and Canal Traffic were added to the dock company as applicants, but the dock company did not apply as a railway company. In consequence of the opinion of the court that the dock company were a railway company and ought to apply as such, the application was then made in the present form by the dock company alone, claiming as a railway company.

Sect. 3 of the Regulation of Railways Act 1873 (36 & 37 Vict. c. 48) provides:

In this Act—The term "railway company" includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament; the term "person" includes a body of persons corporate or unincorporate; the term "railway" includes every station, siding, wharf, or dock of or belonging to such railway, and used for the purposes of public traffic.

Sect. 25 of the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25) provides:

Subject as hereinafter mentioned, the said facilities [that is, facilities for the receiving and forwarding and delivering of traffic] to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); and also the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any person

interested in through traffic, of such traffic at through rates, &c.

The London and Saint Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.) provides:

Sect. 146. It shall be lawful for the company on the one hand, and the Great Eastern Railway Company, the London and North-Western Railway Company, the North London Railway Company, the Great Northern Railway Company, the Midland Railway Company, and the Great Western Railway Company, or either of them, on the other hand, to enter into agreements with respect to the rates and charges to be levied by the company upon railway-traffic using the said docks, and as to the making of any through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded to such traffic to and at such docks, and as to the use by the said railway companies of the railways, tramways, jetties, and other conveniences at the said docks.

Sect. 147. It shall be lawful [for the above railway companies respectively] with their carriages, waggons, and servants, to use free of charge the railways, tramways, and other conveniences at the London Dock and the Victoria Dock, so as to enable them to convey goods and other traffic to and from the shipping there, subject only to such reasonable rules and regulations as the company may find it necessary in the public interest to make; and the company shall provide space at the Victoria Dock for the erection of offices by [the above-named railway companies, omitting the Great Eastern Company] for clerks and for storage of sheets, ropes, and other necessary articles required by the said railway companies, or either of them, for the conduct of their business.

The London and Saint Katharine Docks Company Act 1875 (38 & 39 Vict. c. cliii.) provides:

Sect. 4. Subject to the provisions of this Act, the company are further hereby empowered to execute and do the following works and things (that is to say):

(b) The making, providing, and maintaining, in connection with the aforesaid works or any of them, of all necessary or convenient locks, gates, graving docks, shipping places, wharves, quays, slips, jetties, landing-places, stages, rails, trams, sidings, stations, platforms, ways, approaches, warehouses, sheds, . . . and other works and conveniences.

Sect. 6. With respect to the alteration which will be rendered necessary by the execution of the Victoria Dock extension of the line and levels of the North Woolwich Branch Railway of the Great Eastern Railway Company (which railway and company are in this section referred to respectively as "The North Woolwich Branch" and "The Great Eastern Company"), the following provisions shall have effect:

(k) The company shall either set apart such sidings, or shall allow the Great Eastern Company upon the company's Victoria Dock estate to lay down free of charge and maintain such sidings as may be necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, waggons, and engines used for purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich Branch, so as to render unnecessary the shunting or stopping of such trains, carriages, waggons, or engines on the North Woolwich Branch; and the company shall permit any such sidings, whether set apart by them or laid down by the Great Eastern Company, to be fully and freely worked and used by the last-mentioned company for dock traffic.

Balfour Browne, K.O. (*Freeman*, K.O. and *Waghorn* with him) for the applicants.—The applicants found that the rates charged by the defendants to various inland towns were the same that were charged to persons for whom the defendants carted traffic to their own station at

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the dock. The applicants applied for a through rate, being less than the existing through rate by the amount of the cartage which was not done for them; and all that the applicants took off the rates proposed by them as through rates was the cartage charge. They want to get the benefit of lower through rates for their traffic from the docks, and they only ask to have the rates lower by the amount charged for cartage. It is for their benefit that they should have these lower through rates, as otherwise they might lose certain traffic, and it is also for the benefit of the public. The applicants have now applied as a railway company, and the question is whether they are a railway company entitled to apply for through rates. They are a railway company within the definition in sect. 3 of the Regulation of Railways Act 1873. These exchange sidings are a "railway," and they are "constructed or carried on under the powers of an Act of Parliament." We have the dock railways and the exchange sidings. The dock railways are clearly railways, and, even if they were not constructed under an Act, we have an Act recognising that arrangements may be made for the use of these railways (sects. 146 and 147 of the London and Saint Katharine Docks Act 1864), and that makes the applicants a railway company. The case of the exchange sidings, however, is very different; they were authorised by the London and Saint Katharine Docks Company Act 1875, and they are "railways" within sect. 4, sub-sect. 5, of that Act (which, although it does not use the word "railway," uses the word "rails"); and also within sub-sect. (k) of sect. 6. Practically the whole scheme of sidings in the existing docks has been laid down under this power, and is carried on under the powers and provisions of these two Acts. The exchange sidings are the sidings which were set apart under sub-sect. (k) of sect. 6. These provisions show that the applicants are a "railway company," and in accordance with the suggestion made by the court on the former hearing, when the court intimated their decision that they were a railway company, they now apply as such.

Cripps, K.C., Asquith, K.C., and E. R. Moon for the Midland Railway Company.—The most important point is the point whether the applicants are a railway company entitled to a through rate. With regard to the question of jurisdiction, our position is this: That, so far as our rates are concerned, the dock lines belonging to a dock company are just in the same position as a private siding belonging to a particular owner, and neither as regards the dock lines nor the private siding can this court, under the Regulation of Railways Acts and the Acts under which the court acts, grant a through rate at all; that a through rate can only be granted in fact as between railways in respect of both of which you have both the statutory tolls and the statutory limitations; that is to say, the statutory right of charging on one side and the statutory limitation as regards charging on the other. There is no jurisdiction in any court to grant a through rate which would be over a line in the nature of a private line, so far as statutory charges and statutory tolls are concerned. That is the meaning of the term "railway," and if it were what the applicants here contend for, it would allow a through rate from every colliery siding, so that any owner of a

private siding could claim a through rate. A dock company are not a railway company in connection with their lines. If they had a statutory power of charging it might be otherwise; but there is no statutory charge or statutory power of charging in connection with the dock lines or the exchange sidings, and no statutory limitations, and that is what we rely upon. The application is for a through rate, not from the exchange sidings, but from the dock side; it is therefore a through rate which applies to dock lines, and the dock company are not a railway company in connection with their dock sidings for which the through rate is asked. What takes place is not the handing over of traffic by one railway company to another railway company, but is in the nature of a handing over of traffic by a private siding owner to a railway company. Under such circumstances the dock company are not a railway company, and do not come within that term in the definition:

East and West India Dock Company v. Shaw, Savill, and Albion Company, 60 L. T. Rep. 142; 39 Ch. Div. 524;

Re East and West India Dock Company, 59 L. T. Rep. 236; 38 Ch. Div. 576.

[WRIGHT, J. referred to *Great Northern Railway Company v. Tahourdin* (50 L. T. Rep. 186; 13 Q. B. Div. 320) and *Re Eamouth Docks Company* (29 L. T. Rep. 573; L. Rep. 17 Eq. 181.) The dock lines are really rails or tramways, and they are so called in sect. 28 in the appendix to the Act of 1864. The special Acts of 1864 and 1875 merely show that they were dealing with dock lines requiring special arrangements, and not with a railway line in the ordinary sense.

E. R. Moon for the Great Eastern Railway Company.

Balfour Browne, K.C. in reply.

The case of *Manchester Ship Canal Company v. Midland Railway Company* (10 Ry. Cas. 54) was also referred to.

Cur. adv. vult.

Dec. 13. — WRIGHT J. read the following judgment:—This case is an application by the London and India Docks Company against the Great Eastern Railway Company and the Midland Railway Company for through rates, and the application alleges that the dock company are owners of the docks, and the docks have been constructed under powers of Acts of Parliament; that under those Acts the applicants or their predecessors in title have constructed lines of a railway forming a junction with a railway of the Great Eastern Railway Company and extending for a distance of three miles on either side of the docks, to various warehouses and quays, and in particular that they have constructed the exchange sidings commencing about twenty-nine chains on the dock side from the junction with the Great Eastern Railway. Then they quote the provision of the Act under which those sidings were constructed, and state that they, the dock company, convey traffic by means of their own engines and servants from all parts of the dock to the exchange sidings, and there place the trucks containing the traffic in train order on lines appropriated for the time to the traffic of the defendants, and of other railway companies conveying traffic from the docks. The total length of the lines of railway within the

dock property for the purpose of bringing railway traffic to and from the Great Eastern Railway is about forty-five miles. Then the applicants refer to an agreement of 1864, and then state the facts and claim an order allowing a through rate with a particular apportionment. To-day we have not to deal with any question of the merits. We have merely to deal with the question of jurisdiction, and that is, put shortly, whether the dock company are for this purpose in the position of a railway company owning and working a railway. There is no doubt or question whatever but that for some purposes the dock company are a railway company. Of course, they have railways—that is clear, and a very extensive system of railways—on their dock estate. They are a railway company unquestionably for some purposes, and for some purposes of the Railway and Canal Traffic Acts. Under an Act of 1882 they own and work a passenger line in all respects under the same conditions under which ordinary passenger lines are owned and worked. They have been held to be a railway company under the Railway Companies Act 1867, and the decision holding them to be a railway company has been recognised by Parliament in the Act which provided for the amalgamation of the dock companies, which enacted that the amalgamation should not deprive them of their status under that Act. But the question is whether for this particular purpose of through rates, they are in the position of a railway company within the meaning of sect. 25 of the Railway and Canal Traffic Act 1888. That section provides (without reading it all) that every railway company owning or working railways which form part of a continuous line of railway or railway communication (I leave out about canals) shall afford all due and reasonable facilities, and so forth; and it goes on to enact that one of these facilities shall be the due and reasonable receiving, forwarding and delivering by every railway company at the request of every other such company all through traffic to and from the railway of any other such company at through rates, tolls, or fares, and also the due and reasonable receiving, forwarding and delivering by every railway company at the request of any person interested in through traffic, of such traffic at through rates. Now, in determining whether the dock company are within that enactment, there are many things to be considered. There are two categories under either of which the dock company might be supposed to come. First of all, there may be a dock system in which there are laid down, in the docks, railways which may be called simply dock railways—domestic railways for the purposes of the dock traffic within the docks constructed under general powers to do what is necessary for the work of the docks, and merely, as it were, by chance, connect at the dock gates with some external railway. In a case like that it may be that there would be some purposes under the Railway and Canal Traffic Acts, with regard to which we should have jurisdiction over them as Railway Companies, but hardly, I think, in relation to the 25th section of the Traffic Act of 1888 as regards through tolls and rates. It is not necessary to express any opinion whether we should have jurisdiction in a case of that kind. In the other category would fall a dock company whose property includes

railways or portions of railways, forming in fact a continuation of general railway systems outside the dock estate, connecting the dock railways with those railways as part of one continuous system, and appropriated for that purpose by statute. It is within that latter category that, as it seems to me (I am afraid we are not quite unanimous), the dock company comes. First of all, by the Dock Companies Act 1864, s. 146, it was provided that it may be lawful for the dock company and a railway company to enter into agreements with respect to the rates and charges to be levied by the dock company upon railway traffic using the docks, and as to the making of through rates and charges and the division and apportionment thereof, and as to the facilities to be afforded. If that section stood alone it would probably not be enough to make the dock railways a continuation of the railways outside. Then comes sect. 147 which says: "It shall be lawful for the Great Eastern," and other railway companies there specified, "with their carriages, waggons, and servants to use free of charge, the railways, tramways, and other conveniences, at the London Dock and the Victoria Dock, so as to enable them to convey goods and other traffic to and from shipping there, subject only to such reasonable rules and regulations as the company may find it necessary in the public interest to make," and the dock company shall provide space for offices for the company, and for storage and so forth. Now, if that were the whole of the matter, I should be very much inclined to think it brought the dock company's railways within the scope of the Traffic Act of 1888, because it gives an absolute right for the railway companies named to use these dock railways as a continuation of their own system subject only to reasonable rules and regulations in the public interest. The matter does not rest there, nor does it rest merely on those two sections coupled with the agreement which was made during the passing of the Act of 1864, by which a right was given to the railway companies to exercise their powers on the terms mentioned in the agreement. It does not rest there, because there comes next the Dock Companies Act of 1875. By the Act of 1875, s. 6, sub-s. (f) the company are constituted proprietors of a branch called the North Woolwich branch, and in relation to that branch it seems to me that they would unquestionably be a railway company for all the purposes of any traffic which passed from outside systems over that branch, but I do not understand that that is the case in this instance, or, at any rate, I have not heard any statement that traffic, to which this application refers, is to be carried over that branch. Then in the same section there is sub-sect. (k), which provides, leaving out the immaterial words, that "the dock company shall set apart such sidings"—there is an alternative given which has been adopted—"as may be necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, waggons, and engines, used for the purposes of dock traffic passing or intended to pass to or from the Victoria Dock Extension from or to the North Woolwich branch so as to render unnecessary the shunting or stopping of such trains, carriages, waggons, or engines on the North Woolwich branch; and the company shall permit any such sidings, whether set apart by them or laid down by the

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Great Eastern Company, to be fully and freely worked and used by the last-mentioned company for dock traffic." Now it seems to me that the proper conclusion is, that under these various powers and regulations the dock company's railways, which are worked in the ordinary manner with locomotives and so forth as if they were ordinary railways, and are worked under powers, not optional, but compulsory, on the dock company in connection with the system of the Great Eastern Railway Company, must be regarded as railways within the scope of sect. 25 of the Traffic Act of 1888. I do not see what element is wanting. They are unquestionably railways. The railways are owned and worked by the dock company; they are owned and worked by the dock company under Parliamentary authority, and they are part of one continuous route from the system of the Great Eastern Railway Company to the quay sides. At any rate, they are part of the continuous route from the system of the Great Eastern Company to a long way within the dock boundary—namely, the exchange sidings—a distance of twenty-nine chains, I think it is, inside the dock boundary. Now, that part at any rate, those twenty-nine chains or whatever the distance may be, seems to me to be unquestionably part of one continuous system of railway communication. I do not think it is necessary to say whether the rest of the dock railways reached from the Great Eastern system *via* the exchange sidings, are in the same sense part of the continuation of the general railway system or not; but at any rate, as regards that portion of the exchange sidings, it seems to me that the section is applicable, and that is enough to make the dock company interested in a portion of the route, which route consists of the Great Eastern system, and of this portion of the exchange siding in combination with the one route. It is said that there are no statutory tolls. That is quite true. There is no statutory regulation of tolls or rates chargeable by the dock company for the use of this railway, although there is a statutory regulation of the maximum tolls and rates which they can charge for all dock services, but the Railway and Canal Traffic Acts do not provide, either in the definition of a railway company or elsewhere, that the existence of a statutory regulation of tolls or rates shall be essential as a condition for the application of the Act. Then it is said no returns are made to the Board of Trade, and no provisional order was issued by the Board of Trade or passed by Parliament in relation to the dock railway company. There may have been reasons for that, or it may have been a slip on the part of the Board of Trade. That cannot govern the construction of the section. For these reasons, I am of opinion that the dock company are a railway company not merely for some purposes but for this particular purpose, and that the application is well-founded in that respect.

Sir FREDERICK PEEL read the following judgment:—This is an application to us to order through rates proposed to the Midland and the Great Eastern Railway Companies by the London and India Dock Company for traffic from the Victoria and Albert Dock, *via* the dock company's lines of railway to stations on the Midland Railway. The question is whether these dock lines are a railway within the meaning of sect. 25 of

the Traffic Act of 1888, which describes the traffic a railway company may be required to forward at through rates as traffic arriving by the railway of another railway company. Now a railway for this purpose must be one constructed or carried on under the powers of an Act of Parliament, and I am inclined to think that the dock company's portion of the through route is not a railway of that sort. The three Dock Acts of 1853, 1864, and 1875 are the material we have for judging of this. The Act of 1853 required the dock company to permit the Eastern Counties Railway Company to lay down railways at the intended Victoria Dock, but gave the dock company itself power only to make tramways in connection with the dock, and the Act of 1864, which transferred the Victoria Dock estate to the London and Saint Katharine Dock Company, while it authorised the Great Eastern, the Midland, and other railway companies to use the railways, tramways, and conveniences at the London Dock and the Victoria Dock, left the powers of the dock company for constructing or carrying on railways as it stood under previous Acts. Then under the provisions of the Act of 1875 for the extension of the Victoria Dock, the dock company are either to set aside for the use of the Great Eastern Company, or to allow that company to lay down upon the Victoria Dock Estate such siding as may be necessary for the accommodation of trains with traffic passing between the Victoria Dock extension and the Great Eastern Railway Company's North Woolwich branch, so as to dispense with any shunting of the trains on that branch. In the execution of this Act the dock company appear to have constructed on their dock estate large sidings for the exchange of traffic, having a junction at one end with the North Woolwich branch, and connecting at the other end with the docks. By agreement with the Great Eastern and other railway companies they work the dock railway traffic over these lines to and from the exchange sidings to which the railway companies come to receive and forward or deliver it as the case may be. The sidings and lines so made by the dock company are their portion of the proposed through route, and the question is, I think, does the direction to set apart sidings for dock railway traffic make the sidings so set apart a railway, and the company providing or owning them a railway company? It seems to me that it does not, because the sidings which the dock company are directed to set apart refer, I think, to the sidings which by sect. 4 of the Act they are authorised to make in connection with the Victoria Dock extension, and, unless these sidings are a railway, I do not think the setting them apart for Great Eastern Railway traffic would make them such. The various works, however, authorised by sect. 4 are evidently allowed as works incidental to and an integral part of the dock undertaking, and the company's position in relation to them is that of a dock company only. In other respects the applicants have none of the grounds for being regarded as a railway company, which in the case of the *Manchester Ship Canal* (*ubi sup.*) led us to regard that company as a railway company competent to propose through rates to and from their docks, and on the whole I think the through rates as proposed by the applicants cannot be granted.

OT. OF APP.] THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOC. [OT. OF APP.]

Viscount COBHAM.—So far as I have been able to form an opinion on the difficult points of law and construction which are involved in this case my conclusion is in accord with that of the learned judge, and I shall not attempt to add anything to what he has said. *Judgment for the applicants.*

Solicitors for the applicants, Turner, Son and Foley.

Solicitor for the Great Eastern Railway Company, E. Moore..

Solicitors for the Midland Railway Company, Beale and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 7 and Dec. 2, 1901.

(Before WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Building society—Infant member—Advances—Security—Power to mortgage—Purchase of land by infant—Payment of purchase money by building society to vendor—Lien—Building Societies Act 1874 (37 & 38 Vict. c. 42), s. 38—Infants Relief Act 1874 (37 & 38 Vict. c. 62), s. 1.

The provision in sect. 38 of the Building Societies Act 1874 that an infant may be admitted as a member of any building society, the rules of which do not prohibit such admission, "and may give all necessary acquittances," does not render valid a mortgage of his real estate to secure advances made to him by the society. Such a mortgage is void under the Infants Relief Act 1874.

An infant became a member of a building society and obtained advances from them, a part of the money being paid by the society to the vendor of a piece of land purchased by her, which, to secure these advances, she mortgaged to the building society, the mortgage being in the ordinary form of a building society's mortgage.

The land was conveyed by the vendor to the infant by a deed dated the 21st July, and the mortgage was dated the 22nd July.

With the balance of the money the infant proceeded to build upon the land, and while the houses were in course of erection the building society discovered for the first time that she was an infant at the time she executed the mortgage. They thereupon, without any default on her part in paying the instalments of principal and interest, entered into possession of the mortgaged property, and after completing the houses let them and collected the rents. After attaining her majority she brought an action against the building society alleging that the mortgage was void by reason of her being an infant at the time she executed it, and asking that it might be delivered up to be cancelled, and for possession of the land and title deeds.

Held, that the purchase of the land and the mortgage to the building society were distinct transactions, and that the mortgage was void against the plaintiff under the Infants Relief Act 1874; but that the plaintiff could not affirm the conveyance of the land to herself and repudiate the amount paid by the society to the vendor, and the society had a lien on the land and title deeds for that amount with interest.

Decision of Joyce, J. (83 L. T. Rep. 424) varied.

In June 1898 the plaintiff, Mrs. L. M. Thurstan, who was then an infant, was admitted a member of the defendant society, which was a building society incorporated under the Building Societies Act 1874.

Early in July 1898 the plaintiff, being desirous of purchasing a piece of freehold land and completing six houses then in course of erection upon it, applied to the society, on their printed forms, for a loan of 1200*l.* on the security of the land and houses.

The application was accepted, the society being ignorant that the plaintiff was an infant, and the transaction was carried out by two deeds, executed at the same time, but dated respectively the 21st and 22nd July 1898.

By the first deed the piece of land was conveyed by the vendor to the plaintiff in fee simple in consideration of 393*l.*, which was expressed to be paid by her to the vendor out of her separate estate.

The second deed was an indenture of mortgage made between the plaintiff of the one part and the defendant society of the other part and executed by the plaintiff, and, after reciting that the plaintiff was seised in fee simple in possession free from incumbrances of the hereditaments thereafter described, and that she was a member of the defendant society and according to the rules thereof was entitled to receive out of the funds the sum of 1200*l.* in respect of her twelve shares, and that for the purpose of securing the several payments to become due from her as a member of the defendant society she had agreed to convey such hereditaments in consideration of 1200*l.* paid to her by the defendant society, the plaintiff, as beneficial owner, conveyed to the defendant society in fee simple the aforesaid land with the houses then erected or in course of erection thereon subject to a proviso for redemption thereof if the plaintiff should duly make the several subscriptions and payments and observe the regulations of the defendant society which the plaintiff thereby covenanted to do accordingly, and it was thereby declared that the monthly subscription payable in respect of such advance should be 10*l.* 4*s.*

The defendant society paid 250*l.*, part of the purchase money, to the vendor on behalf of the plaintiff, and afterwards made further advances to her.

In Oct. 1898 the defendant society for the first time became aware that the plaintiff was an infant at the time they made the advances to her, and immediately entered into possession of the land and expended the further sum of 268*l.* in completing the houses upon it. When the houses were completed they let them and collected the rents, amounting in all to about 110*l.* per annum.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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The plaintiff attained the age of twenty-one years on the 25th March 1900, and gave notice to the tenants to pay their rents to her, but they refused to do so.

On the 7th April 1900 the plaintiff commenced this action against the defendant society asking for a declaration that the mortgage deed was void and not binding on her, and that she was entitled to have it delivered up to be cancelled.

The defendant society by their defence alleged that they believed the plaintiff to be of full age at the time they made the advances to her, but they did not allege that the plaintiff had been guilty of any fraud, or had represented that she was of full age.

They claimed to have a lien or charge on the land for the moneys advanced by them to the plaintiff.

In their evidence the defendant society admitted there had been no default in paying the instalments of principal and interest due on the mortgage.

Under the rules of the society a minor could become a member.

Joyce, J. held that the purchase of the land and the mortgage to the building society were all one transaction, and that the plaintiff could not repudiate one part of the transaction and affirm and take the benefit of the rest, and that the building society was entitled to a lien for the amount of the advances, and he dismissed the action.

The plaintiff appealed.

SECT. 1 of the Infants Relief Act 1874 provides:

All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void. Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

The Building Societies Act 1874 provides:

SECT. 13. Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estates by way of mortgage.

SECT. 38. Any person under the age of twenty-one years may be admitted as a member of any society under this Act, the rules of which do not prohibit such admission, and may give all necessary acquittances; but during his non-age he shall not be competent to vote or hold any office in the society.

Badcock, K.C. and Edward Ford for the appellant.—The appellant being an infant at the date of the mortgage it was absolutely void:

Infants Relief Act 1874, s. 1;

Hearle v. Greenbank, 3 Atk. 695, 712.

[*ROMER, L.J.*—According to *Simpson on Infants*, 2nd edit., p. 7, an infant's deed is only voidable. *COZENS-HARDY, L.J.*—In *Zouch v. Parsons* (3 Burr, 1794, 1804) *Mansfield, C.J.* said so.] If the deed is voidable only, the plaintiff has in no way confirmed it:

Martin v. Gale, 36 L. T. Rep. 357; 4 Ch. Div. 428;

Inman v. Inman, L. Rep. 15 Eq. 260.

It is not alleged that the plaintiff has been guilty

of any fraud or misrepresentation. She made no express representation that she was of full age:

Ex parte Jones, 45 L. T. Rep. 193; 18 Ch. Div. 109;

Stikeman v. Dawson, 1 De G. & Sm. 90.

The plaintiff relies on her legal rights, and does not rely on any equitable right. The conveyance and the mortgage were not one transaction, but two. It might be one transaction if the society had conveyed the land to the plaintiff and she had then mortgaged it to them, but it was conveyed to her by the vendor. The legal estate is still in the plaintiff, and the defendants have no equity to compel her to convey it to them. She is therefore entitled to the title deeds which they obtained because they paid the vendor. The fact that the society paid 250*l.* to the vendor does not give them a charge on the land for the subsequent advances:

Ex parte Fuller, 44 L. T. Rep. 63; 16 Ch. Div. 617;

Holmes v. Blogg, 8 Taunt. 508; 19 B. R. 445;

Re Cooper, 47 L. T. Rep. 89; 20 Ch. Div. 611;

Re Ingham, 68 L. T. Rep. 152; (1893) 1 Ch. 352.

Then sect. 38 of the Building Societies Act 1874 does not by the words "may give all necessary acquittances" authorise an infant member of a building society to execute a mortgage of his real estate to the society. The section does not apply to borrowing by a member, but only to infants becoming members and paying money to the society. Where such a power is intended to be given, it is done in express words. By the Trade Union Act Amendment Act 1876 (39 & 40 Vict. c. 22), s. 9, it is provided that an infant member of a trade union may "execute all instruments and give all acquittances necessary to be executed or given under the rules," and there are similar provisions in sect. 11, sub-sect. 9, of the Industrial and Provident Societies Act 1876 (39 & 40 Vict. c. 45) and in the Friendly Societies Act 1875 (38 & 39 Vict. c. 60), s. 15, sub-s. 8.

Hughes, K.C. and G. Broke Freeman for the defendants.—The purchase and the mortgage were really one transaction. The society paid the purchase money directly to the vendor. The plaintiff never had the fee unincumbered. It was always subject to the charge to the society. She cannot affirm one part of the transaction and repudiate the other. The defendants have an interest in the land for the money advanced to build the houses as well as for the amount paid to the vendor. The mortgage being in existence, the lien the society already had extended to the money advanced, which was spent on the property and increased its value. Infancy is no defence to an action for calls upon shares if the infant retains the shares:

Cork and Brandon Railway Company v. Casement, 10 Q. B. 935, 939;

North-Western Railway Company v. M'Michael, 5 Ex. 114.

This mortgage is valid under the Building Societies Act 1874. The object of such a society is to enable the members to build, and the object of this society is so stated in the rules. Sect. 38 gives an infant member power to do anything which an adult member may do under the Act, unless there is an express provision to the contrary. The terms of the mortgage are not a matter of bargain in each case, they are fixed by the rules, so an infant cannot be imposed upon. In *Dennison v. Jeffs* (74 L. T. Rep. 270; (1896) 1 Ch. 611) it

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was decided that an infant member could consent to the dissolution of a building society. They also referred to

Building Societies Act 1874, ss. 14, 15 (1), 21.

Badcock, K.C. in reply.

Cur. adv. vult.

Dec. 2.—WILLIAMS, L.J.—I cannot agree with the conclusion at which Joyce, J. has arrived in its entirety. I think that the mortgage deed is void and not binding on the plaintiff. It seems clearly to come within sect. 1 of the Infants Relief Act 1874 as being a contract “for the repayment of money lent”; and I cannot regard the transaction of the purchase of the land and the advance of the money for building as all one transaction. The transaction of the purchase was a transaction between the vendor and Mrs. Thurstan, whereas the transaction of the advance of the money was between the building society and Mrs. Thurstan. The former transaction was voidable, and Mrs. Thurstan has affirmed it. The latter was void so far as the contract to repay is concerned. I think that the advances of money for building stand on a different footing from the 250*l.* paid by the building society for the purchase of the land and the expenses of conveyance. The money advanced for building was simply money lent, and the society has no security except the mortgage, which, in my judgment, is void as a contract for repayment of money lent; whereas in the transaction of purchase the society acted as the agents of Mrs. Thurstan to carry through the purchase for her by paying the purchase money and obtaining a conveyance to her. In my opinion, Mrs. Thurstan could not adopt the act of her agents and claim to have the title deeds and conveyance handed over to her by the building society without paying to them the purchase money which they paid to obtain the conveyance; and I think that, without any contract to that effect, the society have a lien or charge on the title deeds and conveyance for the money which they paid to obtain the property, which Mrs. Thurstan now claims. If Mrs. Thurstan adopts the acts done by the society, she must discharge the cost and indemnify the society against the same. I thought during the argument that the only security which the building society held for the 250*l.* which they had paid for purchase money was the lien on and right to retain the title deeds and conveyance until the money had been repaid; but I am satisfied now, after discussing the matter with my brethren, that the society, having paid off the vendor, have a right to the remedies of the vendor—have a right, that is, to enforce, the vendor's lien. It is true that the society were not the vendors, but, having paid off the vendor, the society, as against the purchaser, stand in the place of the vendor. It follows, in my judgment, that the plaintiff is entitled to a declaration that the mortgage deed is void and not binding on her, and is entitled to delivery up of the same and to have it cancelled, but is not entitled to have the title deeds given up discharged from any lien or charge of the society unless and until she pays to the society the purchase money which the society paid for the land. I think, moreover, that the society, the defendants, are entitled to have a declaration that they have a lien or charge on the

land for the amount of the said purchase money and expenses, and that, so far as is necessary, the plaintiff is trustee for them of the land conveyed to her. The only other matter with which I have to deal is an argument put forward on behalf of the defendants that sect. 38 of the Building Societies Act 1874, which enables minors to become members of these societies, validates contracts by them to repay moneys which are lent to them by the society. I cannot agree. On this point I take the same view as Joyce, J. The section only validates the contract of membership. Borrowing money is not the necessary consequence of membership. In fact, the majority of members do not borrow of the society. The society can only make advances on the security of a land mortgage; and I think it would be straining sect. 38 very much to hold that it authorised an infant to raise money on mortgage of his land. It only remains to deal with costs. I think each party should bear his own costs of this appeal and below.

ROMER, L.J.—The first question is, whether the Building Societies Act of 1874 enables a minor, by becoming a member of a building society, to borrow money by means of advances on mortgage of his property. I do not think it does. As pointed out by my Lord, though the Act enables a minor to become a member, it has not in terms authorised his borrowing while under twenty-one years of age, and it is not a necessary part of a member's position that he should have advances or mortgage his property. Many members never want advances, and many others, even if they desired advances, could not obtain them, by reason of having no sufficient property to give as security. A minor, who cannot legally contract for a loan or mortgage his estates, is in no worse position than the members I have last mentioned. And to hold that the Building Societies Act has given a minor general power in the shape of advances to borrow, and to mortgage his estates, would practically to a great extent destroy the protection intended to be given to infants by the Infants Relief Act 1874. A building society is not bound to see to the application of its advances by the members advanced. All it need look to is the sufficiency of the security. And if the Building Societies Act authorised any infant to take advances, and mortgage his or her estates for the amount advanced, then every infant with an estate might borrow to the extent of that estate as a security, by merely joining a building society. I do not think the Building Societies Act has authorised this, or has the effect contended for by the defendant society. The case then has to be considered according to ordinary principles regulating dealings by infants. Now, to the extent to which the money advanced by the defendant society went to complete the purchase by the plaintiff, I agree with Joyce, J. in thinking that the plaintiff cannot affirm the purchase and repudiate the advance. But for that advance the vendor would have had a vendor's lien on the estate purchased for the amount, and to that extent I think the defendant society can stand in the shoes of the vendor. But beyond this I do not think we can go with the judgment in the court below. To my mind, it is impossible to treat the advances which were made subsequent to the completion of the purchase as forming one transaction with the purchase, and I think these

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advances cannot be treated as binding the infant on the ground adopted by Joyce, J. Nor can the mortgage be held on that ground to bind the plaintiff. At first I was inclined to think that some other good ground might be found by which the advances, as binding the estate, and the deed of mortgage might be supported, at any rate to some extent. But I have been unable to find any such ground. The Infants Relief Act 1874 is too strong. No doubt the result will be a great hardship on the defendant society, but the Legislature thought it necessary, for the benefit of the community at large, to provide that all contracts by infants for repayment of money lent should be absolutely void. If this results in a hardship to an individual lender, it cannot be helped. He must suffer for the public good. Of course, different considerations would arise if the infant had been guilty of fraud. But here no charge of fraud is made. The plaintiff did not represent or induce the building society to believe that she was of full age. On what other ground then can the court hold that a contract that is void gives the lender a charge on the borrower's land? I know of none. Even if the borrower had, as a matter of fact, and for his own purposes only, used the money to buy some chattels or lands, the lender could not have claimed those chattels or lands, or any charge on them. And, if the borrower had chosen to spend the money in building on his land, that fact, in itself, would not give the lender a charge on the land. It occurred to me that, as the building society in this case advanced its money by instalments to the infant in order to pay her builder, and, inasmuch as the contract to build, as between the infant and the builder, was not one of loan, and might not be void under the statute as a contract for goods supplied, the building society might stand in the shoes of the builder. But, even if that were the case, it would not help the society in this case, for the builder had no lien or charge on the land in respect of the building work done. Lastly, it was suggested on behalf of the building society that, inasmuch as it has a charge on the plaintiff's land for the sum paid on completion of her purchase to the vendor, the plaintiff, being obliged to redeem the land from that charge, is bound to do equity, and that it would not be equity to allow the plaintiff to redeem without paying the moneys subsequently advanced by the society, at any rate to the extent to which the land has been benefited by those moneys. But the short answer is that a court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void. It follows that there must be a declaration that the mortgage is void as against the plaintiff, and the mortgage deed should be cancelled. But it should also be declared that the society was, at the date of the completion of the purchase, entitled to a charge for the limited sum above mentioned, with interest thereon at 4 per cent., and was entitled to retain the title deeds accordingly. I agree with my Lord in thinking that there should be no costs. The defendant society, having only an equitable charge, was not entitled to take possession of the mortgaged property. The proper remedy of the society was to obtain a receiver. But I do not think it would be right to insist on the plaintiff being at once let into possession, as

the defendant society ought to have time to consider its position, and to apply for a receiver if so advised. There should, therefore, only be liberty reserved for the plaintiff to apply for possession. No further relief can be granted in this action.

COZENS-HARDY, L.J.—I agree, and I have very little to add. Two contracts have to be considered. The first was a contract for the purchase of the land. This was voidable only, and not void, and has been adopted and confirmed by the plaintiff since she attained twenty-one. Under this contract, and as a legal consequence of it, there arose a vendor's lien for unpaid purchase money. The second was a contract for the repayment of money lent and to be lent. This was absolutely void under the statute of 1874, and not capable of confirmation. The defendants are in no better position, and they ought not to be in a worse position, than if the plaintiff had been adult, but the mortgage deed were proved to be forged. Even in that case the defendants would be entitled to stand in the shoes of the vendor to the extent to which their money discharged the vendor's lien: (see *Brooklesby v. Temperance Permanent Building Society*, 72 L. T. Rep. 477, 479; (1895) A. C. 173, 182). The result is that we must declare that the defendants had a charge for the amount paid by them to the vendor with interest at 4 per cent.

Solicitors: *Beyfus and Beyfus; Peacock and Goddard*, agents for *Rothera and Sons*, Nottingham.

Wednesday, Dec. 4, 1901.

(Before WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

Re GRIFFIN; GRIFFIN v. GRIFFIN. (a)

APPEAL FROM THE CHANCERY DIVISION.

Friendly society—Policy of life assurance—Assignment—Validity—Nomination—Friendly Societies Act 1875 (38 & 39 Vict. c. 60), s. 15—Friendly Societies Act 1896 (59 & 60 Vict. c. 25), s. 56.

Policies of life assurance granted by friendly societies under the Act of 1875 are assignable in the ordinary way as well as by nomination under that Act.

Semble, such policies are assignable in the same way if granted under the Friendly Societies Act 1896.

Caddick v. Highton (80 L. T. Rep. 527) and Re Redman; Warton v. Redman (85 L. T. Rep. 13; (1901) 2 Ch. 471) overruled on this point.

G. GRIFFIN was a member of the Royal Liver Friendly Society, and in 1894 insured his life with the society for the sum of 30l. payable on his death.

In 1895 he assigned the policy to the plaintiff for valuable consideration.

On his death in 1901 the plaintiff claimed payment of the sum insured, which was also claimed by the widow of the deceased, who was his administratrix.

The society was registered under the Friendly Societies Acts, and the deceased had not made any nomination with respect to the policy.

The plaintiff commenced this action and applied

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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for the appointment of a receiver of the policy moneys.

The application was refused by Joyce, J., who, without expressing any opinion of his own, followed a previous decision of Kekewich, J. in *Re Redman*; *Warton v. Redman* (85 L. T. Rep. 13; (1901) 2 Ch. 471), in which he followed a prior decision of Phillimore, J. in *Caddick v. Highton* (80 L. T. Rep. 527), where he held that policies of this nature could only be assigned by means of nomination under the Friendly Societies Acts.

The plaintiff appealed.

By sect. 15 of the Friendly Societies Act 1875 it is provided:

(3) A member of a society (other than a benevolent society or working men's club), not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, not being an officer or servant of the society, to whom any moneys payable by the society on the death of such member, not exceeding 50*l.*, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid. (4) If any member of a society, entitled from the funds thereof to a sum not exceeding 50*l.*, dies intestate and without having made any nomination under this Act which remains unrevoked at his death, such sum shall be payable, without letters of administration, to the person who appears to a majority of the trustees, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same.

P. O. Lawrence, K.C. and Austen-Cartmell for the appellant—These policies are *prima facie* be assigned in the ordinary way, and there is nothing in the Friendly Societies Acts or in the rules of the society to take away the right to assign them. The fact that a member can nominate a person to receive the money by an entry in the books of the society up to the sum of 50*l.*, and thus save expense and stamp duty, does not take away the ordinary right to assign the policy in the usual way. The power to nominate is a privilege given to members, and does not abrogate the ordinary right to assign. There is nothing in the Acts which prohibits assignment expressly or by implication, and the defendants must show that there is such prohibition. Further, an assign is recognised by the Acts. They referred to

Re Royal Liver Friendly Society, 56 L. T. Rep. 817; 35 Ch. Div. 332;

Grinkham v. Card, 7 Ex. 833;

Re Turcan, 59 L. T. Rep. 712; 40 Ch. Div. 5;

Ashby v. Costin, 59 L. T. Rep. 224; 21 Q. B. Div. 401;

Bennett v. Slater, 79 L. T. Rep. 324; (1899) 1 Q. B. 45;

10 Geo. 4. c. 56, ss. 2, 37;

4 & 5 Will. 4, c. 40, s. 2;

3 & 4 Vict. c. 73, ss. 2, 3;

9 & 10 Vict. c. 27, s. 1, sub-s. 4;

13 & 14 Vict. c. 115, ss. 2 (4), 12;

18 & 19 Vict. c. 63, ss. 5, 9, 24, 37, 40;

Friendly Societies Act 1875 (38 & 39 Vict. c. 60), ss. 4

("Persons claiming through a member"), 8, 15

(sub-ss. 3, 4, 5, 8), 18 (sub-s. 1), 22, 30 (sub-s. 10);

Friendly Societies Act 1896 (59 & 60 Vict. c. 25),

ss. 56, 57, 60, 106 ("Persons claiming through a member");

Industrial and Provident Societies Act 1876 (39 & 40 Vict. c. 45), s. 3.

Hughes, K.C. and J. M. Gover for the widow.—When the Act of 1875 is looked at in the light of the earlier Acts, it is clear that the intention was that no irrevocable alienation should be made with reference to sums under 50*l.* This money is not in the position of the ordinary property of the assured; it is a fund to be applied in a particular way only—namely, in accordance with the provisions of the Act and the rules of the society. There may be a right of assignment as to amounts over 50*l.* Sect. 8 of the Policies of Insurance Act 1867 (30 & 31 Vict. c. 144) shows that policies in friendly societies cannot be assigned.

Younger, K.C. and Mark Romer for the trustees of the society.

WILLIAMS, L.J.—In this case the question really raised is whether or not a policy issued by a friendly society governed by the Act of 1875 is or is not assignable, and I have come to the conclusion that it is assignable. Where a policy is taken out for a sum of money which is payable to the member who takes out the policy, or his personal representative, by virtue of the contract entered into, no one will deny for a moment that such a sum of money, *prima facie*, is part of the property of the member, or the estate of the deceased member, as the case may be. Therefore we must find something in the Act of 1875, or in the rules of the society, which prevents this particular property having this ordinary incident of property. Now, it is admitted on both sides that there is nothing whatsoever in either Act of Parliament or the rules which expressly prevents the moneys payable under this policy, or the policy itself, from being assignable. If, therefore, the policy is not assignable it must be from some implication arising under the statute. I do not propose to go through all the legislation upon the subject of friendly societies prior to 1875, or to deal with the arguments that Mr. Lawrence put forward, based upon the presence in these Acts of Parliament of words and phrases which seem to recognise the rights of persons not members of the society, claiming through members of the society. I think it is more satisfactory to decide this case upon the interpretation of the Act of 1875, and really only one section of the Act of 1875 has been referred to from which it could be argued that the statute takes away by implication the power to assign a policy issued by the society, and that is sect. 15, sub-sect. 3. That provides: "A member of a society (other than a benevolent society or working men's club), not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, not being an officer or servant of the society, to whom any moneys payable by the society on the death of such member, not exceeding 50*l.*, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid." It is said one ought to draw the inference from that provision that the statute intended that the power of nomination thus given by that sub-section should be the only mode of alienation of moneys under

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a policy issued by a friendly society governed by this statute. I think we are not bound to draw any such conclusion, and that we ought not to draw it. In the first place, sub-sect. 3 is apparently intended not to give so much a power of alienation as to give a testamentary power of disposition. It is a sub-section which enables the nominator to nominate a person to whom the moneys arising under the policy shall be paid at his decease. That power is by the express terms of the Act of Parliament a revocable power, but it is revocable only in a way provided by the statute; that is to say, by delivering a particular notice to the society. But why is it suggested that this sub-sect. 3 of sect. 15 takes away the power of alienation? It is said that there is an express provision in this Act of Parliament that the money shall be paid in accordance with this nomination unless the nomination has been revoked; and then it is said that, if that is so, it might be that there is outside and beside the nomination an assignment, possibly an assignment for value, and that, having regard to the imperative words of this sub-section, the money must be paid in accordance with the nomination unless it is revoked. This might put the nominator in a position whereby he could revoke a previous assignment for value, or could defeat the claim of such an assignee. I do not know how that might be. It is said, I know, it is not likely that the Legislature meant to put the nominator or his assignee for value in such a position, and that the way to avoid that is to read sub-sect. 3 as providing one express mode of alienation, and excluding all others; but, as I have already said, this question as to what might be the position of an assignee for value as against a nominee does not really arise in this case, and we have not to decide it. As far as my decision is concerned, I must be taken to decide that, whether or not that difficulty, or that hardship, or that strange position would arise, I cannot find sufficient in the Act of Parliament to make me say that by necessary implication the ordinary incident of property is taken away. I think that the policy of insurance, and the moneys payable under it, are assignable. In the particular case we have before us, the policy was only a 30*l.* policy and there was no nomination; and for that reason I decline to go into the question of what might be the state of things if the policy had been for a larger sum than 50*l.*, and there had been a nomination as to 50*l.* and a surplus beyond. We have not to decide that question. All we have to decide now is in the case of a policy for 30*l.*, there being no nomination, whether or not an assignment executed by the member of the society who took out the policy in his lifetime is effective to transfer to the assign the right to this 30*l.*, or whether it becomes part of his general estate; and I hold that it is effective to transfer to the assign that policy and the moneys under it.

ROMER, L.J.—I agree. As my Lord has pointed out, the policy moneys in question in this application are *prima facie* assignable. To make them non-assignable you must find some legislative enactment to that effect, either express or arising by necessary implication. After considering the various Acts to which our attention has been called, I can find no such legislative

enactment. The case is really governed by the Act of 1875, and, far from finding any express enactment in that Act prohibiting assignment, there are expressions used in that Act, and provisions in it, which seem to me to militate against the idea that an assignment in such a case was not recognised by the Act. There is, for example, the definition in sect. 4 of the Act. That section defines "persons claiming through a member," and says it includes "the heirs, executors, administrators, and assigns of a member, and also his nominees, where nomination is allowed." The fact that in that definition both the assigns and the nominees are put together seems to my mind sufficient. And that section is followed up by several important sections where the expression I have referred to is used; for example, in sect. 21, sub-sect. 2, which gives a right of suing the friendly society to a "member, or person claiming through a member." It provides that in legal proceedings "which may be brought under this Act by a member or person claiming through a member," the society may be sued in a particular way. Now, the chief section relied on by the respondents in this case as supporting their contention is sect. 15. To my mind, that section may one of these days give rise to questions of some difficulty which fortunately do not arise on this appeal. And I should like to keep my mind free to decide those questions when they come before us. I mean questions which may arise between persons nominated under this section by a member to receive moneys payable on his death and the express assigns of that person who effected the policy. Also questions of this kind, as to whether, as between the member and his nominee, there might not be provisions, enforceable on behalf of some persons, which had made the nominee a trustee. I am not indicating any opinion one way or the other. I only say that these questions and similar questions may arise and may have to be considered hereafter. In the case before us there is no nomination; the member has not nominated any person to receive these policy moneys, so that the question is whether there is anything in sect. 15, sub-sect. 3, which tends to show, or shows by necessary implication for there is nothing express, that, in a case where there are no nominees under the section, an assign for value, or an assign from a member in his lifetime, should have no legal position, and could not have his rights in any way recognised or enforced. I am bound to say I cannot find in this section any such necessary implication. It appears to me that, even giving the fullest rights to the nominees, it does not follow that in a case where there are no nominees there should not be a right to assignment, and that the assigns should have no rights whatever. The mere fact that nominees have been provided for by the sub-section does not, in my opinion, justify the argument, or the conclusion, that the Legislature intended that no other persons claiming through a member should be recognised than these nominees. It may well be when such questions, as I have before referred to, come to be considered that it may be held that these nominees are really only in the nature of assigns—assigns claiming under what is equivalent to an assignment which is revocable in a particular way; or that they are in the position only of assigns

whose position, unless their position is revoked, is conclusive as between them and the society. It may well be that that is the proper view to take; I express no opinion upon it, for, as I have said, it does not arise here. But I can find nothing in the Act of 1875, even assuming that the nominees are in the position of persons who have titles for all purposes which negative, when they do exist, the rights of the assignees for value—even assuming that, I can find nothing that justifies the inference that when there are no such nominees you can have no other assignees at all. I should like to say, further, with reference to the judgment of Phillimore, J. in *Caddick v. Highton* (*ubi sup.*), to which our attention has been called, that I cannot see anything in the Policies of Assurance Act 1867 which justifies the conclusion that Phillimore, J. came to in that case. All that the Act of 1867 did was to give the assignees of most policies the right to sue on those policies at law. It excepted the policies of such a class as we have to consider on this appeal; but it appears to me that might well have been, because, if the last-mentioned policies were not excepted, it might have justified the argument that those policies could have been sued on in the ordinary way without being hampered or hindered in any way in the ordinary courts of law; whereas we know from the course of legislation on the subject of friendly societies that provisions more or less of a stringent character have been made to settle disputes before special tribunals, and I need not say now that those provisions compel disputes to be settled in a special way, and only render them enforceable in special cases. But it may well be that the Legislature in passing the Act of 1867 did not want to throw any doubt on the efficacy of those provisions in the case of policies of the kind we have to consider on this appeal. Lastly, I cannot find anything in the case of *Bennett v. Slater* (*ubi sup.*) which would justify us in allowing the contention of the respondents on this appeal. And for those reasons I agree in thinking that the appeal should be allowed.

COZENS-HARDY, L.J.—I agree. This is really an appeal from the decision of Phillimore, J. in *Caddick v. Highton* (*ubi sup.*). He there decided in terms that policies of this nature cannot be assigned; they can only be nominated; and unless and in so far as they are nominated they vest both legally and beneficially in the legal personal representative of the deceased member. In order to establish that, it is important to remember how to approach an Act like the Friendly Societies Act 1875. It is not necessary to find any clause enabling assignments to be made. If the view of Phillimore, J. is correct, you must find some words preventing the owner of the property from disposing of that which did not belong to anyone else. I do not find any such words in this Act. I will not go through the sections my learned brothers have gone through, but I will refer to sect. 18, sub-sect. 1, which seems to me strong to show as to this Act that the owner of the policy can deal with it as part of his property. It provides a mode in which the funds of the society may be invested, and the Legislature said, in effect, that the funds of this society may be lent to members on personal security, with two satisfactory sureties to the amount of half the value of the

policy; and that the amount due on the loan may be deducted from the policy when it matures. That seems to me consistent, and only consistent, with a view that this policy is a part of the property of the assured. Then reliance is placed on *Bennett v. Slater* (*ubi sup.*); but that case when carefully considered seems to me to be a strong authority in support of the view that this is property subject to assignment, for the Lords Justices there held that although so long as there was a nomination in force and unrevoked the will of the assured had no operation on the policy, yet, if it had been revoked, the policy would have formed part of his estate and been subject to his disposition by will. We are not met here with the more difficult problem Phillimore, J. had to deal with of assignment for value followed by nomination. I desire, as my learned brothers have, to keep that an open point. Here there was no nomination, and we have nothing but the policy, the assignment, and the death of the insured, and I have no doubt the assignment was perfectly good.

[The motion was treated as the trial of the action, and an order was made declaring the right of the plaintiff to payment of the policy money.]

Solicitors: *Pritchard, Englefield, and Co.*, agents for *J. J. Lambert*, Manchester; *R. B. Wheatley, Son, and Daniel*, agents for *Cobbett, Wheeler, and Cobbett*, Manchester; *Rowcliffes, Rawle, and Co.*, agents for *Bremner, Sons, and Corlett*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 29 and 30.

(Before FARWELL, J.)

YOUNG AND OTHERS (Trustees of Frederick Young, deceased) v. STAR OMNIBUS COMPANY LIMITED. (a)

Right of way—Alleged extinguishment and partial abandonment—Obstruction—Mandatory injunction to remove obstruction refused.

The plaintiffs, as owners of certain lands situate in the borough of Croydon, known as Whitehorse-lane, had a right of way over a strip of land 10ft. wide on adjoining property in the occupation of the defendants.

Some years before action brought, the plaintiffs erected a summer-house which projected over the strip of land to the extent of 2ft. 4in. Before action brought, the defendants erected and eight months prior to the date of the writ they completed the erection of a stable on the strip of land which obstructed the plaintiffs' right of way. The plaintiffs brought an action (1) for a declaration that they were entitled to the right of way; (2) an order requiring the defendants to remove the buildings in question; (3) for an injunction to restrain the defendants, their servants and agents, from obstructing the plaintiffs and their tenants, and the agents of the plaintiffs and their tenants, in the exercise of such right of way.

The defendants pleaded extinguishment or abandonment before action brought.

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

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Held, (1) on the facts, that the plaintiffs had proved their title to and had not abandoned or extinguished their right of way; (2) that partial abandonment, by the erection of a summer-house projecting across a portion of the strip of land was not, in the circumstances, sufficient evidence of abandonment; that the plaintiffs were entitled to an injunction and 40s. damages, but that, owing to the fact that the defendants' obstructing building had been completed eight months before action, an order for its removal could not be made.

ACTION for—(1) a declaration that the plaintiffs as trustees of Frederick Young, deceased, and as owners of certain lands in the borough of Croydon, and known as Whitehorse-lane, were entitled to a right of way over certain lands in the occupation of the defendant company adjoining the land of the plaintiffs; (2) an order requiring the defendants to remove certain buildings by which the exercise of such right of way is obstructed; and (3) for an injunction to restrain the defendants, their servants and agents, from obstructing the plaintiffs and their tenants, and the agents of the plaintiffs or of their tenants, in the exercise of such right of way.

According to the statement of claim, by an indenture dated the 19th Aug. 1872, and made between William Rutley and William Thomas Bugden of the first part, James Young of the second part, and Frederick Young of the third part, property in the parish of Croydon abutting on the west and south-west side on the strip of land over which the right of way was claimed, was granted and passed unto Frederick Young, his heirs and assigns.

By the same indenture a right of way over the strip was granted to Frederick Young.

The defendant company at the time of action brought and for some time previously had been in occupation of the lands adjoining the private road, and in or about Oct. and Nov. 1901 they erected a building consisting of stables, &c., partly upon their own land, and partly upon the strip in question, over which the plaintiffs, as executors of Frederick Young, who died on the 18th April 1874, claimed to have an easement or right of way.

The plaintiffs alleged that this building hindered their enjoyment of the right of way.

The defendants by their defence—(1) denied the plaintiffs' title to the right of way; (2) alleged that the strip over which the plaintiffs claimed an easement had for many years previously been converted into and used as gravel pits, and that the alteration so caused involved an extinction of any right of way; (3) that upwards of thirty years before action one Alfred Draper (the defendants' predecessor in title) had acquired possession as tenant thereof of (a) the house and garden known as Yew Tree Cottage, Whitehorse-lane, Croydon, adjoining the plaintiffs' property; and (b) the strip of land over which the right of way was claimed; that the defendants or their predecessors had enjoyed uninterrupted user of the premises for over thirty years, and the plaintiffs' claim was barred by the Statute of Limitations.

Upjohn, K.C. (*R. C. Glen* and *Bethune* with him), for the plaintiffs, having opened the plaintiffs' case and produced the deeds showing their title to the right of way,

FARWELL, J. said that the onus was on the defendants to prove extinction or abandonment. A large number of witnesses were called on both sides. The defendants' witnesses proved (*inter alia*) that some years before action brought, a summer-house had been erected on the plaintiffs' land which projected over the strip of land to a distance of 2ft. 4in.

Glen submitted that the plaintiffs had made out their title to the right of way, and that they had never expressly abandoned it. [*FARWELL*, J.—I am with you on those points.] He also submitted that the plaintiffs had not impliedly abandoned their right of way. It was one thing not to assert an intention to use a way, and another to assert an intention to abandon it. The defendants must show there was an intention on the part of the plaintiffs to abandon:

Moore v. Rawson, 5 D. & R. 234; 3 B. & C. 332;

Cook v. Mayor of Bath, 18 L. T. Rep. 123; L. Rep. 6 Eq. 678.

Thirty years of non-user were held not to be sufficient evidence of intention to abandon. He also cited on this point:

James v. Stephenson, 68 L. T. Rep. 539; (1893) A. C. 162;

Crossley v. Lightowler, L. Rep. 2 Ch. 478; 36 L. J. 584, Ch.; 15 W. R. 801.

He submitted that the plaintiffs were entitled to a mandatory injunction to compel the defendants to remove the building. [*FARWELL*, J.—There is no evidence before me as to the nature of the building which the defendants have erected.] It is upon the defendants to show that the building is of such a substantial nature that it would be hardship upon them to have to pull it down. Mere delay is not fatal to the grant of an injunction, if no mischief is caused thereby to the defendant:

Kerr on Injunctions, p. 50.

Where a mandatory injunction is asked for, the plaintiff need not apply for an interlocutory injunction before the hearing:

Gala v. Abbot, 6 L. T. Rep. 852; 8 Jur. N. S. 987.

The correspondence in this case shows that the plaintiffs did not know their rights were being interfered with. This is not an injury that can be compensated by mere damages.

Jenkins, K.C. (with him *T. L. Wilkinson*) for the defendants, in reply.—By failing to make objection to the defendant's interference with their alleged right of way during a number of years, the plaintiffs induced the defendants to believe that they had abandoned their right. Acts done by the defendants and acquiesced in by the plaintiffs are as important as if they had been done by the plaintiffs themselves:

Stokoe v. Singers, 8 E. & B. 31; 26 L. J. 257, Q. B.; 3 Jur. N. S. 1256.

The plaintiffs are not entitled to a mandatory injunction to compel the defendants to pull down a building completed before action brought, where the delay was caused by the defendants' laches.

Jan. 30.—*FARWELL*, J.—I think the plaintiffs are entitled to the right of way claimed by them in this case. It is clear that the defendants' predecessors in title purchased the land in question in 1879 subject to that right. As a defence to this action, they now set up that the right of way has

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been extinguished, released, or abandoned by the plaintiffs. In order to establish this defence, it is necessary for them to show an intention to abandon in the mind of the owner of the right of way. This was clearly established in the case of *Moore v. Rawson* which has been referred to in the course of the argument. I have come to the conclusion that there is no evidence in the case before me to justify my finding that the plaintiffs have abandoned their right of way leading from Whitehorse-lane to the gravel pits along the strip between Mrs. Draper's property and the plaintiffs' own land. This strip has been, until quite recently, a path overgrown with grass, &c., and there have been no wheel tracks up it for any distance for a number of years. In Oct. 1900 the defendants built a stable across the path over which the plaintiffs now claim their right, and this is the cause of the present action. In support of their argument that the right has been abandoned the defendants allege in the first place that a gate with a lock upon it was put up by the plaintiffs' predecessor. I find as a fact that this was done by him in pursuance of an arrangement with Mrs. Draper, with a view to preventing tramps having access to the ground in question. This gate was kept locked and two keys were kept, one by each party. In my opinion the mere erection of a gate affords no sufficient evidence of abandonment. It was further alleged that the strip of land in question was from time to time choked up with boughs and branches of trees, but upon this point the evidence has not been satisfactory. In further support of this case, the defendants argue that by building a summer-house many years ago which projects for a distance of 2ft. 4in. over the strip, the plaintiffs surrendered their right of way. In my view, that was at best only a partial abandonment, and constitutes no defence to this action. It is plain to my mind that when the defendant company purchased this land they knew there was a right of way vested in the plaintiffs. As purchasers they took what they could get. I therefore find against the defendants upon the question of abandonment, but Mr Jenkins has argued that on the authority of *Stokoe v. Singers* (8 E. & B. 31) extinguishment of an easement is a matter of intention and that intention may be inferred from the conduct of the party claiming the easement. In that case Martin, B. (at p. 33) in summing up to the jury said: "Though the person entitled to a right might not really have abandoned his right, yet, if he manifested such an appearance of having abandoned it so as to induce the owner of the adjoining land to alter his position in the reasonable belief that the right was abandoned, there would be a preclusion as against him from claiming the right." In that case the plaintiff owned a house in which there were ancient lights, but his predecessor blocked them up and they continued blocked up for nearly twenty years. The facts of the present case are very far removed from these. Moreover, it seems to me that this is an allegation of estoppel by conduct, which is not pleaded by the defendants and in support of which no evidence has been laid before me. I cannot therefore say that the easement has been extinguished either expressly or implied by the conduct of the plaintiffs. The question remains: "What form is the judgment of the court to take. The

plaintiffs in their writ and pleading claim a declaration that they are owners of the easement in question, a mandatory injunction to compel the defendants to remove the stable, and an injunction to restrain further interference with their right of way. No evidence of damage with the exception of a statement by Mr. Duncan Young "that the preservation of this right is important to the trustees," has been brought before me. As to whether I can grant a mandatory injunction it is important to observe that the stable had been erected, and the right of way had been thereby interfered with for eight months before the writ was issued. No evidence was called to prove that there had been complaints nor do any such complaints appear upon the correspondence. It is a rule of this court that the onus is upon the plaintiffs to give reason for delay. It was therefore for them to allege in their pleadings and to give sufficient reasons for their delay in seeking a remedy. Further, I am unwilling to order the building to be pulled down, as I cannot see that it will do the plaintiffs any material injury. As I am in the dark as to the quantum of damages, I award the plaintiffs 40s. and costs, and an injunction to restrain further interference with their right of way.

Liberty to apply.

Solicitors: *A. Hunt, for Rooke and De la Combe, Westerham; Hicks, Davis, and Hunt.*

Oct. 31, Nov. 1, Dec. 12, 1901, and Jan. 22, 1902.

(Before JOYCE, J.)

Re HARGREAVES; HARGREAVES v. HARGREAVES. (a)

Will—Gift of income of residue to children for life subject to annuity to widow—Death of widow—Advances—Hotchpot—Interest on advances.

A testator by his will and codicil, dated the 5th May 1880 and the 12th July 1882 respectively, after giving certain legacies, devised and bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of 2000l. to his widow during her life and, subject thereto, to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children; and then upon trusts therein expressed. The testator provided that, as to certain advances already made to some of his children, and as to any future advances to his children exceeding at any one time the sum of 1000l., these advances should be treated as capital of the original shares, and be brought into hotchpot and accounted for accordingly.

The testator died on the 3rd July 1887, and left surviving him six children; of whom three had received advances, and three had not.

The widow died in March 1900.

Held, that, in bringing the advances into hotchpot for the purpose of determining the respective shares of the six children, the shares of the advanced children must respectively be debited with 4 per cent. on the amount of their respective advances from the testator's death down to the time when the estate ought, or should be deemed, to have been divided.

(a) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law

By his will, dated the 5th May 1880, the testator, Henry Hargreaves, after giving certain legacies, bequeathed the sum of 7000*l.* stock to his trustees upon trust to pay the annual income thereof to his son Henry Percy Hargreaves, and then upon the trusts therein declared for the benefit of the children and wife of Henry Percy Hargreaves; and the testator declared that this provision was intended to be in addition to the sum of 12,000*l.* which he had already advanced to Henry Percy Hargreaves and in addition to any other sums which he might advance to him in his lifetime, unless he should by writing direct the contrary, and that the sum of 12,000*l.* and any further advances should not be brought into hotchpot by his said son in calculating the sum thereinbefore bequeathed to trustees for his benefit and the benefit of his children and wife as aforesaid. And the testator devised all the real estate and bequeathed all the residue of the personal estate, of or to which he should be seised, possessed, or entitled, at his death, unto his trustees upon trust that his trustees should permit such part of the same as they should think fit to remain in its then state or upon the investments existing at his death for such period as they should think proper, and should as soon as conveniently might be after his death collect and get in all moneys which should belong or be due to him, and should sell and dispose of and convert into money all such parts of his real and residuary personal estate as should not consist of money or of real estate or investments which they should think fit to retain as aforesaid until the sale of such real estate or the variation of such investments under the trusts of his will, and should out of the moneys which should belong to him at his death and the moneys which should arise from any such sale, disposition, or conversion, as aforesaid, pay his funeral and testamentary expenses and the pecuniary legacies bequeathed by that his will or any codicil thereto; and should stand possessed of the then residue upon the trusts thereafter declared.

The testator, after giving directions as to the sale of his real and residuary personal estate, and as to the investment of the trust funds, and directing that the income of the unconverted estate until its conversion should be disposed of in the same manner as the converted estate, declared that his trustees should stand possessed of his residuary trust moneys and of the stocks, funds, shares, and securities from time to time representing the same, and the annual income thereof, upon trust out of the income to pay certain annuities, and upon trust out of the income to pay the annual sum of 2000*l.* unto his wife during her life until she should marry or until the happening of two certain events should not have happened, and upon trust to divide the same into as many shares as there should be children of his who should be living at his death, or should have died in his lifetime leaving children living at his death, or born in due time afterwards, other than his son Henry Percy Hargreaves, who was thereinbefore provided for, and to pay the annual income of such shares unto his children other than Henry Percy Hargreaves; and then upon certain trusts therein expressed, in favour of the children and wife of his son George Hamilton Hargreaves, and in favour of the children and husbands of his daughters.

After reciting that on the marriage of his daughter Alice Hargreaves he had settled the sum of 12,000*l.* stock on her, and had advanced to his son George Hamilton Hargreaves the sum of 6000*l.* to set him up in business, the testator then declared that those sums respectively should be treated as part of the capital of the original shares, the annual income of which was thereinbefore directed to be paid or applied to or for the benefit of Alice Mackenzie and George Hamilton Hargreaves, and in fixing the amount of such original share the same sums respectively should be brought into hotchpot and accounted for accordingly—and for that purpose he directed at what amounts they were to be taken. The testator then provided and declared that if he should thereafter during his lifetime advance or covenant to advance any sum or sums exceeding at any one time the sum of 1000*l.* sterling or any stocks, funds, shares, or securities, of that value on the marriage of his son George Hamilton Hargreaves, or for his further preferment or advancement in the world, on the marriage of any of his daughters (including any future marriage of his daughter Alice Mackenzie), or for the preferment or advancement in the world of any daughter, then and in such case, unless he should by any writing in his lifetime or by any codicil thereto declare the contrary, the sum or sums so advanced or covenanted to be advanced should be treated as part of the capital of the original share, the annual income of which was thereinbefore directed to be paid or applied to or for the benefit of such son or daughter, and in fixing the amount of such original share the same sum or sums should be brought into hotchpot and accounted for accordingly; and for that purpose any such stocks, funds, or securities should be treated as of the value thereof at the average price of the day on the day of his death.

By a codicil, dated the 12th July 1882, the testator, after reciting that he was desirous of putting all his sons and daughters on an equal footing in regard to the distribution of his property, revoked the bequest in his will contained of 7000*l.* stock in favour of his son Henry Percy Hargreaves, and also the direction that unless he should otherwise direct the contrary the sum of 12,000*l.* and any further advances should not be brought into hotchpot; and thereby declared and directed that the words in his will declaring the trusts upon which the trustees of his will were to hold, divide, and distribute his said residuary estate, and the stocks, funds, shares, and securities from time to time representing the same and the annual income thereof, should be read as if the words "other than my said son Henry Percy Hargreaves" had been omitted.

The testator died on the 3rd July 1887, and left surviving him six children—viz., Henry Percy Hargreaves, George Hamilton Hargreaves, and Alice Mackenzie, and three other daughters who had not received advances.

On or about the 3rd Jan. 1889 the value of the testator's estate was ascertained to be about 137,750*l.*, and the investments in the names of the trustees consisted principally of railway ordinary shares and one sum of railway preference stock, all of which were taken at the values at which they were valued for probate, and the sum of 5500*l.* secured on mortgage, which was then valued at 1500*l.*, but which was subsequently (in

April 1892) paid in full; all of which were investments existing at the date of the death of the testator.

The widow died in March 1900.

In bringing the sums advanced to children of the testator into hotchpot for the purpose of distributing the income of the testator's estate, the trustees had added to such advanced sums interest as from the date of the testator's death according to the average rate of income on the whole estate; and this interest had fluctuated between 3 and 5 per cent.

The questions raised on the present summons were as follows: (1) Whether under the provisions contained in the will and codicils of the testator Henry Hargreaves, the plaintiff, Henry Percy Hargreaves, and other advanced children of the testator were liable to pay interest on the advances made to them respectively by their father in his lifetime, or on some and what portions of such advances, and, if so, whether such interest should have been paid at a rate varying according to the actual income derived from the investments for the time being representing the residuary estate of the testator, or at a fixed rate, and, if at a fixed rate, what such rate should have been; (2) whether, if interest was properly payable on such advances or on portions of such advances, from which date or dates it should have been calculated; (3) whether the accounts kept by the trustees had hitherto been kept upon a proper basis, and, if not, in what respect they were erroneous, and how they should now be rectified and be framed in future, and for what period the plaintiff was entitled to require the past accounts to be rectified.

Sampson for the trustees.

Younger, K.C. and *Vaughan Hawkins* for the advanced children.

Hughes, K.C. and *Brinton* for the unadvanced children.

The arguments of the learned counsel are referred to in his Lordship's judgment.

Cur. adv. vult.

JOYCE, J. (after referring to the will, continued:—Now, considerable advances have been made to some of the children, and to one particularly, a Mr. George Hargreaves; I think it is a very large amount. But there was no loan to any child creating a debt. The will contains no express direction as to interest, but only that in fixing the amount of the children's shares the advances shall be brought into hotchpot and accounted for accordingly. There being no loan to any child, there cannot be any personal liability to repay capital or to pay interest, but the amount of each advance has to be added for the purposes of computation and debited against the share of the advanced children in order to produce equality. A considerable annuity is given to the widow, but there is no special or express provision for division of the surplus income during the subsistence of this annuity; merely a direction to bring the advances into hotchpot with the expression of the testator's desire in the codicil that his children should be placed upon an equal footing. The residue being divisible among the children equally, subject to the provision as to hotchpot, it was contended on the one hand that interest ought to be debited on advances at the same rate

per cent. as the income had actually accrued on the testator's estate since his decease, or rather, on the estimated value of the net residuary estate at that time. For this, however, no precedent was produced or authority cited. On the other hand, it was contended that the interest to be debited in respect of the advances ought not to be at a higher rate than 3 per cent., having regard to the decisions in *Re Goodenough*; *Marland v. Williams* (73 L. T. Rep. 152; (1895) 2 Ch. 537); *Rowls v. Bebb* (82 L. T. Rep. 633; (1900) 2 Ch. 107); and especially *Re Lambert*; *Moore v. Middleton* (76 L. T. Rep. 752; (1897) 2 Ch. 169). In a simple case where there are no special circumstances and the net residue is divisible at once, it ordinarily takes some considerable time (often more than a twelvemonth) to get in and realise the assets, discharge the liabilities, and have the net residue ready for actual distribution. Such net residue is practically always derived in part from interest or income; it may be the profits of the trade or business received or accrued in the intermediate period since the testator's decease. It is obvious, therefore, that if such residue were then equally divided, the shares of advanced children being merely debited with the capital amount of the advances without interest, an advanced child would be receiving a larger share of the income accrued since the testator's decease than he was justly entitled to. In order to prevent this, either interest must as from the death be charged or debited in account against the advances; or it must be ascertained precisely how much of the distributable net residue ought to be considered as capital or corpus of the estate as at the death, and how much income, this income being proportioned among the children in proportion to their shares of the capital which produced it, regard being had to the amount of the advances received by the advanced children. At first sight it would appear to be a plausible theory that under ordinary circumstances the same rate of interest should be debited in respect of the advances as the estate had produced, but if no income, or only a low rate of income, had accrued on the estate, it would be said, and with some reason, that the advanced children, having received portions of their shares in advance, ought to be debited in respect thereof with interest at an ordinary rate, they having all the time had the use and benefit of the sums advanced. I do not think that the rate of income which can now be obtained upon an investment in Government stock or trust securities has really much, if anything, to do with the question of the rate to be charged or debited in respect of advances for the period immediately subsequent to the testator's decease. It appears to me that the practice has been established of debiting advanced children with interest at the rate of 4 per cent. on their respective advances from the date of the testator's death, without entering into any calculation or apportionment of what part of the residue that finally comes to be divided is derived from income accrued since the testator's decease, and what part ought to be taken to be the capital value of the net residue at the time of his death. The determination of this last amount must, at all events before the assets are finally realised, be always more or less a matter of guess work. For instance in the present case I observe in par. 9 of the principal

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affidavit, that of Mr. Henry Percy Hargreaves, that the estate comprised a sum of 5500*l.* secured on mortgage which was valued on the 3rd Jan. 1889—I think that is eighteen months after the testator's death—at 1500*l.* whereas it was subsequently paid in full. Again, if the estate includes a business which has to be disposed of, it is impossible to say, with any degree of certainty, what that may be worth before actual realisation. Upon the whole, I see no sufficient reason why I should not in the present case follow what I consider to be the ordinary rule as established by the authorities, and hold that the rate of interest to be debited from the testator's decease, if and so far as interest be debited, shall be at the rate of 4 per cent. As I have said already, I do not think that the rate of interest at which money can now be invested in Government stock, or upon trust securities, has much to do with it, though it was material in the cases that the court was considering, in *Re Goodenough*; *Marland v. Williams* (*ubi sup.*) and in *Rowlls v. Bebb* (*ubi sup.*). Nor do I think that Stirling, L.J. in *Re Lambert*; *Moore v. Middleton* (*ubi sup.*) did decide, or intended to decide, that the rate of interest to be debited on advances between the death of the testator and the period of actual distribution was to be 3 instead of 4 per cent. as formerly, whatever it ought to be at a later date, when the rest of the estate is invested in trust securities. It has been decided in *Re Rees*; *Rees v. George* (44 L. T. Rep. 241; 17 Ch. Div. 701) that when the entire estate was by the will given to the testator's widow for her life, interest is to be charged or debited on advances, not from the death of the testator, but only from the determination of the life interest, that being the nominal period of distribution. But it still, I think, remains to be determined what is to be done in respect of debiting the interest when a portion only, but a considerable portion, of the estate is given to someone for life, so that only a partial distribution, if any, can be made at the testator's decease, and the share under such partial distribution of any advanced children in the estate available for distribution with the advances added for the purposes of computation is less than the amount of the advances. This, after all, is, I think, rather a problem for an actuary than a legal question. Mr. Vaughan Hawkins has suggested a theory as to what ought to be done in such a case. Here, however, no part of the corpus of the estate is directed to be set aside, or is really given to the widow or anyone for life, but an annuity is given out of the actual income. Upon consideration, though the argument addressed to me by Mr. Vaughan Hawkins will in my opinion be well worthy of consideration when such a case happens as I have just now mentioned, I do not think that the schemes which he proposes ought to be adopted in the present case. The testator died as far back as the 3rd July 1887. There has not been any actual division of corpus during the lifetime of the widow, who died in March 1900. At one time I was disposed to think that a fair and equitable mode of dealing with the estate would have been to treat the annuity as a legacy, to debit each advanced child with 4 per cent. interest on the advance from the death of the testator until such time as the assets were completely realised, the liabilities discharged, and the net residue invested or ready for investment;

and then to ascertain the amount of each child's share in such residue, but after first deducting therefrom the capital value of the annuity as if it had been a legacy to be paid, and, of course, having regard in the division of the amount of the advances in the usual way. The annuitant being now dead, there would be no difficulty in ascertaining what was the capital value of the annuity claimed, I suppose, upon the 3 per cent. table, or the amount, or the proportionate values of the shares of the several children, and an actuary or accountant could calculate what income the several children would respectively have been entitled to receive, if this mode of proceeding that I have just described had been adopted. No one has suggested to me such a scheme as this, and it has not been discussed or considered. I am of opinion, and decide, that the shares of advanced children must respectively be debited with 4 per cent. on the amount of their respective advances from the testator's death down to the time when the estate ought to have been, or should be deemed to have been, divided, leaving open for the present the question when that was, and whether the interest (if any) to be debited at a later date upon the advances, should be at a lower rate. I also decide that I am unable to accept the scheme of distribution proposed by Mr. Vaughan Hawkins. How far the past division of income can now be revised and readjustments made remains to be decided, and has not yet been argued. If there is to be a general division and readjustment I leave open for future decision the question upon what precise basis that is to be made, subject, however, to what I have stated that I now decide. Therefore, I do now decide that to a certain extent the debiting has been wrong; that is to say, that from some time or other it is to be 4 per cent.

Solicitors for trustees, *Howard, Woolley, and Co.*
Solicitors for advanced children, *Cheston and Sons.*

Solicitors for unadvanced children, *Chester, Broome, and Griffiths.*

Friday, Jan. 24.

(Before EADY, J.)

Re NORRIS. (a)

Costs—Conveyancing—Taxation—Solicitor mortgagee—Negotiation fee—General Order under Solicitors' Remuneration Act 1881 (44 & 45 Vict. c. 44), sched. 1, part 1, r. 11—Mortgagees' Legal Costs Act 1895 (58 & 59 Vict. c. 25), s. 2.

A solicitor practising alone and not in partnership, acting for a client desirous of selling property mortgaged to a bank, advanced out of his own moneys to his client the sum required to pay off the mortgage on the property, which was then reconveyed to the client, who executed a mortgage of the property to the solicitor to secure his advance.

In his bill of costs delivered to his client the solicitor charged the scale fee for negotiating the loan, which fee was disallowed on taxation on the ground that the solicitor making the advance could not negotiate with himself.

On a summons by the solicitor to vary the taxing master's certificate:

(a) Reported by J. TRISTRAM, Esq., Barrister-at-Law.

Held, that sect. 2 of the Mortgagees' Legal Costs Act 1895 expressly provides for such a case, and entitles a solicitor practising alone to charge the scale fee for negotiating a loan to his client where the solicitor himself advances the sum secured by the mortgage.

SUMMONS to review taxation of costs.

The applicant, a solicitor practising without a partner, was retained by Mrs. G. E. C. M. Herries, then G. E. C. M. Davies, widow, the legal personal representative of her late husband, J. D. Davies, deceased, to act as her solicitor in the administration of her late husband's estate.

His estate comprised certain farms which were mortgaged to the North and South Wales Bank to secure an advance of 1041l.

An arrangement was entered into for the sale of those farms, and, in order to facilitate the sale, the applicant paid off out of his own moneys the 1041l. owing to the bank.

The bank thereupon reconveyed the property to Mrs. G. E. C. M. Herries, who executed a mortgage thereof to the applicant.

The applicant subsequently delivered to Mrs. G. E. C. M. Herries his bills of costs, which the latter paid under protest, and then, on the 28th May 1900, obtained an order for taxation of such bills on the ground that there were special circumstances justifying a taxation notwithstanding payment.

The bill relating to the mortgage was as follows:

Mrs. Davies.—As to mortgage for 1041l.

1899. May.	£	s.	d.
To our fee for negotiating the mortgage	10	10	0
To our fee for investigating the title to both properties and preparing and completing mortgage thereof from Mrs. Davies to Mr. A. J. Norris to secure 1041l. and interest	15	10	0
Paid stamp	1	7	6
	26	0	0
	1	7	6
	27	7	6

Taxing Master Ryland disallowed the negotiation fee of 10l. 10s. on the ground that the solicitor could not negotiate with himself.

The applicant made the following objection to the disallowance of the negotiation fee: "It is submitted that under sect. 2 of the Mortgagees' Legal Costs Act 1895 the solicitor is entitled to charge the negotiation fee in respect of the mortgage notwithstanding that he himself was the mortgagee."

This objection was considered by Taxing Master Shearme (Taxing Master Ryland having died in the meantime), and his answer was as follows:

The late Taxing Master Ryland disallowed the negotiating fee on the ground that the solicitor making the loan cannot negotiate with himself. I have merely adopted his view and overruled the objection.—Dated the 10th day of July 1901.—EDWARD SHEARME, Taxing Master.

This was a summons to vary the taxing master's certificate taken out on the 7th Aug. 1901 by the applicant against Mrs. G. E. C. M. Herries, the question for decision being whether a solicitor is entitled under sect. 2 of the Mortgagees' Legal Costs Act 1895 to charge a negotiation fee where he himself advances the money.

The Mortgagees' Legal Costs Act 1895, s. 2, provides:

(1) Any solicitor in whom either alone or jointly with any other person a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagor.

Stokes for the applicant.—A solicitor mortgagee acting alone may now charge the scale fee for negotiating a mortgage by his client to himself as if he were acting for a mortgagee other than himself:

Mortgagees' Legal Costs Act 1895, s. 2.

This altered the law on this point as prescribed by the General Order under the Solicitors' Remuneration Act 1881 (44 & 45 Vict. c. 44), sched. 1, part 1, r. 11:

Re MacGowan; MacGowan v. Murray, 63 L. T. Rep. 537; on appeal, *Ib.* 793; (1891) 1 Ch. 105.

Negotiation only signifies arrangement, and a solicitor can arrange a mortgage where he himself advances the money as well as when another person is the mortgagee.

Gatey for the respondent.—[EADY, J.—I suppose I must assume that the provisions of the mortgage executed by Mrs. Herries were agreed to by her.] Yes; she executed the deed, which is not in dispute. But in this case there was nothing to arrange by the solicitor as the property was ascertained; and the amount of the advance necessary to pay off the mortgage was an ascertained amount. All the solicitor did was to say, "I will lend you that amount on your executing a mortgage of the property to me." Then the mortgage deed was prepared by the solicitor in the usual way. Under rule 11, sched. 1, part 1, of the General Order under the Solicitors' Remuneration Act 1881 the solicitor must arrange and obtain the loan to entitle him to charge the negotiation fee. Here the solicitor only obtained the loan by offering to lend the money. Sect. 2 of the Mortgagees' Legal Costs Act 1895 contemplates the solicitor to be acting for his partner or for his firm so as to entitle him to charge the negotiating fee. Here the solicitor obtained the money but did not arrange the loan, and he is entitled to charge only for work which he does, and not for negotiating, if he does not do it:

Re W. Eley, 57 L. T. Rep. 253; 37 Ch. Div. 40.

The question is one of fact whether there has been an actual negotiation and arrangement of terms:

Re Reade; Salthouse v. Reade, 33 S. J. 219.

There cannot be any negotiation in the case of a mortgage where a solicitor practising without a partner advances the money to his client, as a solicitor cannot hold an interview with himself.

EADY, J. stated the facts, and proceeded:—On behalf of the client it is contended that the

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solicitor did not negotiate the mortgage. Rule 11 of sched. 1, part 1, of the General Order under the Solicitors' Remuneration Act 1881 provides that "The scale for negotiating . . . As to a mortgagee's solicitor, it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts." Leaving out of consideration for the present the words "from a person for whom he acts" and dealing with the first part of that provision, Did the solicitor in this case arrange and obtain the loan? The property was mortgaged to the North and South Wales Bank, and it was proposed that that mortgage should be paid off and the property reconveyed to Mrs. Herries, and that Mr. Norris should advance to her a sum sufficient to discharge the mortgage. Mr. Norris discussed this with Mrs. Herries, and said he would advance the necessary amount if she would execute the mortgage to him, which she agreed to do. It is not disputed that the terms upon which the money was advanced by Mr. Norris are correctly stated in the mortgage deed. Upon these facts I think that Mr. Norris did arrange and obtain the loan. That, however, does not dispose of the whole question. Under rule 11 the solicitor must arrange and obtain the loan "from a person for whom he acts." Here Mr. Norris himself was the lender, and did not obtain the loan from any person. But it is contended that, since the passing of the Mortgagees' Legal Costs Act 1895, where a solicitor negotiates a mortgage he is entitled to the scale fee for negotiating the loan even though he himself advances the money. To this it is objected that that provision does not apply where a solicitor not in partnership with any other solicitor himself makes the loan, since if he advances the money he cannot be said to negotiate the loan with any other person. In my opinion that is too narrow a construction of the provisions of that Act. Sect. 2 provides that "any solicitor to whom either alone or jointly with any other person a mortgage is made . . . shall be entitled to receive for all business transacted and acts done by such solicitor . . . in negotiating the loan . . . all such usual professional charges and remuneration as he . . . would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor . . . to transact such business and do such acts." The question therefore is, If Mr. Norris had not himself advanced the money, but applied to some third person who advanced the loan, would he be entitled to charge the scale fee for negotiating the mortgage? He would clearly be entitled. Then the Act says: "Any solicitor to whom alone a mortgage is made shall be entitled to receive for all business transacted and acts done by such solicitor in negotiating the loan all such usual professional charges as if acting for another." Any other construction would not give effect to the words "any solicitor to whom either alone or jointly with any other person a mortgage is made." The statute is intended to include the case of a solicitor acting alone, and gives him the negotiating fee. It follows that the applicant is entitled to the negotiating fee which has been disallowed on taxation.

Solicitors: Norris and Norris; Prestons, for Ivor Harries, Rhayader.

KING'S BENCH DIVISION.

Nov. 15 and Dec. 16, 1901.

(Before Lord ALVESTONE, C.J., DARLING and CHANNELL, JJ.)

HEEDMAN v. WHEELER. (a)

Bills of exchange—Promissory note—Signature in blank—Filled up without authority—Delivery to innocent payee—"Holder in due course"—"Negotiated"—Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 20.

W. applied to A. for a loan of 15l. At A.'s request W., on A.'s promise to procure the money, signed a blank paper bearing a 6d. stamp and gave A. authority to fill it up as a promissory note for 15l. payable to A.

A. thereupon applied to H. for a loan of 25l., and offered in exchange to give H. a promissory note for 30l. signed by W. H. agreed, and A. thereupon filled up the signed and stamped paper as a promissory note for 30l. payable to H. A. then tendered the note to H., who accepted it and gave A. a cheque for 25l. payable to order of W. At the time of this transaction H. had no knowledge that W. had signed the note in blank, or that A. had authority only to fill it up for 15l. and make it payable to himself.

Subsequently A. forged W.'s name to H.'s cheque, and obtained and appropriated to his own use the 25l.

On action by H. against W. on the promissory note:

Held, that A.'s delivering the note to H. did not "negotiate" it within the meaning of the proviso to sect. 20 of the Bills of Exchange Act 1882, and that therefore H. was not entitled to recover.

Lewis v. Clay (77 L. T. Rep. 653) observed upon.

APPEAL from the County Court of Newcastle.

The facts are fully set out in the judgment, and are stated shortly in the headnote.

Bills of Exchange Act 1882 (45 & 46 Vict. c. 61):

Sect. 2. In this Act unless the context otherwise requires . . . "Holder" means the payee or indorsee of a bill or note who is in possession of it or the bearer thereof. . . . "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.

Sect. 20 (1). Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer or the acceptor, or an indorser; and in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. (2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

Arthur Powell for the appellant.—There are two grounds upon either of which the plaintiff

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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was entitled to judgment. In the first place, he is a "holder in due course" within the proviso of sect. 20 of the Bills of Exchange Act 1882. Here the note was complete within that proviso when Anderson filled in the payee's name and the amount of the bill, and its delivery after that to the plaintiff "negotiated" it within that proviso. "Negotiation" in the Bills of Exchange Act does not mean the transfer of the note from a holder in due course to another holder. It is defined by sect. 31, which shows that "negotiated" means "transferred from one person to another in such a manner as to constitute the transferee a holder." Here the transfer by Anderson constituted the plaintiff a holder. Sect. 2 defines "holder" as including "the payee of a note who is in possession of it." And he was holder in due course within sect. 29 since the note was complete and regular on the face of it and he took it in good faith and for value. In the second place, the plaintiff is entitled to recover on the ground that, as between two innocent persons, the one to suffer through the fraud of a third person is the one whose act or omission enabled the third person to commit the fraud: (per Ashhurst, J. in *Lickbarrow v. Mason*, 2 T. R. 63). Here it was the defendant's act—the signing of the stamped paper—that enabled Anderson to obtain and appropriate the money. This principle is still good law:

Farquharson Brothers v. King, 85 L. T. Rep. 264; (1901) 2 K. B. 697.

Bruce Williamson for the respondent.—The proviso to sect. 20 applies only between persons other than the immediate parties to the note. As between the immediate parties to the note, the note is merely a simple contract in writing. It only acquires the characteristics of a negotiable instrument when it passes into the hands of third parties. It is only then that the note is "negotiated." The delivery to the payee is merely the "issue" of the note: (see sect. 2). The delivery by the payee to a third person is the first negotiation of the note—that is, the transfer to a third person of the rights secured to the payee by his contract with the maker. Such transfer makes the note part of the commercial currency of the country, and it is only then that its transfer gives the transferee who gives value and acts in good faith a good title against everybody to the note. Further the note in this case was not completed before the delivery to the payee, and so it could not be said to be "negotiated" after completion: (see sect. 84, which enacts that "a promissory note is inchoate and incomplete until delivery thereof to the payee). Lastly, as to the dictum of Ashhurst, J. in *Lickbarrow v. Mason* (*sup.*), it is too wide. This is the result of the judgment in the House of Lords in *Scholfield v. Lord Londesborough* (75 L. T. Rep. 254; (1896) A. C. 514).

Powell in reply.—If Anderson had inserted his own name as payee in the note, there is no doubt that the delivery to the plaintiff would have "negotiated" the note, or that the latter would have been entitled to the benefit of the proviso to sect. 20. It seems strange that he should be deprived of that benefit and put upon inquiry as to Anderson's authority because the note was made to himself. Further, "completion" in sect. 20 obviously refers to complete in form, and has no

reference to complete in the sense that word is used in in sect. 84.

Dec. 16.—*CHANNELL*, J. read the following judgment of the court:—This is an appeal from a judgment of the judge of the Newcastle County Court given for the defendant in an action by the payee against the maker of a promissory note for 30*l.*, and the principal point involved is the construction of the 20th section of the Bills of Exchange Act 1882. The facts are not in dispute. The conduct of each of the parties in the action appears to have been quite straightforward and honest, and the evidence of each of them has been accepted as true. The difficulties which arose were occasioned by the fraud of one Anderson, who is now dead. The facts are as follows: Mr. Wheeler, the defendant, was a curate at Sunderland, and being about to remove to Norfolk, he required a temporary loan of 15*l.* to pay the expenses of removing. He applied to Anderson to lend him the money, and Anderson promised to do so. The defendant, however, seems to have understood that Anderson proposed to get the money from someone else, and the name of the plaintiff Herdman was mentioned as a person who would lend it; but the defendant objected to borrowing the money himself direct from the plaintiff. The defendant gave to Anderson a promissory note payable to Anderson for 15*l.*, and expected to get the money from Anderson the next day. We think he must have expected that Anderson would have borrowed the money, and probably from the plaintiff. If he knew anything of business he must have understood that his promissory note would be indorsed by Anderson to the lender of the money. On the next day Anderson saw him, and did not give him the money, but informed him that the promissory note was in some way wrongly made out, and gave it back to him and it was burnt. In lieu of it the defendant gave to Anderson his signature on paper stamped with a 9*d.* stamp, which would be sufficient for a note for 75*l.* This was done in a restaurant when the defendant was in a hurry, and he trusted to Anderson to fill it up, but only authorised him to do so as a promissory note payable to himself and for 15*l.* only. Anderson promised to send the 15*l.* He did subsequently send a cheque of his own for 15*l.* which, however, was dishonoured. Anderson, having got the defendant's signature and the note in blank, communicated by telephone with the plaintiff and asked him if he was willing to lend the defendant 25*l.* upon his promissory note for 30*l.* at a month. He represented that the defendant was in urgent need of the money, and was willing to pay the 5*l.* for the accommodation; but he further stipulated that if the money was repaid in a week 2*l.* only should be charged instead of 5*l.* The plaintiff agreed to the proposal, and it was arranged that Anderson should bring or send the note and receive the money. The plaintiff, having to go out, wrote a cheque for the 25*l.* payable to the order of the defendant and left it with his wife to be exchanged for the promissory note. Anderson then sent the promissory note by a clerk and received the cheque from the plaintiff's wife. The note, when received by the plaintiff's wife, was filled up as a promissory note for 30*l.*, with the plaintiff's name inserted as payee. It was, on the face of it, complete and regular in all respects, and the plaintiff had no notice that it

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had been signed in blank, or that Anderson had in any way acted without authority. The plaintiff's cheque for 25*l.* was presented at the bank on which it was drawn, with an indorsement purporting to be the defendant's but which was not his, and the indorsement appears to have been forged by Anderson. The defendant appears to have got cash from some one for Anderson's cheque for 15*l.* but when it was dishonoured he had to take it up. In the result, therefore, he got no part of the proceeds of the promissory note. When the week elapsed the plaintiff wrote to the defendant on the matter, and then some correspondence took place, in which the plaintiff and defendant each stated the facts as far as they knew them. The defendant, upon receiving the plaintiff's letter, had some communication with Anderson, who promised to settle the matter, and gave him a receipt purporting to be a discharge of his liability, but Anderson did not settle with the plaintiff, and died within a few days and before the promissory note became due. This action was brought in the High Court, and the defendant, having got leave to defend, it was transferred to the Newcastle County Court. The judge on these facts gave judgment for the defendant. The liability of the defendant appears to depend upon whether the case comes within the proviso at the end of the 20th section of the Bills of Exchange Act—that is whether in this case the note was within the meaning of the words as used in that section: "After completion negotiated to a holder in due course." On the part of the defendant it was not denied in argument before us that the plaintiff was a holder in due course, but it was said that the note was not negotiated to him, and that, if it was, it was not negotiated after completion. Since the argument we have been referred by counsel for the defendant to the case of *Lewis v. Clay* (77 L. T. Rep. 653) as an authority that the plaintiff was not in that case a holder in due course. On the argument it was further said that sect. 84 shows that the note was incomplete until the delivery to the plaintiff, and consequently, if it could be said to be "negotiated" to him at all, it was not "after completion," but either before or, at most, simultaneously with completion; but it was further said, and this we think is the substantial argument for the defendant, that it was never negotiated to the plaintiff, as he was the payee, and an original party to the contract contained in the note, and did not become a party by transfer. It was contended that a bill or note is only "negotiated" when it is transferred from one holder to another, and for this sect. 31 is referred to. In substance the argument for the defendant and the judgment of the County Court judge in his favour comes to this—that the proviso in sect. 20 can have no application as between the immediate parties to a note or bill. If this is the necessary meaning of the words used in the proviso, we must, of course, give effect to it and affirm the judgment for the defendant, for the Bills of Exchange Act is now the code of law on the subject, and in cases where it differs from the old law it prevails over the old law. But if the words used in the Act are fairly capable of being construed as meaning the same as the words used by judges previously to the Act in stating the law, it would be right to give them that meaning, in the absence of any-

thing to indicate a clear intention of the Legislature to alter the previous law. Further, by sect. 97, sub-sect. 2, the rules of the law merchant are to continue to apply to bills and notes, except so far as they are inconsistent with the provisions of the Act. It is, therefore, material to see what light the law on this subject before the Act throws on the case before us. We find Bowen, J. stating the law thus in *Garrard v. Lewis* (47 L. T. Rep. 408; 10 Q. B. Div. 30): "I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration (even if it be fraudulent or unauthorised) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered." Of course such a case as the present, where there was no marginal figure, but only verbal instruction to fill in 15*l.* as the amount, is an *à fortiori* case. It will be observed that the words "when the bill reaches the hands of a holder" are wide enough to cover the case of the payee, unless it could be contended that a payee was not a holder. Again, Lord Selborne, in *France v. Clarke* (50 L. T. Rep. 1; 26 Ch. Div. 257), expresses the rule thus: "The person who has signed a negotiable instrument in blank or with blank spaces is (on account of the negotiable character of the instrument) estopped by the law merchant from disputing any alteration made in the document after it has left his hands by filling up blanks or otherwise (in a way not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice, but it has repeatedly been explained that this estoppel is in favour only of such *bonâ fide* holder." This statement would appear to include the case where the name of the person who became *bonâ fide* holder had been inserted as payee. The reported cases in which a holder who had given value for a bill after it had become complete and regular on the face of it, has been held entitled to recover, notwithstanding that the bill had been signed by the defendant in blank and had been filled up otherwise than in accordance with the defendant's authority, will, we believe, be found to be all cases where the holder was indorsee and not payee; but it is obvious that cases such as the present, where the payee's name was inserted without his knowing of the bill having been in blank, would be rare. The language of the judges seems wide enough to cover the case of the payee as well as the case actually before them, but that is all that can be said. There are of course cases where the payee's name has been inserted by himself and where he has been entitled to recover, as *Crutchley v. Mann* (5 Taunton, 529), *Harvey v. Cane* (34 L. T. Rep. 64), and *Scard v. Jackson* (24 W. R. 159), but in these it seems there had been nothing done in excess of the defendant's authority except the mere putting of the payee's name. In *Harvey v. Cane* it was said that "anybody who gets the bill (i.e., one with the payee's name omitted) fairly may put his own name as payee," and if this wide statement is correct, it would seem that a payee stands in as good a position as an indorsee when he *bonâ fide* gives value for the bill; but in *Harvey v. Cane* the court also seems to have come to the conclusion that what was done

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came substantially within the defendant's authority. As to the cases relied on by the defendant in the argument before us, in *Awde v. Dixon* (6 Ex. 869) the form of the bill showed that it had been prepared for signature by more than one person, so that the plaintiff had notice of the defect. *Scholfield v. Lord Lonsborough* (75 L. T. Rep. 254; (1896) A. C. 514) differs from this, that there the bill was a perfect bill when the defendant signed it, and what was said as to forgery does not appear to apply to the case of a bill or note in blank, when it was signed: (see *London and South-Western Bank v. Wentworth* (42 L. T. Rep. 188; 5 Ex. Div. 96) which case does not appear to have been dissented from in the House of Lords in *Scholfield's* case (*sup.*). The cases quoted by the defendant in the argument do not appear, therefore, to help him very much; but, on the other hand, the investigation of the law before the Bills of Exchange Act appears to show that there is no case which would be a distinct authority in favour of the plaintiff if the law were still as before the Bills of Exchange Act. The law has been stated by various judges in general terms in such a way as to cover the case, but they do not appear to have had their attention specially drawn to the point. We therefore approach the consideration of the words used in the Act, without any very clear guide from the previous state of the law, but we do rather expect to find the *bonâ fide* holder for value without notice, or the holder in due course as he is now called, fully protected. Passing now to the words of sect. 20 of the Act, the 1st sub-section of that section shows that Anderson has a *prima facie* authority to fill up this note, but that in this case is hardly important. The 2nd sub-section shows that, unless the case comes within the proviso at the end, the note is not enforceable against the defendant, because it was not filled up strictly in accordance with the authority given. It was suggested on the argument that the first part of the 2nd sub-section would never be wanted if the proviso had the effect contended for by the plaintiff; but on consideration there seem to be cases, which would arise fairly often in practice, which would not be within the proviso, and where the first part of the 2nd sub-section would take effect. The proviso can never operate in favour of a person who knows the acceptance of the bill to have been in blank. If in the present case Anderson, instead of communicating through the telephone with the plaintiff, had brought the stamped paper signed by the defendant with him, and had filled it up in the plaintiff's presence, the plaintiff would certainly have been put on inquiry as to Anderson's authority, and by reason of the first part of the 2nd sub-section could only have recovered if Anderson was acting strictly within his authority. So in all cases where the plaintiff has been allowed to recover on a bill in which he had inserted his own name as payee he would, I think, now have to show that this was within the authority given by the defendant. This is in accordance with the cases before the Act, with the possible, though not clear exception, of *Harvey v. Crane* (*sup.*): (see *Hogarth v. Latham*, 39 L. T. Rep. 75; 3 Q. B. Div. 643, and the remarks on *Harvey v. Crane* in that case; see also per Lord Selborne in *France v. Clarke*, *sup.*). Then comes the important proviso, "Provided that if any

such instrument" (that is an instrument which has been either a simple signature on stamped paper or a bill wanting in any material particular) "after completion is negotiated," &c. Now, it seems to us that completion here refers to completing the form of the bill or supplying the wanting "material particular." It is after it has been made complete and regular on the face of it, to take the words of sect. 29 defining holder in due course. We do not think the word "completion" as used in this proviso includes delivery. It is the form of the instrument which is being referred to, and not its ceasing to be inchoate and revocable and becoming an operative instrument, which is the matter referred to in the 84th section. But, even if the bill could not be said to be completed unless delivered to some one, here it was delivered to the plaintiff, and, if what happened on his giving his cheque for it and becoming the holder for value is "negotiating it to a holder in due course," it may, I think, be said to be "negotiated after completion." The real question is, does "negotiated to a holder in due course" cover what was done in this case? The plaintiff undoubtedly became the holder of the bill for value when it was handed to his wife, and she gave over his cheque in exchange. It is true that the cheque was paid on a forged indorsement, but the 60th section of the Bills of Exchange Act authorises the plaintiff's bankers to charge him with the money so paid; so that his money is gone, and the case, we think, is the same as if he had 25l. in cash for the promissory note. This brings us to the important words, "negotiated to a holder in due course," and it is necessary to consider the case of *Lewis v. Clay* (*sup.*), to which our attention has been called since the argument. In that case the Lord Chief Justice said in an action brought by the payee of a promissory note, "Further, an examination of sects. 20, 21, 29, 30, and 38, relating expressly to bills, and sects. 83, 84, 88, relating to promissory notes, will make it clear that 'a holder in due course' is a person to whom after its completion by and as between the immediate parties the bill or note has been negotiated. In the present case the plaintiff is named as a payee on the face of the promissory note, and is, therefore, one of the immediate parties. The promissory notes have, in fact, never been negotiated within the meaning of the Act. I desire to say here that, even if the plaintiff were 'holder in due course,' it would, in my judgment, make no difference in the result." The Chief Justice thus gave his judgment really on the same ground as *Foster v. Mackinnon* (L. Rep. 2 O. P. 704) was decided, and at the end of his judgment he again refers to this question, and says that it follows *a fortiori* that the plaintiff as a named payee cannot recover. It is quite clear, therefore, that the expression of opinion of the late Lord Chief Justice that a payee was never a holder in due course was a dictum only, and moreover, as his remarks on the other part of the case appear quite unanswerable, the case could not well have been appealed, and in fact was not appealed; so that his dictum could not well be questioned in that case. It appears to us that the late Lord Chief Justice overlooked the definition of holder in sect. 2, which is "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

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Therefore in sect. 29 it is necessary to read holder as including payee as well as indorsee, and to read it, "a holder in due course is a payee or indorsee," &c. That being so, the only words in sect. 29 which can be said to indicate that a payee cannot be a holder in due course are those in sub-sect. 1 (b), "and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." But if the word "payee" had been expressed in the earlier part of the section, it would be clear that this means "if negotiated to him he had at the time no notice," &c. On the whole, therefore, we are not prepared to hold that a payee of a note can never be a holder in due course, but it is, as it seems to us, just as unnecessary for us to decide that question as it was for the late Lord Chief Justice in the case before him. The real point in the present case, after all, is, can we hold that this note was "negotiated" to the plaintiff within the meaning with which the words are used in the proviso of the 20th section? And as to this we certainly have the opinion of the late Lord Chief Justice that a delivery to a payee for value is not a "negotiating" within the meaning of the Act. In the 31st section it is said, "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." Does this mean only from one person who is holder to another, or may the person transferring be an agent in possession of the bill otherwise than a holder, whose delivery constitutes the receiver a holder? And even if that cannot be the meaning in the 31st section, may it not be possible to say that in the 20th section "negotiated to a holder in due course" means no more than delivered to a person in such a way that he thereupon becomes a holder in due course? This is the argument of Mr. Arthur Powell for the plaintiff, and he quotes from the Imperial Dictionary a meaning of "negotiate" which might cover the present case. He also points out that if this note had been payable to Anderson's order and indorsed by him to the plaintiff or if it had been by the form in which it was drawn or by a blank indorsement payable to bearer, the plaintiff could clearly have recovered on it. If the production by Anderson of the promissory note in either of those forms would have made it unnecessary for the plaintiff to inquire into Anderson's authority to deal with it, it certainly is odd that the production of a note with the plaintiff's own name in as payee should be a matter which the plaintiff must inquire into and ascertain the extent of Anderson's authority before he could safely take it. The fact that plaintiff's name was there would be more likely to lull suspicion on his part than arouse it. Mr. Powell contends that the present case clearly comes within the mischief which the proviso of the 20th section was intended to meet, and suggests that we should not be straining the words in putting on them the meaning for which he contends. On the other hand, we have to deal with the points raised by Mr. Bruce Williamson in his argument for the defendant, that the issuing of a bill or note to the first holder stands on a different footing altogether from the transfer of it from one holder to another, because when the first holder takes it it has not become part of the mercantile currency of the country, to use an expres-

sion found in some of the cases. He contends that the rule that one holder of a negotiable instrument can give a better title to it than he himself possesses is based upon the view that negotiable instruments are currency and that it is on their passing from hand to hand, and not on their coming into being, that negotiable instruments acquire their special validity in the hands of a holder in due course. Even if the payee of a note may be a holder in due course, the question whether he is so or not depends upon the actual state of facts as between him and the maker of the note; and the contract between the payee and the maker though no doubt it has some incidents, such for instance as days of grace written into it by the law merchant, yet is governed more by the ordinary law of contracts than by the law merchant, and in particular that the element of negotiability in no way enters into the contract between the maker and the payee. There is much to support this argument in the Bills of Exchange Act. For instance, delivery to the payee being required to complete the contract, it is said in sect. 21, sub-sect. 2, that "as between immediate parties and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be either by or under the authority of the party drawing, accepting, or indorsing as the case may be." Payees and holders not in due course are, therefore, put on the same footing as regards proof of authority of the person handing them the bill. In the present case, therefore, the delivery of the note to the plaintiff must, in order to enable him to recover, be under the authority of the defendant. It certainly was not so delivered by the defendant's actual authority, and cannot be said to have been delivered under his authority by reason of the ostensible authority with which Anderson had been clothed by the signature in blank. Mere possession of a promissory note, complete and regular on the face of it and payable to a named payee, would not be conclusive evidence that the maker had given authority to the person in whose possession it was to deliver it to the payee because the facts might possibly be, as in *Baxendale v. Bennett* (40 L. T. Rep. 23; 3 Q. B. Div. 525), or as in *Foster v. Mackinnon* (sup.) or *Lewis v. Clay* (sup.). As to this we think that, if the note had been placed by the maker in another person's hands with authority to deal with it in some way or other, that would be sufficient to make a delivery under the authority. A question very similar to this is dealt with by Williams, L.J. at some length in his judgment in the recent case of *Farquharson v. King* (85 L. T. Rep. 264; (1901) 2 K. B. 697), where he deals with the cases of *Henderson v. Williams* (72 L. T. Rep. 98; (1895) 1 Q. B. 521) and *Brocklesby v. Temperance Building Society* (72 L. T. Rep. 477; (1895) A. C. 173). If here the defendant had signed the note in the form it ultimately took, as a promissory note for 30*l.* payable to the plaintiff, but had instructed Anderson only to deliver it to the plaintiff on the plaintiff giving him 25*l.* for it, we think that, if Anderson had delivered it contrary to those instructions, in exchange for 25*l.* only it would have been a good delivery "under the authority," of the defendant to satisfy the 21st section. It would not have been necessary for the plaintiff to inquire in that case as to any limit of Anderson's authority; but it is not so clear that it was not

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necessary for him to do so on the facts of the present case, because there does not seem to have been any actual authority by the defendant to Anderson to deal with the note at all. He had nothing but that authority which the defendant conferred by signing his name on stamped paper—that is to say, only his authority which the law merchant, or now the Bills of Exchange Act attributes to that signature. Anderson, if agent of the defendant at all, was only agent to fill up the paper, and if the question were to be determined altogether apart from the law merchant and the Bills of Exchange Act, we should have to say that there was here no binding contract at common law whereby the defendant promised the plaintiff that if the plaintiff would give 25*l.* to Anderson for the defendant the defendant would pay 30*l.* to the plaintiff in a month. We have been very reluctant to come to the conclusion that the judgment in favour of the defendant in this case was right because it appears dangerous even to cast any doubt upon a payee's right to recover when he has taken a bill or note, complete and regular on the face of it, honestly and for value; but, after carefully considering the matter, we have come to the conclusion that we should be unfairly straining the words if we did not hold that "negotiated" in the proviso at the end of the 20th section meant transferred by one holder to another. It is to be observed that the Bills of Exchange Act, in sect. 2, defines "issue" as meaning "the first delivery of a bill or note complete in form to a person who takes it as a holder." Here Anderson clearly issued the note to the plaintiff within the meaning of this definition. There is therefore a technical word defined and used in the Act to mean that which Anderson did here, and the appropriate words to have used in the proviso to sect. 20, if it had been intended to include this case, would have been "if such instrument after completion is issued or negotiated to a holder in due course." Those are not the words, and, although we think that the present case might possibly have been decided in the plaintiff's favour before the Bills of Exchange Act was passed, we think that we cannot consistently with the meaning of "issue" and "negotiate" in the Act say that the present case is covered by the words used in the proviso. That being so, it falls within the first part of the 2nd sub-section of sect. 20; and as the authority of the defendant was not strictly followed he is not liable. We think, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Francis Miller and Steels*, for *Dickinson, Miller, and Dickinson*, Newcastle-upon-Tyne.

Solicitors for the defendants, *Stokes and Stokes*, for *Criddle and Criddle*, Newcastle-upon-Tyne.

Monday, Dec. 16, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MAYOR AND CORPORATION OF WESTMINSTER v. LONDON COUNTY COUNCIL. (a)

Metropolis — "Wooden structures"—Licence to erect—Jurisdiction of borough corporations—London County Council—London Building Act 1894 (57 & 58 Vict. c. cxxiii.), s. 84—London Government Act 1899 (62 & 63 Vict. c. 14), s. 5, sched. 2, part 1.

Stands and platforms constructed entirely of wood save as to the nails holding the planks together were erected within the city of Westminster.

The corporation of Westminster claimed that as by sect. 5 and sched. 2, part 1, of the London Government Act 1899 the power to license wooden structures given to the London County Council was transferred to them, they were the proper authority to license the erection of these structures, and to take proceedings in default of obtaining such licence:

Held, that sect. 84 of the London Building Act 1894 applied to all wooden structures, whether permanent or temporary, not coming within the general provisions of part 6 of that Act; that it therefore applied to these structures; and that consequently the power to license their erection was transferred by sect. 5 and sched. 2, part 1, of the London Government Act 1899 to the corporation.

APPLICATION of the mayor, aldermen, and councillors of the city of Westminster under sect. 29 of the London Government Act 1899, by way of special case agreed upon by them and the London County Council.

The case was (so far as material) as follows:—

By sect. 29 of the London Government Act 1899 it is enacted that

If any question arises or is about to arise as to whether any power, duty, or liability is or is not transferred by or under this Act to the council of any metropolitan borough, or any property is or is not vested in any such council, that question, without prejudice to any other mode of trying it, may, on the application of the council, be submitted for decision to the High Court in such summary manner as, subject to any Rules of Court, may be directed by the court, and the court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question.

Questions had arisen between the London County Council and the mayor, aldermen, and councillors of the city of Westminster as to whether the powers, duties, and liabilities of the county council with respect to the approval or licensing, erection, setting up, and control of certain structures within the city of Westminster were or were not transferred by or under the London Government Act 1899 from the said county council to the council of the city of Westminster. The circumstances under which such questions had arisen were stated in the subsequent paragraphs of the case.

By sect. 1 of the London Government Act 1899 it was enacted that the whole of the administrative county of London, exclusive of the city of London, should be divided into metropolitan boroughs (in the Act subsequently referred to as

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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boroughs) and by that section it was also declared lawful for Her late Majesty, by Order in Council subject to and in accordance with the Act, to form each of the areas mentioned in the 1st schedule to the Act into a separate borough, subject to such alteration of area as might be required to give effect to the Act, and to such adjustment of boundaries as might appear to Her late Majesty in Council expedient for simplification or convenience of administration, and to establish and incorporate a council for each of the boroughs so formed.

By sched. 1 of the said Act it was declared that one of the areas to be constituted a separate borough was

The area of the ancient parliamentary borough of Westminster, comprising the parishes of St. Margaret and St. John, Westminster, the parish of St. George, Hanover-square, the parish of St. James, Westminster, the parish of St. Martin-in-the-Fields, and the district of the Strand Board of Works, and including the close of the collegiate church of St. Peter, Westminster, and the liberty of the Rolls.

By the Borough of Westminster Order in Council 1900, dated the 15th May 1900, and made under and in pursuance of the provisions of the London Government Act 1899, there was constituted a metropolitan borough of Westminster, and provisions were made therein for determining the area of the borough so constituted, and by the same Order in Council a council was established for the said borough.

By Royal charter dated the 29th Oct. 1900 there was granted and confirmed to the said metropolitan borough of Westminster the title of city, and it was declared that from the date therein mentioned the said borough should be called and styled the city of Westminster, and that the council established for the said borough should be styled the mayor, aldermen, and councillors of the city of Westminster.

By sect. 5 (1) of the London Government Act 1899 it was enacted that

As from the appointed day the powers and duties of the London County Council under the enactments mentioned in part 1 of the 2nd schedule to this Act shall, subject to the conditions mentioned in that schedule, be transferred to each borough council as respects their borough.

The 9th Nov. 1900 was appointed as the day for the coming into force of this section by an order of the Lord President of the Privy Council, dated the 18th Oct. 1900, and made under the powers of sect. 33 of the London Government Act 1899.

Sched. 2, part 1, of the said Act, so far as directly material, runs as follows:

Part 1.—Minor powers and duties to be transferred from county council:

Powers and duties transferred.	Conditions of transfer.
Power under sect. 84 of the London Building Act 1894 to licence the setting up of wooden structures and power to take proceedings for default in obtaining or observing the conditions of a licence under that section.	

Sect. 84 of the London Building Act 1894 is one of a group of five sections included in part 7 of that Act, under the title "Special and Temporary

Buildings and Wooden Structures." Those sections are in the following terms:

Sect. 82 (1). Where a builder is desirous of erecting an iron building, or structure, or any other building, or structure to which the general provisions of part 6 of this Act are inapplicable, or, in the opinion of the council, inappropriate, having regard to the special purpose for which the building or structure is designed and actually used, he shall make an application to the council, accompanied by a plan of the proposed building, with such particulars as to the construction thereof as may be required by the council. (2) The council, if satisfied with such plan and particulars, shall signify their approval of the same in writing, and thereupon the building may be constructed according to such plan and particulars, but the council shall not authorise any building of the warehouse class to be erected of greater cubical extent than 250,000 cubic feet, except in accordance with the foregoing provisions of this Act. (3) The council may for the purpose of regulating the procedure in relation to such applications issue such general rules as they think fit as to the time and manner of making applications and as to the plans to be presented, the expenses to be incurred, and any other matter or thing connected therewith. (4) All expenses incurred in and about the obtaining the approval of the council shall be paid by the builder to the superintending architect, or to such other person as the council may appoint, and in default of payment may be recovered in a summary manner. (5) A copy of any plans and particulars approved by the council shall be furnished to the district surveyor within whose district the building to which such plans and particulars relate is situated, and it shall be his duty to ascertain that the same is built in accordance with the said plans and particulars.

Sect. 83. Where an application is made to the council by any person stating his desire to erect in any place an iron or other building or structure of a temporary character, to which the general provisions of part 6 of this Act are inapplicable, the council may, if they approve of the plan and particulars of the building or structure, limit the period during which it shall be allowed to remain in that place, and may make their approval subject to such conditions as to the removal of the building or structure or otherwise as they think fit, and if, at the expiration of that period, the building or structure be not removed in accordance with those conditions the council may serve a notice on the occupier or owner of such building or structure requiring him to remove it within a reasonable time specified in the notice, and if the occupier or owner fail to remove such building or structure within the time named the council may, notwithstanding the imposition and recovery of any penalty, cause complaint thereof to be made before a petty sessional court, who shall thereupon issue a summons requiring such occupier or owner to appear to answer such complaint, and, if the said complaint is proved to the satisfaction of the court, the court may make an order in writing authorising the council to enter upon the land upon which such building is situated, and to remove or take down the same and do whatever may be necessary for such purpose, and also to remove the materials of which the same is composed to a convenient place and (unless the expenses of the council be paid to them within fourteen days after such removal) sell the same as they think proper.

Sect. 84 (1). No person shall set up in any place any wooden structure (unless it be exempt from the operation of this part of this Act) except boardings enclosing vacant land, and not exceeding in any part 12ft. in height, without having first obtained for that purpose a licence from the council, and the licence may contain such conditions with respect to the structure and the time for which it is to be permitted to continue in the said place as the council think expedient. (2) Provided that a licence shall not be required in the case of any wooden

structure of a movable or temporary character erected by a builder for his use during the construction, alteration, or repair of any building, unless the same is not taken down or removed immediately after such construction, alteration or repair. Provided that this section shall not extend to or apply within the city (i.e. the city of London) or to any hoarding duly licensed by the local authority under any statutory powers in that behalf.

Sect. 85. This part of this Act shall not apply in the case of a pile, stack, or store of timber not being a structure affixed or fastened to the ground.

Sect. 86. Structures or erections erected or set up upon the premises of any railway company and used for the purposes of or in connection with the traffic of such railway company shall be exempt from the operation of this part of this Act.

Certain other provisions of the London Building Act 1894 which are or may be material, are as follows:

Sect. 138. Subject to the provisions of this Act and to the exemptions in this Act mentioned, every building or structure and every work done to, in, or upon any building or structure and all matters relating to the width and direction of streets, the general line of buildings in streets, the provision of open spaces about buildings, and the height of buildings, shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate.

Sect. 200 (3). Every person who . . . (e) sets up, erects, or adapts any building or structure to which Part 7 of this Act applies without having obtained any licence required by that part of this Act, or makes default in observing any of the conditions contained in such licence, shall be liable to a penalty not exceeding 20*l.* a day during every day of the continuance of the noncompliance with the order of the court in reference to the matters aforesaid.

Sched. 3.—Fees payable to district surveyors. Part 1. . . . On wooden and temporary structures. —On inspection of any wooden structure, or on inspection of any structure or erection put up on any public occasion, the same amount as for a new building calculated on the area of the structure or erection without reference to the area of any building to which it may be attached, or in or on which it may be put up.

By the London Building Act 1898 which is to be read as one Act with the London Building Act 1894 it is enacted as follows:

Sect. 6, sub-sect. (3) (e), of the 200th section of the principal Act shall hereafter be read and construed and take effect as though the word "retains" had been inserted therein immediately after the word "erects," and the words "approval or" had been inserted therein immediately before the word "licence" wherever such word occurs therein.

Sect. 7. Every person who does any of the things specified in para. (a), (d), and (e) of sub-sect. (3) of sect. 200 of the principal Act as amended by this Act shall be liable, on conviction, to a penalty not exceeding 40*l.* for every such offence, and the court before whom an information is laid by the council in respect thereof may, in addition to imposing such penalty, make an order in writing directing such person to demolish the building or structure complained of, or any part thereof, or to comply with the condition contained in any consent, licence, or approval granted by the council for the setting up, erection, adaptation, alteration, or retention of such building or structure, and such order of the court shall be deemed to be the order of the court within the meaning and for the purposes of the 3rd sub-section of the 200th section of the principal Act, and the imposition of any penalty under the provisions of the present section shall be without prejudice to any proceedings under the 3rd sub-section of the 200th section of the

principal Act for the daily penalty therein mentioned, or under any other provisions of the principal Act or otherwise, but that no person shall be liable to more than one penalty (other than daily penalties) for the same offence.

In order to enable spectators to view the funeral procession of Her late Majesty Queen Victoria on 2nd Feb. 1901, and the procession of His present Majesty to open Parliament in State on the 14th Feb. 1901, a number of stands or structures were erected within the city of Westminster along the line of route of the procession. These stands or structures were constructed of wood, except the nails and some of the other fastenings, and the cloth or other hangings placed upon them. They were of a temporary character and had all been removed.

Questions had arisen between the London County Council and the council of the city of Westminster as to which of the councils was the proper authority under the London Building Act 1894 (1) to control, approve, or license such structures; (2) to take proceedings against the persons who have without licence, permission, or approval erected such structures; (3) and, further, as to whether structures were or were not subject to the supervision or inspection of the district surveyor under the Act.

The council of the city of Westminster contended that the structures in question were wooden structures within sect. 84 of the London Building Act 1894, and did not fall within the provisions of sects. 82 or 83 of that Act, and that by the effect of sect. 5 (1) of the London Government Act 1899 all powers and duties of the county council and its officers and of the district surveyors with respect to such structures in the city of Westminster were transferred to the council of the said city on the 9th Nov. 1900, and that the county council had now no authority either to license such structures within the said city or to take proceedings for default in obtaining or observing the conditions of any licence granted with respect to such structures, and that the supervision and inspection of such structures by the district surveyor had been transferred by the Local Government Act 1899 to the council of the said city and its officers.

The London County Council contended that the structures in question were structures of a temporary character, falling within the operation of sects. 82 and 83 of the London Building Act 1894, and that, notwithstanding the provisions of sect. 5 of the London Government Act 1899, they still had authority to approve the plans and particulars of such structures and to take proceedings in respect of such structures if erected or maintained without or contrary to the terms of their approval, and that such structures remain subject to the inspection and supervision of the district surveyor.

The questions submitted for the decision of the High Court were the questions stated above.

Manisty, K.C. (Craies with him) for the Corporation of Westminster. The meaning of sects. 82 to 86 of the London Building Act 1894 can best be ascertained by looking at the enactments they superseded. Now sect. 82 supersedes sect. 56 of the Metropolitan Building Act 1855, with this difference for present purposes that after the word "building" has been inserted "or structure." Sect. 83 supersedes sect. 12 of the Metropolis

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Management Act 1882, with the same difference. Sect. 84 supersedes sect. 13 of the same Act. Now sect. 13 referred to "movable and temporary" wooden structures. The structures now in question would clearly come within that section. In sect. 84, however, the words "movable or temporary" are left out. Surely the effect of this cannot be to narrow the section, and make it inapplicable to those structures to which it originally solely applied? Our contention is that the leaving out of these words does not narrow the operation of the section, but enlarges it so as to make it include not merely "movable or temporary" wooden structures, but all wooden structures. If these structures are within the section, then the power to license and to take proceedings with regard to them are transferred to the corporation by sect. 5 of the London Government Act 1899. Counsel further argued that the district surveyors had no power to inspect or supervise wooden structures, and were not entitled to fees for so doing, but the court declined to decide this point. He also referred to

Venner v. McDonell, 76 L. T. Rep. 152; (1897) 1 Q. B. 421.

Horace Avory, K.C. (Dally with him) for the London County Council.—If the contention of the corporation of Westminster that structures such as these now in question are within sect. 84 is correct, many difficulties will arise in the administration of the Act. It seems clear that there is nothing in the London Government Act 1899 interfering with the right of the district surveyors to inspect such structures, and claim fees. Passing that over, another difficulty will constantly arise as to who is to license when—as is often the case—the structure is partly or mostly of iron, and not as it happens to be in the present instance wholly of wood save as to the nails used. A third difficulty as to jurisdiction will be as to the question whether the structure is dangerous or not. Under sects. 102 to 104 of the London Building Act jurisdiction over all dangerous structures is given to the county council, and so we may have the county council proceeding against a structure erected under the licence of the corporation. [Lord ALVERSTONE, C.J.—My difficulty is to imagine what sect. 84 applies to if it does not apply to structures like these.] I submit it applies to wooden structures erected in connection with a house—such as a bicycle shed—which are not temporary structures in the ordinary sense. I contend that sect. 82 applies to all permanent buildings, and sect. 83 to all temporary buildings, while sect. 84 applies only to structures of wood which are neither temporary nor permanent in the ordinary sense. [CHANNELL, J.—It seems to me that sects. 82 and 83 apply to structures which come within the general provisions of part 6 of the Act. These are therefore left to the county council. Sect. 84 refers to those not coming within part 6, and so these are left to the local authority.] Counsel referred to

Whitechapel Board of Works v. Crow, 84 L. T. Rep. 595.

Lord ALVERSTONE, C.J.—The broad question raised in this case is whether the London County Council or the corporation of Westminster is the proper authority to lay down the conditions of construction and to sanction the construction

of wooden structures which it is proposed to erect, or which may have to be erected at the public functions taking place within the area of the borough of Westminster. Now, it is impossible to attempt to deal with every case that may arise, or to decide upon any particular state of facts which may be involved in the construction of some special structure. The question has been raised with regard to a number of constructions made wholly of wood, except in so far as nails were used in their construction, and all I wish to guard against is being supposed to say that we do lay down or are about to lay down any general rule which must govern some special case which may involve other considerations. In my opinion the main question should be decided in favour of the city of Westminster. The history of the matter has been very clearly stated by both the learned counsel who appeared before us. Before the passing of the London Government Act of 1899 there had been a series of enactments which put buildings and structures under certain supervision, and by sect. 56 of the Act of 1855 there was a provision enacted which represents sect. 82 of the London Building Act. By sect. 12 of the Act of 1882 there was a provision enacted which represented sect. 83 of the London Building Act. Sect. 13 of the Act of 1882 was a section which superseded sect. 56, and which dealt with, or was intended to deal with, temporary or moveable wooden structures, and no doubt some question similar to that which we have now got to decide might have arisen under those three sections taken from the two Acts of Parliament. When the London Building Act of 1894 was passed, the section of the Act of 1855 was replaced by sect. 82, and sect. 12 of the Act of 1882 was replaced by sect. 83. I think the latter was substantially the same section. Sect. 84, which replaced sect. 13 of the Act of 1882, was modified to a certain extent by the removal of the words which related to moveable or temporary wooden structures, and applying sect. 84 to wooden structures except hoardings. I may say in passing that it is quite clear to my mind that we could not accept the arguments pressed upon us that sect. 84 was meant to refer to permanent wooden structures, not only because of the proviso which might have remained *per incuriam*, but because of the operative and enacting words which give a right to impose a particular condition as to the length of time that the structure shall remain up. The first question, therefore, that we have to consider is what is the class of structures that fall within sects. 82 and 83, as distinguished from sect. 84, because by the subsequent Act the powers of sect. 84 have been transferred to the Westminster borough. I think, as far as I can express an opinion sufficiently for the purposes of this case, without attempting, as I have said, to deal with any particular state of circumstances which may arise, that sects. 82 and 83 are intended to apply to buildings or structures which from either their construction or their intended use would ordinarily have been supposed to come under the provisions of part 6 of the Act, but, either because of their mode of construction, or because of their use, it was thought by the London County Council that the general provisions of part 6 of the Act are inapplicable, and then the provisions and powers of sects. 82 and 83 would apply. Sect. 84 seems to

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me, as it now stands, to be a section giving control over wooden structures to which no general provisions or substituted provisions of a general character would be applicable. Therefore it was intended to give a special power to make conditions both as to the terms upon which, and to lay down the conditions under, and the time for which, certain structures should be erected. Then we come to the Act of 1899—The London Government Act. As I have already said, by the combined operation of sect. 5, if I remember aright, and the schedule, the powers of sect. 84 of the London Building Act to license the setting up of wooden structures, and the power to take proceedings for default in obtaining or observing the conditions for licensing under that section, are transferred to the borough of Westminster. I was very anxious to learn whether Mr. Avory could assist us as to what would be transferred to the borough of Westminster if his argument was right. The only case that he was able to suggest to us was (if I may use a somewhat abnormal phrase) permanent temporary structures, or, in other words, some wooden structures intended to remain, but added on to some other structure. It does not seem to me that this is a satisfactory explanation of the legislation. I think that the Local Government Act recognised that matters that ought to be dealt with by a central body, and could be the subject of substituted regulations in place of the general provisions of part 6 should be laid down by the central body, the London County Council, but that local matters, as for instance the erection of wooden structures for a limited time, to which no general or substituted regulation could be intended to apply, should be transferred under sect. 84 to the borough of Westminster. Therefore, upon the question which arises as to which of the two authorities are to fix the conditions, and impose the limit of time for temporary wooden structures, which are to be erected for the purpose of enabling persons to see public ceremonies, in my opinion the contention of the borough of Westminster is right. Now, there remains only the question of the possible supervision or duty of supervising on the part of the district surveyors. Speaking for myself, although I think, for the reasons that Mr. Avory has pointed out, difficulties may arise, and the construction we are putting upon the section will not remove this difficulty, I do not think we ought to decide the question for two reasons. In the first place it seems to me that it may, to a certain extent depend on the very conditions that the Westminster corporation think fit to impose. Secondly, we could not deal with that question without deciding what are the rights, duties, and obligations of district surveyors under the Act. They are not represented before us, and their case has not been argued. I think it would be unwise of us to attempt to lay down rules on such a point without knowing the particular circumstances under which the duty arises. We therefore propose not to answer the third question which has been put to us, as it is not necessary for our main decision, nor in fact could it be a judgment—it could only be an expression of opinion. On the broad question which has been submitted to us, and on which our direction is asked, I think that the contention made on behalf of the borough of Westminster is the right one,

and that they are the authority to exercise the powers of sect. 84, with regard to these particular structures.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Lord ALVERSTONE, C.J.—As this application is under a power to come and ask the court for instructions, I do not think there ought to be costs in any way. *Judgment for the applicants.*

Solicitors for the mayor and corporation of Westminster, Caprons, Hitchins, Brabant, and Hitchins.

Solicitor for the London County Council, W. A. Blazland.

Jan. 14 and 15.

(Before PHILLIMORE, J.)

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Revenue—Estate duty—Mortgage by life tenant and remaindermen—Indemnity to life tenant—Property passing at life tenant's death—Finance Act 1894 (57 & 58 Vict. c. 30), ss. 1, 2 (1) (b), 17 (7).

The life tenant of settled lands joined with the remaindermen in creating a mortgage on the lands. The money secured by the mortgage was entirely for the benefit of the remaindermen, and the life tenant did not covenant to pay either the mortgage debt or the interest thereon. By an indenture of even date with the mortgage, and made between the remaindermen and the life tenant, the former covenanted to indemnify the life tenant against any loss of profits of the settled land or any expenses or actions in respect of the mortgage, and assigned certain securities and charges on other lands as security for the performance of such covenants.

Held, on the death of the life tenant, that, whether the settled land passed under sect. 1 of the Finance Act 1894 or was deemed to pass under sect. 2 (1 b) the estate duty must be assessed upon the principal value of the settled land, and not on such value less the amount of the mortgage debt.

Earl Cowley v. Inland Revenue Commissioners (80 L. T. Rep. 361; (1899) A. C. 198) distinguished.

INFORMATION.

By the will, dated the 8th Aug. 1883, of Walter Francis, Duke of Buccleuch and Queensberry, the testator, in exercise of a power of appointment, reserved to him, and of every other power enabling him, appointed that all those his manors, lands, hereditaments, and estates situate or arising at Ditton, Datchet, and elsewhere, in the counties of Buckingham and Middlesex, with the rights, royalties, and appurtenances thereto respectively belonging (which manors, hereditaments, and estates in the counties of Buckingham and Middlesex were thereafter distinguished as the testator's Ditton estate) and all proceeds of sale (if any) of hereditaments previously forming part of his Ditton estate, or moneys held upon the trusts thereof, should from and after his decease be and remain to the use of his wife, Charlotte Anne, Duchess of Buccleuch and

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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Queensberry, and her assigns for her life without impeachment of waste, and from and after her decease to the use of the testator's second son, the defendant, then Lord Henry John Montagu Douglas Scott, and his assigns during his life without impeachment of waste, and from and after his decease to the use of the first, second, third, and all and every other the son and sons of the defendant successively according to priority of birth in tail male, with divers remainders over.

The Duke of Buccleuch died on the 16th April 1884, and his will duly came into operation.

By an indenture dated the 28th May 1888 and made between Charlotte Anne, Duchess of Buccleuch, widow of the testator, of the first part, the defendant, now Lord Montagu, of the second part, the Hon. J. W. E. D. Scott Montagu the eldest son of the defendant of the third part, and the Hon. James Archibald Douglas Home and Frederick Iltid Nicholl and Henry Frederick Nicholl thereafter called the trustees of the fourth part, and duly enrolled as a disentailing assurance pursuant to 3 & 4 Will. 4, c. 74, reciting the testator's will and reciting that the testator's second son was created Baron Montagu of Beaulieu on the 26th Dec. 1885, and that J. W. E. D. Scott Montagu was the eldest son of the defendant and attained the age of twenty-one years on or about the 10th June 1887, and reciting that the defendant and J. W. E. D. Scott Montagu were desirous of executing such disentailing assurance and resettlement as was thereafter contained, it was witnessed that in consideration of the premises the defendant and J. W. E. D. Scott Montagu (with the consent of Charlotte Anne, Duchess Dowager of Buccleuch as protector of the settlement) conveyed unto the trustees all and singular the manors of Ditton and Datchet St. Helens, and the advowson of the chapel of Ditton, and the mansion-house and park of Ditton, and the messuages, lands, tenements, and hereditaments situate in the parishes or places of Ditton and Stoke Poges, Datchet and Langley, or elsewhere in the county of Buckingham, and of Stanwell in the county of Middlesex, of which the particulars were given in the schedule thereto, to hold unto the trustees in fee simple subject to the life estate of the Duchess Dowager of Buccleuch under the will, and all powers annexed or appurtenant to that life estate, but freed from the life estate of the defendant under the will, and all powers annexed to or exercisable during the continuance of such life estate, and also freed from the estate in tail male of J. W. E. D. Scott Montagu under the will and all other estates in tail male or in tail (if any) of J. W. E. D. Scott Montagu, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail, to such uses and in such manner as the defendant and J. W. E. D. Scott Montagu should from time to time by deed jointly appoint, and in default of and subject to any such appointment to the use of the defendant for his life without impeachment of waste, in restoration of the life estate given to him by the will and the powers annexed to such life estate, with remainder to such uses as J. W. E. D. Scott Montagu after the death of the defendant should from time to time by deed or by will appoint, and in default of and subject

to such appointment to the use of J. W. E. D. Scott Montagu for his life without impeachment of waste, with remainder to the use of the first and other sons of J. W. E. D. Scott Montagu successively according to seniority in tail male with divers remainders over. The indenture contained also a disentail and resettlement on trusts corresponding to the uses and trusts of the hereditaments thereinbefore conveyed of the sum of 232*l.* 3*s.* 3*d.* India Three and a Half per cent. Stock, being capital money arising under the Settled Land Act from the Ditton estate then in the hands of the trustees.

By an indenture dated the 29th May 1888, and made between the Dowager Duchess of Buccleuch of the first part, the defendant of the second part, J. W. E. D. Scott Montagu of the third part, and the Hon. G. H. Brabazon Ponsonby, Earl Spencer, and the Marquess of Bristol (thereinafter called the mortgagees) of the fourth part it was witnessed that in consideration of 27,000*l.* lent to the defendant at the request of the Duchess Dowager of Buccleuch by the mortgagees out of money belonging to them on a joint account, of which sum the defendant and J. W. E. D. Scott Montagu acknowledge the receipt, the defendant and J. W. E. D. Scott Montagu joint and severally covenanted to repay the sum lent with interest, and the Dowager Duchess of Buccleuch, as tenant for life in possession under the will of the Duke of Buccleuch, granted, and the defendant and J. W. E. D. Scott Montagu, in exercise of the joint power of appointment given to them over the fee simple in remainder expectant on the decease of the duchess dowager, by the indenture of disentail and resettlement, appointed all the mansion-house and park of Ditton, and the messuages, lands, tenements, and hereditaments situate in the parishes of Ditton, Stoke Poges, Datchet, and Langley, or elsewhere in the county of Buckingham, to hold unto and to the use of the mortgagees in fee simple subject to the proviso that on payment on the date therein mentioned by the defendant and J. W. E. D. Scott Montagu, or one of them, or the person deriving title under them, to the mortgagees, or the persons deriving title under them of the sum of 27,000*l.* with interest, the premises conveyed and appointed should at the request and at the cost of the defendant and J. W. E. D. Scott Montagu, or one of them, or the persons deriving title under them, be reconveyed to the uses which under the will and resettlement should be then subsisting and capable of taking effect of and concerning the Ditton estate devised by the will of the Duke of Buccleuch, and resettled by the disentailing assurance and indenture of resettlement; and the Duchess Dowager of Buccleuch in respect of her life interest only and the defendant and J. W. E. D. Scott Montagu thereby severally covenanted with the mortgagees at all times during the continuance of the security to keep the premises in repair, to insure them against fire, and to rebuild if the premises were burnt down, and on failure to observe these covenants the mortgagees might repair and insure and the Duchess Dowager, the defendant, and J. W. E. D. Scott Montagu undertook to repay the money so expended, which was, until repayment, to be a charge on the land.

By an indenture dated the 29th May 1888 and made between the defendant of the first part,

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J. W. E. D. Scott Montagu of the second part, the Duchess Dowager of Buccleuch of the third part, the Duke of Buccleuch and the Earl of Home, thereafter called the trustees, of the fourth part, after reciting the settlement of and charges upon the Clithero estate, in the county of Lancaster, and that the Duchess Dowager of Buccleuch agreed, at the request of the defendant and J. W. E. D. Scott Montagu, to concur in the mortgage of the Ditton estate upon the express condition that she should be indemnified in respect thereof in the matter thereafter appearing, it was witnessed that in pursuance of this agreement and in consideration of the premises the defendant and J. W. E. D. Scott Montagu did jointly and each of them as a separate covenant did for himself covenant with the duchess dowager that they or one of them, or their or one of their heirs, executors, and administrators, would at all times keep indemnified the duchess dowager against the mortgage debt of 27,000*l.* and interest, and against all actions, suits, proceedings, claims, and demands, which might be brought or made by any person or persons against her or the Ditton estate during her life, by way of enforcing the mortgage security, or for or in respect of the sum of 27,000*l.* and interest thereby secured, and in further pursuance of the agreement and for the same consideration, the defendant and J. W. E. D. Scott Montagu as beneficial owners did and each of them according to his interest and as beneficial owner did assign and convey unto the trustees all an annuity of 1500*l.* payable out of the Clithero estate under the will of the Duke of Buccleuch, during the continuance of a term of 1300 years, to the possessor for the time being of the Beaulieu estate under the Beaulieu settlement, to hold the annuity of 1500*l.* unto the trustees, their executors and administrators, during the joint lives of the duchess dowager, the defendant, and J. W. E. D. Scott Montagu and during the joint lives of the duchess dowager and the survivor of the defendant and J. W. E. D. Scott Montagu if the term should so long continue undetermined, upon the trusts thereafter declared, and in further pursuance of the agreement the defendant and J. W. E. D. Scott Montagu in exercise of the joint power of appointment vested in them over the Clithero estate, subject to the term of 1300 years and as beneficial owners appointed that subject to the term and the trusts thereof the Clithero estate should remain and be to the use that the trustees, their heirs and assigns, might receive thereout the yearly rentcharge of 1500*l.*, to commence from the determination of the term of 1300 years, if the Duchess Dowager of Buccleuch should then be living, and to continue thenceforth during the life of the duchess dowager and to be considered as accruing from day to day, but to be paid by equal quarterly payments on the usual quarter days, upon the trusts thereafter declared. These trusts were that the trustees should hold the annuity of 1500*l.* and the rentcharge of 1500*l.*, as the case might be, upon trust during the life of the duchess dowager to keep down the interest on the mortgage debt of 27,000*l.*, or on so much thereof as should from time to time be owing on the security of the indenture of mortgage to the intent that the life interest of the duchess

dowager in the Ditton estate might be wholly exonerated therefrom, and to repay to the duchess dowager all sums which she might from time to time incur by reason of the mortgage security, or in respect of the money secured thereby, and also to repay to her all rents and profits of the Ditton estate which but for the mortgage security would have been paid or payable to her, and which she might lose by reason of the mortgage security of any proceedings taken by the mortgagees to enforce such security, and to pay to the duchess dowager compensation in respect of any mesuage or messuages, lands or hereditaments, forming part of the Ditton estate of which she might be deprived of the possession by reason of the mortgage security, and generally at all times thereafter to save harmless and keep indemnified the duchess dowager from and against the mortgage debt of 27,000*l.* and the interest thereon, and from and against all actions, suits, proceedings, claims, and demands which might be brought by any person or persons against her or the Ditton estate during her life by way of enforcing the mortgage security, or for or in respect of the sum of 27,000*l.* and interest thereby secured. And it was thereby declared that subject to these trusts the trustees or trustee should hold the annuity of 1500*l.* so long as the same should continue payable upon trust for the person from time to time entitled under the will of the Duke of Buccleuch to the residue of the annuity of 6000*l.* or 8000*l.* as the case might be, and should hold the rent charge of 1500*l.* when and so long as it should be payable upon trust for the person from time to time entitled in possession to the Clithero estate.

The Dowager Duchess of Buccleuch died on the 28th March, 1895.

The mortgage above referred to was created wholly for the benefit of the defendant and his son J. W. E. D. Scott Montagu, or one of them, and the Dowager Duchess of Buccleuch and her estate was in fact kept wholly indemnified by them or one of them against the mortgage, and all claims for interest or otherwise in respect of it.

The defendant, as tenant for life in possession of the Ditton estate, was bound to deliver an account and to pay estate duty under the Finance Act 1894 on the principal value of the estate, but in delivering such account he claimed to deduct the mortgage of 27,000*l.* from the capital value of the estate, and refused to pay estate duty on the capital value without deduction. The informant submitted that such deduction ought not to be allowed.

The chief prayer of the informant was that it might be declared that upon the death of Charlotte Anne, Dowager Duchess of Buccleuch and Queensberry, estate duty became payable under the provisions of the Finance Act 1894 upon the principal value of the Ditton estate as property which passed on her death within the meaning of that Act without deduction of the mortgage debt of 27,000*l.*, and that the defendant was bound to deliver an account and pay duty accordingly.

Finance Act 1894 (57 & 58 Vict. c. 30):

SECT. 1. In the case of every person dying after the commencement of this part of this Act there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter pro-

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vided of all property, real and personal, settled or not settled, which passes on the death of such person, a duty, called "estate duty," at the graduated rates hereinafter mentioned.

Sect. 2 (1). Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the ceasing of such interest.

Sect. 7 (7). The value of the benefit accruing or arising from the ceasing of an interest ceasing on the death of the deceased shall (a) if the interest extended to the whole income of the property be the principal value of that property; and (b) if the interest extended to less than the whole income of the property be the principal value of an addition to the property equal to the income to which the interest extended.

The *Attorney-General* (Sir R. B. Finlay, K.C.) (the *Solicitor-General*, Sir Edward Carson, K.C., and *Vaughan Hawkins* with him) in support of the information.—The Ditton estate passed within the meaning of the Finance Act 1894 on the death of the Dowager Duchess of Buccleuch to the defendant either under sect. 1 or under sect. 2 (1) (b) of the Act. Whether it passed under sect. 2 (1) (b) or under sect. 1, we submit that the estate duty is to be assessed upon the principal value of the property without any deduction for the mortgage debt. The ground of this contention is that the mortgage, though it may have been a mortgage of the whole fee as between the mortgagees and the tenant for life and remaindermen, was as between the tenant for life and remaindermen themselves merely in fact a mortgage of the remainder. The indenture of mortgage and the indenture of indemnity must as between the tenant for life and the remaindermen be read as one transaction, and read as one transaction they amount to this, that while nominally the life tenant's interest is made a security for the mortgage debt, the remaindermen undertake that in fact it shall never become liable as a security, and that they shall compensate the life tenant for any expense she may be put to on account of the security, and they provide other security for carrying out their undertaking. Accordingly the transaction was never intended to diminish, and did not in fact diminish, the life tenant's interest or income in the Ditton estate during her life. At her death she was in enjoyment of the whole income of the estate. Accordingly, assuming the property passed on her death under sect. 1 of the Finance Act 1894, what passed was the whole property in the estate, and accordingly, on the principal value of the whole property the estate duty is assessable; or, assuming that it passed under sect. 2 (1) (b), then the benefit which came to the remaindermen must be measured under sect. 7 (7), and since the duchess's interest extended to the whole income of the Ditton estate the duty must be assessed on its principal value. This distinguishes this case from *Earl Cowley v. Inland Revenue Commissioners* (80 L. T. Rep. 361; (1899) A. C. 198). There the tenant for life and the remainderman both not merely joined in the mortgage but both entered into covenants to pay the debt and the interest thereon. The land mortgaged was the sole security for the debt, and both as between the mortgagee and the life tenant and remainderman and between the life tenant

and remainderman themselves the life tenant's interest was liable for the debt and interest, and the interest was in fact during his life paid by the life tenant out of the income. That was altogether a different case from this. There the mortgage was entered into for the benefit primarily of the life tenant; here it was solely for the benefit of the remaindermen. There the life tenant personally covenanted to pay the mortgage debt and interest; here she did nothing of the kind, but the remaindermen covenanted to pay both interest and principal. And there there was no undertaking on the part of the remainderman to indemnify the tenant for life against any expense or costs she might be put to in consequence of joining in the mortgage, nor was any security given for the carrying out of such an undertaking. The question we submit is one of fact whether or not the life tenant enjoyed up till her death the full property and income of the Ditton estate, and it cannot be denied that in fact she did enjoy it. This also distinguishes the case from *Attorney-General v. Beech* (79 L. T. Rep. 565; (1899) A. C. 53). There in fact the life tenant's interest ceased altogether before her death by her surrender of her life interest to the remainderman. At her death, therefore, she had no income from or interest in the property at all, and so nothing could pass or be deemed to pass from her to those already in possession. The same observations apply to

Attorney-General v. De Préville, 81 L. T. Rep. 266, 690; (1900) 1 Q. B. 223.

Danckwerts, K.C. and *Austen-Cartmell* for the defendant.—This case is within the principle of *Earl Cowley v. Inland Revenue Commissioners* (*sup.*). The principle of that case is that when the life tenant and the remainderman during the life of the life tenant join in mortgaging the whole fee, then on the death of the life tenant all that passes to the remainderman is the equity of redemption. The reason, as pointed out by Lord Macnaghten in that case, is that as far as the land is mortgaged it is taken out of the settlement. It does not matter for what purpose the land was mortgaged, or who received the benefit of the mortgage. The sole question is, has the property in settlement been diminished during the life of the tenant for life by part of it being taken out of settlement either by sale or by mortgage binding equally on the tenant for life and the remainderman? If it has been, then all that passes to the remainderman is the property so diminished, and estate duty is payable only on such property. Here the property is diminished just as much as it was in *Earl Cowley v. Inland Revenue Commissioners* (*sup.*). The indenture of indemnity and the security given to the life tenant cannot alter the nature of the mortgage, nor can they make anything pass which in fact does not pass on the death of the tenant for life. This case is within sect. 1, and no question arises as to what is deemed to pass (*Earl Cowley v. Inland Revenue Commissioners, sup.*); and all that in fact passed to the defendant was the equity of redemption.

The *Attorney-General* in reply.

PHILLIMORE, J.—On the 28th May 1888 the Ditton Park estate stood limited to the Duchess Dowager of Buccleuch and Queensberry for her

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life and then subject to, but for other purposes, an overriding power, to Lord Montagu for life with remainder to his eldest son for some estate of freehold. On the 29th May, by an indenture to which the duchess, Lord Montagu, and his son were parties as grantors, by conveyance of the duchess's life estate and by an appointment made by Lord Montagu and his son in exercise of the power which I have mentioned, the estates were mortgaged to secure a sum of 27,000l. and interest. The ordinary personal covenants for payment by the mortgagor or mortgagors were expressly made by Lord Montagu and his son only, and the power of redemption was given, not to the duchess nor to the successor in fee only, but it was given to Lord Montagu who had a life estate in remainder, and his son, successors in fee, otherwise there is no peculiarity, unless the last is a peculiarity, of which I am not certain, in the mortgage deed. By an indenture of even date (reciting what one would have conjectured already from the form of the mortgage, that the duchess was not the real borrower, that the money was borrowed for Lord Montagu and his son) Lord Montagu and his son covenanted personally to keep the duchess indemnified, and to indemnify her if she would suffer loss in respect of her estate in Ditton Park; and, further, to convey by way of security sufficient interest which they had in other properties during the lifetime of the duchess. In those circumstances the duchess apparently was never the sufferer during her life by the fact that she had joined in the mortgage and incurred, as between her and the mortgagees, her life estate in the Ditton Park estate, and she died, as she had lived, beneficially interested in the Ditton Park estate to its full value. Upon her death the Crown claimed estate duty from Lord Montagu and those claiming after him, and Lord Montagu and those claiming after him admitted their liability to the estate duty. The question then arose as to the measure of that liability. The Crown said it was to be assessed on the supposition that the duchess had been beneficially interested during her life until her death in the Ditton Park estate to its full value. Lord Montagu and those claiming under him said that she was to be treated as only interested in the Ditton Park estate incumbered by the mortgage for 27,000l., and that is the matter which I have to determine. The Crown rests its claim upon sect. 1, sect. 2 (1) (b), and sect. 7, sub-sect. (7) of the Finance Act of 1894, and those seem to me to be in substance the only material portions of the Finance Act which I have to consider. The argument of the defendants rests upon the deductions which they say are to be drawn from the decision of the House of Lords in *Attorney-General v. Cowley* (sup.). They also pray in aid the decision of the House of Lords in *Attorney-General v. Beech* (sup.) and the decision of the Court of Appeal in *Attorney-General v. De Prévillé* (sup.). Now, I may say, perhaps, once and for all, that there will never be found any reluctance in me to carry those three decisions to their full conclusion. I may quote what I myself said as regards a decision of the House of Lords, of my own willing acceptance of the decision of the House of Lords in *Attorney-General v. Cowley* (sup.). I may quote what I myself said in *Attorney-General v. Hawkins* (83 L. T. Rep. 531, at p. 534; (1901) 1 K. B. 285).

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I may now say with all respect, with regard to either one of those three decisions—namely, *Cowley*, *Beech*, and *De Prévillé*—I have not the slightest intellectual difficulty in following and, I hope, applying them wherever they become important; and for the purpose of this case I accept the contention of the defendant that the duchess's estate in Ditton Park was legally incumbered, and that that legal incumbrance must be taken into consideration in assessing what her successors have to pay. But, having said that, I nevertheless come to the conclusion in favour of the Crown. I have, in my opinion, simply to consider what was the beneficial interest in the Ditton Park estate which the duchess enjoyed, and which upon her death she relinquished, and, having to consider that, I have no hesitation in saying that she must be deemed to have been beneficially interested in the Ditton Park estate to its full value. I am not certain that it makes really any difference that the defendants in this case happen to be also the people who are bound to keep the duchess's interest in the Ditton Park estate up to its full value. If it does make any difference it makes the case for the Crown stronger. I think, however, it would have been quite the same if it had been other persons who had covenanted to indemnify the duchess, to secure the duchess, provided always, that the security was ample and sufficient. I think, looking, as I ought to do, at the two deeds as constituting, as far as the duchess and Lord Montagu and his son were concerned, one transaction (by "the two deeds" I mean the mortgage deed and the deed of indemnity), I must come to the conclusion that, though the Ditton Park estate in respect both of the duchess's interest and the interest in remainder, was a primary security, or the security, of the mortgagees, nevertheless as between those interested in the Ditton Park estate, the duchess's estate in the Ditton Park estate was only liable by way of suretyship, and Lord Montagu and his son were bound to prevent the duchess ever suffering any diminution of her interest. If it had been necessary during the duchess's life to estimate *inter vivos* the value of her life interest in that property, if, for instance, a tax had been imposed upon capital instead of upon income, or if the duchess had conveyed her estate, and there had been a question of the *ad valorem* duty to be imposed upon that conveyance, it is possible, or probable, that the possible liability of the duchess's estate to meet the mortgagees would have to be assessed as a contingent liability, and assessing the contingent liability at some figure, would *pro tanto* have diminished the value of her life interest. If (which might have happened) the duchess had been called upon to pay the mortgage, or if the mortgagees had entered into possession or if they had sold or compelled the duchess to join in selling some portion of the property to meet their claims, then the estate, which the duchess relinquished on her death, would have been *pro tanto* diminished, and a lesser rate of duty would have been recoverable from Lord Montagu and his successors. But now that I have to assess the duty upon the duchess's death, I know that there can be no liability, and I know that there has been no demand and no payment in respect of the liability, and therefore I think that I am

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bound to treat the duchess as no doubt having subjected her estate to a legal incumbrance, but having that incumbrance in fact as a mere shell without any kernel, and as in fact being beneficially interested in this estate to its full value up to the date of her death, and taking that view it becomes unnecessary to consider many other circumstances which have been, I hope, properly raised and met during the course of the argument of this case. Accepting to the full the canons, which binding authorities have imposed upon me, and applying my mind to the construction of this section, thinking this matter comes simply under the plain language of sect. 1, though it may come also under sect. 2 (1) (b), I am of opinion that the estate which the duchess relinquished, or which passed on her death, in the Ditton Park estate, was the full beneficial life interest in it, and that therefore the duty must be paid without reduction of the incumbrance of 27,000*l*. I give judgment, therefore, for the Crown with costs.

Judgment accordingly.

Solicitor for the informant, *The Solicitor of Inland Revenue.*

Solicitors for the defendant, *Nicholl, Manisty, and Co.*

House of Lords.

Dec. 9, 10, and 17, 1901.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN, SHAND, DAVEY,
BRAMPTON, ROBERTSON, and LINDLEY.)

NOAKES AND Co. v. RICE. (a)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Mortgage—Restrictive covenant—Clog on equity
of redemption—"Tied house."*

Any stipulation which varies the effect and incidents of redemption of a mortgage on payment off of what is due on the loan is a "clog" within the meaning of the equitable rule, and cannot be enforced.

A covenant in a mortgage of a public-house to a firm of brewers binding the mortgagor to sell on the licensed premises no malt liquors except such as he purchased from the mortgagees, although valid during the continuance of the security, cannot be maintained after the mortgage debt has been paid off, as being a clog on the equity of redemption.

Judgment of the court below affirmed.

Santley v. Wilde (81 L. T. Rep. 393; (1899) 2 Ch. 474) disapproved by Lord Macnaghten and Lord Davey.

THIS was an appeal from a judgment of the Court of Appeal (Lord Alverstone, M.R., Rigby and Collins, L.JJ.), reported 82 L. T. Rep. 784; (1900) 2 Ch. 445, who had affirmed a judgment of Cozens-Hardy, J., reported 81 L. T. Rep. 482; (1900) 1 Ch. 213.

The question was whether on payment off of all moneys secured by an indenture of mortgage dated the 7th Oct. 1897 and made between the respondent of the one part and the appellants of the other part, the respondent was entitled to

have a reconveyance of the subjects comprised in the indenture together with a release or assignment of a certain covenant contained in it.

The appellants were a brewery company, and prior to the sale to the respondent of a public-house were mortgagees thereof under an indenture of mortgage dated the 28th April 1892, wherein was contained a covenant in similar terms to the covenant in the present case.

The appellants having become entitled to sell the premises, negotiations took place between them and the respondent, who was desirous of becoming the purchaser of the same, and it was ultimately agreed that the appellants should advance to the respondent the sum of 4850*l*. to enable him to effect the purchase, and that the exclusive right to supply the public-house with all malt liquors required therefor should be secured to the appellants for the residue of the term for which the same were held, and that the repayment of the mortgage money and interest should be secured by first mortgage of the premises.

Pursuant to the agreement the appellants advanced to the respondent the sum of 4850*l*. for the purpose of the purchase, which was completed on the 7th Oct. 1897, and by an indenture of mortgage of that date made between the respondent of the one part and the appellants of the other part the respondent demised and conveyed to the appellants the said leasehold public-house and premises and the trade and tenant's fixtures therein and the goodwill of the business carried on thereat, by way of mortgage for securing the said sum of 4850*l*. and interest thereon at the rate of 5*l*. per cent. per annum, and all such further sums as are therein mentioned, and in the same indenture was contained a covenant in the words following:

And for the considerations aforesaid the mortgagor, so as to charge the premises hereinbefore expressed to be hereby demised into whosoever possession the same may come, whether by act of the party or by operation of law, or by any other ways or means howsoever, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell or permit to be used or sold in, upon, or about the said demised premises any malt liquors, except such as shall be *bond fide* purchased by the mortgagor of the company; and, further, that if and whenever there shall be a breach of the said covenant he, the mortgagor, shall and will pay to the company the sum of 1000*l*. as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors, pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him.

On the 24th March 1898 the respondent gave notice to the appellants of his intention to pay off the money secured by the indenture of the 7th Oct. 1897, provided the appellants were willing on payment thereof to release him from the above-stated covenant.

The appellants refused to acquiesce in this suggestion, and on the 8th Nov. 1898 the respondent issued the writ in the action and delivered a statement of claim on the 8th Dec. 1898.

By the order of Cozens-Hardy, J. dated the 16th Nov. 1899 it was declared that upon pay-

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

ment by the respondent to the appellants of all moneys due under the said indenture of the 7th Oct. 1897 the respondent was entitled to a reconveyance of the hereditaments comprised therein and to a release or transfer at his option of all the covenants contained in the said indenture, and that in any case the appellants were not thereafter entitled to the benefit of the said covenant.

The appellants appealed, and the Court of Appeal affirmed the order of Cozens-Hardy, J.

Haldane, K.C., Eve, K.C., and Stanley Fisher appeared for the appellants, and contended that the old doctrine making void any clog on the equity of redemption as laid down on the older cases, such as *Jennings v. Ward* (3 Vern. 520), *Tulk v. Moxhay* (2 Phil. 774), *Bunbury v. Winter* (1 Jac. & W. 255), had been much modified by later decisions—see notes to *Howard v. Harris* (2 Wh. & Tud. 11) and the observations of Jessel, M.R. in *Teevan v. Smith* (47 L. T. Rep. 208; 208 Ch. Div. 724) and *Wallis v. Smith* (47 L. T. Rep. 389; 21 Ch. Div. 243). Stipulations similar to this have been enforced in *Potter v. Edwards* (26 L. J. 468, Ch.), *Mainland v. Upjohn* (60 L. T. Rep. 614; 41 Ch. Div. 126), *Biggs v. Hoddinott* (79 L. T. Rep. 201; (1898) 2 Ch. 307), and *Santley v. Wilde* (81 L. T. Rep. 393; (1899) 2 Ch. 474), which is absolutely in point in the present case:

Carritt v. Bradley, 85 L. T. Rep. 197; (1901) 2 K. B. 550.

These cases show conclusively that every stipulation for a collateral advantage to the mortgagee will not be held void. [The LORD CHANCELLOR (Halsbury).—The extent to which you may clog the equity of redemption may come to be a question of fact.] *Salt v. Marquis of Northampton* (65 L. T. Rep. 765; (1892) A. C. 1) is not really in point.

Asbury, K.C. and E. Beaumont, for the respondent, argued that the only case which went as far as the appellants' contention in this case was *Santley v. Wilde*, and, if that case cannot be distinguished, it was wrongly decided. This case is really governed by *Salt v. Marquis of Northampton*. This provision is a clog on the equity of redemption within the meaning of the rule laid down in the older cases. If this tie were left in existence after the mortgage was paid off, no other brewer would advance money on the security.

Haldane, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case it is suggested that great differences of judicial opinion are apparent upon many of the decisions which are germane to the present appeal. For my own part I very much doubt if it is quite accurate so to describe the differences of judicial opinion. In many, and indeed I think in most, of the cases to which our attention has been drawn, the court has not been in any doubt or difficulty as to the rule, which has been established in the courts of equity so firmly that nothing could shake it now, but only as to the application of that rule to different sets of facts. It is to my mind a very remarkable corroboration of the criticism which I am now making that in

the case upon which doubt appears to have been thrown—namely, *Santley v. Wilde* (*ubi sup.*)—the judgment of Lindley, M.R. is in these terms—and I do not know that there has been a more authoritative statement of the rule which comes up now than what he there laid down: "The principle is this: a mortgage is a conveyance of land, or an assignment of chattels, as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable upon the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that 'once a mortgage always a mortgage'; but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule." I cite that case because it appears to me that it lays down the rule; and the differences which are supposed to prevail from time to time appear to me to be only differences of fact, or of the modes in which the various courts have regarded the facts, as to whether a case came within that rule or not. But I do not believe that there is any portion of that which Lindley, M.R. laid down in the case which I have cited that has been the subject of doubt or difficulty in any court whatever. I find that the same question has arisen, and has been very learnedly discussed, in the Irish courts lately in the case of *Browne v. Ryan*, (1901) 2 Ir. Rep. 653, and certainly that case is extremely relevant to the question which this House is now discussing, because, in truth, it arose upon what practically are the same facts as in this case, and the learned judges in the Court of Appeal have arrived at the same conclusion as that at which I invite this House to arrive. FitzGibbon, L.J. in his judgment, and also Holmes, L.J. in referring to the case which I have just cited, appear to consider that case inconsistent with the rule which they themselves lay down. I confess that I am unable to find any inconsistency. It may be that Lindley, M.R. took a different view of the facts in the case with which he was then dealing to that which they would have taken, but that is not a difference in the law; and in this case it appears to me, as in the case which was argued in the Court of Appeal in Ireland, to be almost impossible, if the rule laid down by Lindley, M.R. is the rule upon which the courts must act, to deny that there is a fetter or clog, or whatever figurative word may be used, to prevent that which according to the known state of the law is to be enforced—namely, that the person who has pledged his estate for the payment of a debt shall, upon redemption, be entitled to have that estate back again unfettered and unclogged by anything that shall prevent him from exercising the right which the law insists upon his being permitted to have. Under these circumstances it is and must be in each case a question of the particular thing which is advanced as a clog or fetter, and in some cases it may seem

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to come very near the line. Whatever rule is laid down, one can reduce it to something like an absurdity by taking an extreme case. But taking this case it appears to me that undoubtedly this was a mortgage, and that the equity of redemption is clogged and fettered here by the continuance of an obligation which would render this house less available in the hands of its owner during the whole period of the term apart from the realisation of the security. Under these circumstances, as a matter of the merest and simplest reasoning, I am wholly unable to come to any other conclusion than that there is a clog and fetter here which the law will not permit. That seems to me to be the whole of this case; and, apart from the attempt to determine the sources from which this rule of law or equity was derived, it seems to me that this case is capable of being disposed of very summarily in that way. I care not what the sources of the rule were. I care not what differences of fact there may have been in other cases. What I say is, here is a case strictly within the rule, and looking at the facts of this case, and applying to it one's ordinary knowledge of what would be the effect of the covenant upon the property which was made the pledge, and has to be restored free and unfettered to its owner, I cannot entertain a doubt that it did, and did intentionally, place a clog and fetter upon the right of redemption which it is the policy of the law, as declared by the courts of equity, to insist shall not be taken away by anything in the nature of a mortgage. Under these circumstances I move that this appeal be dismissed with costs.

LORD MACNAGHTEN.—My Lords: I am of opinion that the judgment of Cozens-Hardy, J., affirmed by the Court of Appeal, is perfectly right. Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself, and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered, to all intents and purposes, as if the land had never been made the subject of the security. In the present case it is hardly necessary to appeal to this principle, because the mortgage deed under consideration expressly and in terms provides that, on repayment of the money advanced, the mortgagees are to reconvey the mortgaged premises to the mortgagor or as he shall direct. That, of course, means that the land is to be reconveyed, freed, and discharged from all burden and liability in respect of or arising out of the contract under which the advance was made. Mr. Haldane, in his reply, felt the difficulty of his position so much that he was driven to contend that the subject of the security was a "tied" public-house, and that, therefore, the mortgagor could only get back his property subject to that tie in favour of the mortgagees the brewers. But to this, as was pointed out in the Court of Appeal, there are two answers. In the first place, the argument has no foundation in fact. Nothing can be plainer than this—that it was the object and intention of all

parties that the property should be set free from the old "tie" attached to it or attempted to be attached in the hands of its former owner, and that it should be mortgaged to the appellants as a free public-house. In the next place, if the tie is invalid after redemption now, the tie could not have subsisted after the old mortgage was paid off. Since the argument, my attention has been called to the case of *Browne v. Ryan*, recently decided by the Court of Appeal in Ireland (1901) 2 Ir. Rep. 653). There a farmer mortgaged his holding to secure 200*l.* and interest, and as part of the mortgage transaction it was stipulated that the mortgagor should sell his holding within twelve months, employ the mortgagee as the auctioneer at a certain commission, and pay him the like commission if the conduct of the sale was given to anyone else. The Court of Appeal held, and in my judgment rightly held, that the stipulation had no effect after redemption. The judgments of the learned judges of the Court of Appeal seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English Court of Appeal in *Santley v. Wilde* (*ubi sup.*), and they expressed their disapproval of the conclusions at which the English Court of Appeal arrived. Speaking for myself, with all deference to my noble and learned friend opposite (Lord Lindley), I cannot help sharing that view. I do not in the least dissent from the propositions laid down by my noble and learned friend, taking them separately. But the transaction in that case seems to me to have been nothing more than an ordinary mortgage to secure an advance of money with a superadded obligation offending against the settled principles of equity in that it rendered redemption impossible. It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that, after full payment of principal, interest, and costs, he should continue to receive for a definite or indefinite period a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created. Nor can I agree with the President of the Probate Division (Sir F. Jeune), who seems to have thought that *Santley v. Wilde* was covered by the decision in *Biggs v. Hoddinott* (*ubi sup.*), a decision to which, as it seems to me, no objection can be taken. If there is an expression in Cozens-Hardy, J.'s judgment to which I do not cordially assent it is one in the last paragraph of his judgment, where the learned judge seems to refer to this tie as "an equity attached to the property" or as "an equitable burden." I rather doubt whether such an obligation can be made to run with the land or can be imposed on the owner in respect of the property except as between lessor and lessee, or in the case of a mortgage during the continuance of the security. I think that the judgment should be affirmed.

LORD SHAND concurred.

LORD DAVEY.—My Lords: There are three doctrines of the courts of equity in this country which have been referred to in the course of this case. The first doctrine to which I refer is expressed in the maxim "Once a mortgage always a mortgage." The second is that the mortgagee shall not reserve to himself any col-

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lateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void. The first maxim presents no difficulty; it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void. In the case of *Salt v. Marquis of Northampton* (*ubi sup.*) the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed. The second doctrine to which I refer—namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract—was established long ago when the usury laws were in force. The court of equity went beyond the usury laws, and set its face against every transaction which tended to usury. It therefore declared void every stipulation by a mortgagee for a collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest. I think that it will be found that every case under this head of equity was decided either on this ground or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view which the court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think that the case of *Biggs v. Hodkinson* (*ubi sup.*) was rightly decided. The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: "Once a mortgage always a mortgage, and nothing but a mortgage." The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest, and costs from getting back his mortgaged property in the condition in which he parted with it. I do not dissent from the opinion expressed by Lindley, M.R. in *Santley v. Wilde* (*ubi sup.*). He says: "A clog or fetter is something which is inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition." But, I ask, security for what? I think that it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan for which the mortgagee has validly stipulated during the continuance of the mortgage. There are two elements in the conception of a mortgage—first, security for the money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. I confess that I should have decided the case of *Santley v. Wilde* (*ubi sup.*) in a way different from that in which it was decided in the Court of Appeal. After the payment of principal and interest and everything which had become payable up to

the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits, and the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem. The principle is this, that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan. In my opinion every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest would be. I apprehend that a man could not stipulate for the continuance of the payment of interest after the principal was paid, and I do not think that he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption. By the Conveyancing Act a mortgagee may now be required to transfer his mortgage upon payment of what is due to him, and he must then transfer all his security, including every advantage which he derives from the mortgage transaction, and all his deeds and documents constituting his title as mortgagee. And on redemption he must do the like to the mortgagor, and any stipulation which varies the effect and incidents of redemption on payment off of what is due on the loan is a clog within the meaning of the rule. Now, applying what I have said to the present case, the decision becomes easy. In the first place, I do not think that the respondent's covenant to deal exclusively with the brewers continued after the payment off of the loan and the redemption; and, secondly, if it did, it was an attempt to charge it on the property, and that constituted a clog or fetter which, according to well-established principles, was void. I only desire to add that, with Lord Macnaghten, I cannot assent altogether to the assumption made by Cozens-Hardy, J. that the covenant constituted, or might constitute, a good charge upon the property by virtue of the operation of the doctrine in *Tulk v. Moshay* (*ubi sup.*). I should hesitate some time before I assented to that proposition, but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge upon the property would render it void. Upon these grounds I agree that the appeal should be dismissed.

Lord BRAMPTON and Lord ROBERTSON concurred.

Lord LINDLEY.—My Lords: I agree in thinking that the covenant contained in this mortgage, by which the mortgagees have attempted to convert the house mortgaged from a free public-house into a tied public-house, even after redemption, is invalid. I see no answer to the objection taken to it that upon payment of the mortgage debt the mortgagor cannot get back what he mortgaged—namely, a free public-house. The attempt to strengthen the tie by stipulating for liquidated damages and charging them on the property certainly does not mend matters, but makes them

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worse. The case before us is not like the case of a mortgage of wasting property, for example, a lease which, owing to its nature, cannot be given back on redemption in the state in which it was mortgaged. Here the mortgage contains a covenant the object of which is to disentitle the mortgagor on redemption from having back the property unfettered by that covenant. This is inconsistent with the settled law of mortgage. I regard the mortgage deed in this case as another unsuccessful attempt to lay a new burden on land not warranted by law, or by the doctrine laid down in *Tulk v. Moxhay* (*ubi sup.*), which has often been relied upon of late as going much farther than it does. The conclusion thus arrived at is not inconsistent with *Santley v. Wilde* (*ubi sup.*) on which the appellants rely so strongly. Some of your Lordships think that that case went too far. I do not think so myself; but I will not trouble to consider its details, which were complicated. The principle upon which the Court of Appeal decided the case was, I still think, sound. Whether it was properly applied in that case is now of no importance. I believe the true principle applicable to these cases to be that expounded by the Court of Appeal in *Biggs v. Hoddinott* (*ubi sup.*) and *Santley v. Wilde* (*ubi sup.*). That principle is perfectly consistent with a real pledge and with the maxim "Once a mortgage always a mortgage"; but it will not render valid the covenant which your Lordships have to consider in the present case. I agree that this appeal ought to be dismissed with costs. As regards the recent case of *Browne v. Ryan* (*ubi sup.*) in Ireland, I am satisfied that the Court of Appeal did not go too far in holding that the plaintiffs' action for damages could not be sustained.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Fishers*.

Solicitors for the respondent, *Sandilands and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, Nov. 30, 1901.

(Before WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

Re FAULDER AND Co.'s TRADE MARK. (a)
APPEAL FROM THE CHANCERY DIVISION.

Trade mark—"Distinctive word"—"Disentitled to protection"—*Disclaimer*—*Patents, Designs, and Trade Marks Act 1883* (46 & 47 Vict. c. 57), ss. 64, 73, 74.

A trade mark in connection with jams was registered in 1887 by F. and Co., consisting of the word "Silverpan" with a copy of their written signature underneath. In 1900 some rivals in trade applied that the register might be rectified by the removal of the trade mark, or by the addition of a disclaimer of any right by F. and Co. to the exclusive use of the word "Silverpan."

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

Held (reversing the decision of Kekewich, J., 83 L. T. Rep. 726), that the word "Silverpan" was a distinctive word within the meaning of sect. 74 of the Patents, Designs, and Trade Marks Act 1883 and ought to have been disclaimed, and the mark was ordered to be removed from the register, F. and Co. preferring that course to the entry of a disclaimer.

Re Clement et Cie's Trade Mark (81 L. T. Rep. 400; (1900) 1 Ch. 114) and *Re Smokeless Powder Company's Trade Mark* (66 L. T. Rep. 407; (1892) 1 Ch. 590) distinguished.

Per Romer, L.J.: The word "distinctive" as used in sect. 74 of the Patents, Designs, and Trade Marks Act 1883 means something which at the time of registration is chosen by the applicant, and is *prima facie* suitable when used, to distinguish his goods from the goods of others.

Per Cozens-Hardy, L.J.: Whether the court can order a disclaimer to be entered under sect. 74 after the registration of the trade mark is completed, *quære*.

FAULDER AND Co. LIMITED were the registered proprietors of a trade mark, No. 59,902, registered in 1887 under the Patents, Designs, and Trade Marks Act 1883, which they used in their trade of makers of jams and marmalades. The trade mark consisted of a copy of the written signature of Henry Faulder and Co. with the word "Silverpan" above it.

In 1900 they brought an action in the Palatine Court of Lancaster claiming an injunction to restrain the defendants O. and G. Rushton Limited from infringing their trade mark, and from selling any jams or preserves in pots or jars with wrappers or labels having imprinted thereon any imitation or colourable imitation of the trade mark or the word "Silverpan" and obtained an interim injunction restraining the defendants from "passing off" by the use of the word "Silverpan."

The defendants then moved for an order that the register of trade marks might be rectified (a) by the removal of the trade mark, or (b), alternatively, by adding to the entry in the register a disclaimer of any right on the part of the registered proprietors to the exclusive use of part of the trade mark—viz., the word "Silverpan."

The plaintiffs did not claim to be entitled to the exclusive use of the word "Silverpan" under their registration.

The Patents, Designs, and Trade Marks Act 1883 provides:

Sect. 73. It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design.

Sect. 74 (1). Nothing in this Act shall be construed to prevent the comptroller entering on the register in the prescribed manner and subject to the prescribed conditions, as an addition to any trade mark . . . (b) In the case of an application for registration of a trade mark not used before the thirteenth day of August 1875—Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made. (2). The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same,

and a copy of the disclaimer shall be entered on the register.

The motion was refused by Kekewich, J. on the ground that the word "Silverpan" was not a distinctive word within sect. 74 and was not calculated to deceive within sect. 73.

Faulder and Co. appealed.

Moulton, K.C. and *A. J. Walter* for the appellants.—The essential of this trade mark is the signature of the firm. The word "Silverpan" is added matter, and it is a distinctive word or combination of words common to the trade within sect. 74 of the Act of 1883. Therefore any right to the exclusive use of it ought to have been disclaimed under that section. "Distinctive" in that section means any mark which is *primâ facie* distinctive, but which is really common to the trade:

Sebastian's Law of Trade Marks, 4th edit., p. 352, note (b).

If the word should not have been disclaimed under sect. 74, then it is merely descriptive of the article, and, by reason of being calculated to deceive or otherwise, it is disentitled to protection in a court of justice within sect. 73, and is excluded from registration as part of a trade mark:

Re Anderson's Trade Mark, 26 Ch. Div. 409, 415;
Re Arbenz's Application, 56 L. T. Rep. 252; 35 Ch. Div. 248.

The case of *Re Smokeless Powder Company's Trade Mark* (66 L. T. Rep. 407; (1892) 1 Ch. 590) was different. There the two words were two ordinary English words; they were not written as one word as here, and could not have been chosen to distinguish the article as here. *Re Clement et Cie's Trade Mark* (81 L. T. Rep. 400; (1900) 1 Ch. 114) was also a different case. There the label as a whole was the mark, and it was a good mark although a part of it was a word common to the trade.

Warrington, K.C. and *Sebastian* for the respondents.—This is a trade mark within sects. 64 and 74 of the Act of 1883. It consists of a signature and added word. The whole thing is the mark, and no disclaimer of the word "Silverpan" is necessary under sect. 74. But if the signature is the essential part within sect. 64 and "Silverpan" is an addition, then at the date of registration it was not a distinctive word within sect. 74, and need not be disclaimed. A distinctive word within sect. 74 is a word "*primâ facie* distinctive"; and "common to the trade" means open to the trade:

Burland v. Broxburn Oil Company; the "Washerine" case, 61 L. T. Rep. 618; 42 Ch. Div. 274.

A distinctive word within that section is one which, if it were not open to the trade, could be used to distinguish the goods of one man from those of another. The date to be considered is the date of registration, and then "Silverpan" was not distinctive in that sense:

Re Smokeless Powder Company's Trade Mark (*ubi sup.*);

Re Clement et Cie's Trade Mark (*ubi sup.*).

The respondents have a right to prevent other persons from using the word "Silverpan" without distinguishing their goods from those of the respondents.

R. J. Parker for the comptroller.

WILLIAMS, L.J.—In my judgment this appeal should be allowed. The real question that we have to decide in this case is whether or not the word "Silverpan" is a distinctive word within the meaning of sect. 74 of the Act of 1883. If it is, the result is that Messrs. Faulder will have to disclaim. Now, with regard to the meaning of the word "distinctive" in sect. 74, Mr. Warrington does not quarrel with the definition of that word which was given by Chitty, J. in *Burland v. Broxburn Oil Company; the "Washerine" case* (*ubi sup.*). The definition or meaning of that word which is given there by Chitty, J. (as he then was) is "*primâ facie* distinctive." The question we have to ask ourselves here is, whether this word "Silverpan" is *primâ facie* distinctive as used in the advertisement in the *Trade Marks Journal*. In my judgment it is *primâ facie* distinctive. It is not an English word; it is a word which is formed by putting together two common words. I entirely agree with Mr. Warrington that with reference to this question we ought to take into consideration the state of things which existed at the time of the registration, and, taking that to be so, it seems to me that the word "Silverpan" is *primâ facie* distinctive. It is not worth while to go through all the cases, but I will refer to one or two in which the words used have been held not to require disclaimer under sect. 74. One of those cases is *Re Clement et Cie's Trade Mark* (*ubi sup.*). If one looks at the words "St. Raphael" as used in that case (and the case only referred to those words), one finds they are part and parcel of what Romer, L.J. in his judgment called the lower label, and under those circumstances it was held, and, if I may say so, very naturally held, that the words "St. Raphael" which occurred in the course of the long sentence in the lower label were not distinctive. In the same way in *Re Smokeless Powder Company's Trade Mark* (*ubi sup.*) Chitty, J. held that the words "Smokeless Powder" were not distinctive. He there said: "In my opinion the words 'smokeless powder' are not distinctive words, or a distinctive combination of words—they are two ordinary English words denoting that no smoke, or practically no smoke, comes from this powder." In addition to that, he called attention in another part of his judgment to the fact that the words "Smokeless Powder Company Limited" were really only part and parcel of the registered design. I have only to add one word as to the facts that appear in the affidavit. Although I agree with Mr. Warrington as to the date at which the test is to be applied as to whether a word is *primâ facie* a distinctive word or not, yet I am not at all sure that when one is considering that matter, one is not entitled to take into consideration the fact that since that date the word has been used as a distinctive word, quite irrespective of any suggestion that something may have happened since the date of registration which did not exist at that date to enable the word so to be used as a distinctive word. That is not a matter of any great importance, because in my judgment the word "Silverpan" as used in the registered advertisement was clearly intended to be used as a distinctive word. I think that under those circumstances there ought to have been a disclaimer under the provisions of sect. 74.

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ROMER, L.J.—I agree. As was pointed out by Lord Lindley, when Master of the Rolls, in *Clement et Cie.'s Trade Mark (ubi sup.)*, there might be cases in which it would be extremely difficult to say, with reference to sect. 64 of the Act of 1883, whether particular words were part of a trade mark or an addition to it. He said that he thought that the words in question in that case were obviously part of the trade mark. I can only say that in this case I think the word objected to, "Silverpan," is clearly an addition to the trade mark, and not a part of it. Then, if that be so, the question arises whether that addition is distinctive or not within the meaning of the word "distinctive" as used in sect. 74 of the Act of 1883, for, if it is, then it must be disclaimed. That gives rise to the consideration of what is distinctive within the meaning of the word as used in sect. 74 of the Act. I may point out that an addition would not necessarily be non-distinctive merely because it could not be, in itself, a good subject of a trade mark. That was pointed out in the "*Washerine*" case (*ubi sup.*), which in my opinion was rightly decided by Chitty, J., and which really governs this case. Looking at the Act of Parliament, and trying to gather from its words what the intention of the Legislature was, I think that the word "distinctive," as used in sect. 74, was employed to mean something at the time of registration apparently chosen by the applicant who is seeking to register his trade mark, and *prima facie* suitable for the purpose, when used, of distinguishing his goods from the goods of others. Applying that test to the present case, it is clear to me that the word "Silverpan" is distinctive, and, that being so, it follows that in this case there must either be a disclaimer of the word, or the trade mark must go off the register. I understand from what Mr. Warrington said his clients prefer in this case that the trade mark should go off the register. I would only add that in my opinion this case is quite distinguishable from the case of *Re Smokeless Powder Company's Trade Mark (ubi sup.)*, as has been pointed out by my Lord, and that there is nothing in the case of *Clement et Cie.'s Trade Mark (ubi sup.)*, or what was said there by the judges of the Court of Appeal who decided that case, which in any way militates against this judgment.

COZENS-HARDY, L.J.—I agree, and have nothing to add on the main part of the case. I understand that the respondents prefer an order to have the mark taken off the register. I only desire to express a doubt whether we have any jurisdiction now to make an order for disclaimer.

[The trade mark was ordered to be expunged, the respondents desiring that this should be done in preference to the entry of a disclaimer, and the court having some doubt as to whether a disclaimer could be directed after the registration was completed.]

Solicitors: *Rowcliffes, Rawle, and Co.*, agents for *John Wall, Wigan*; *Robinson and Bradley*, agents for *Brown and Co., Stockport*; *The Solicitor to the Board of Trade*.

Thursday, Jan. 23.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

HUNT v. LUCK. (a)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser—Title—Adverse rights—Inquiry of tenants as to whom they paid their rent—Constructive notice—Conveyancing Act 1882 (45 & 46 Vict. c. 39), s. 3.

A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; but actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights.

H. executed a conveyance of freehold property to one G., an auctioneer, which purported to be made in consideration of 12,000l. It was assumed (although not proved) that no part of the purchase money was in fact paid, and that H. remained the true owner of the property.

The tenants of the property continued to pay their rents to W., a house agent who collected them on behalf of H.

G. obtained advances to himself on the security of the property, and executed legal mortgages of it to the defendants.

The defendants had no express notice that G. was trustee of the property on behalf of H., or that H. was in receipt of the rents, but a valuer, who surveyed the property on their behalf, inquired of the tenants as to whom they paid their rents, and discovered that they paid them to W. He was not, however, told on whose behalf W. received them.

H. and G. had since died.

The plaintiff, who was H.'s widow and tenant for life under his will, brought an action against the defendants to have the conveyance delivered up to be cancelled.

Held, that it is not the duty of a purchaser or mortgagee to inquire of the tenants as to whom they pay their rents, either under sect. 3 of the Conveyancing Act 1882 or under the law as it stood independently of that Act, and the action must be dismissed.

Decision of Farwell, J. (83 L. T. Rep. 479; (1901) 1 Ch. 45) affirmed.

Dictum of Jessel, M.B. in Mumford v. Stohwasser (30 L. T. Rep. 859; L. Rep. 18 Eq. 556) disapproved.

ALFRED HUNT, the husband of the plaintiff, was, prior to the date of the indentures next mentioned, seised of certain freehold houses and land at Wimbledon, in Surrey, and was in receipt of the rents.

By an indenture, dated the 31st March 1896, and made between Alfred Hunt of the one part and William Mercer Gilbert of the other part, certain of the freehold houses were conveyed by way of gift by Alfred Hunt to Gilbert.

By a second indenture, dated the 10th Oct. 1896, and made between Alfred Hunt of the one part and William Mercer Gilbert of the other part, in consideration of the sum of 12,000l. paid by Gilbert to Hunt, the whole of the freehold houses and land, which were the subject of this action, were conveyed to Gilbert in fee simple.

(1) Reported by W. C. Biss, Esq., Barrister-at-Law.

The deed contained an acknowledgment by Hunt of the receipt of the purchase money.

Gilbert subsequently by deed mortgaged a part of the freehold houses to the defendants Sayer and Slater to secure the sum of 3750*l.*, and by another deed mortgaged the remaining houses and land to the defendant Hodgson to secure the sum of 2250*l.*

Alfred Hunt died on the 10th June 1898, having by his will made the plaintiff tenant for life of the property in question, and administration, with the will annexed, was subsequently granted to her.

Gilbert died on the 6th Sept. 1898, having by his will appointed the defendant Luck sole executrix, and made her residuary legatee and devisee.

The plaintiff claimed to have the indentures of the 31st March and the 10th Oct. 1896 delivered up to be cancelled, upon the ground that they were not the deeds of Alfred Hunt, and that either his signatures to such deeds were forgeries, or that he was incapable of transacting business by reason of mental infirmity, and that he did not know what he was doing when he executed the deeds.

It was further alleged by the plaintiff (although not proved) that no part of the purchase money of 12,000*l.* was ever paid by Gilbert. It was assumed, however, for the purpose of the case that Hunt in fact remained the true owner of the property.

The property consisted of twenty-seven houses, twenty-five occupied by weekly tenants and two by tenants from year to year, and the rents were then being received by Woodrow, a well-known estate agent and valuer at Wimbledon, who was collecting them on behalf of Hunt, and continued to do so down to the time of his death.

During the negotiations with reference to the mortgages, the defendants, the mortgagees, employed Woodhams, a valuer, to value the property for them.

There was some evidence that Woodhams inquired of the tenants as to whom they paid their rents, and that he was informed that they paid them to Woodrow, but it did not appear that he had ever seen Woodrow, and no further inquiries were made on the point.

The defendant Luck did not appear.

The action was tried before Farwell, J. in Oct. 1900, and was dismissed with costs as against the mortgagees; his Lordship holding that it was not the duty of a purchaser or mortgagee to inquire of the tenants as to whom they paid their rent; that the fact that a tenant was in occupation was only notice of the tenant's rights and not of the person through whom he claimed, although actual knowledge that the rent was paid to some person whose receipt was inconsistent with the title of the vendor is notice of such person's rights.

From this decision the plaintiff appealed.

W. F. Webster (*Upjohn*, K.C. with him) for the appellant.—If the defendants had inquired of the tenants, "To whom do you pay your rents?" they would have been told that the rents were paid to Dr. Hunt, and they would have discovered that Dr. Hunt, and not Gilbert, was the owner of the property. This inquiry was one which the defendants ought reasonably to have made. In

consequence of their omission to make it, they ought to be held affected with constructive notice of Dr. Hunt's title. It is not necessary for the plaintiff to show that the defendants wilfully shut their eyes; it is sufficient that they did not make all reasonable inquiries. The Conveyancing Act 1882, s. 3, expresses this in a negative manner; but several cases before the Act state the law positively in the same terms. [*COZENS-HARDY*, L.J. referred to *Bailey v. Barnes* (69 L. T. Rep. 542, 544; (1894) 1 Ch. 25, 35), where Lindley, L.J. said: "The Conveyancing Act 1882 really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended by the Legislature."] Under the old law the plea of purchaser for value without notice was not available to a purchaser whose vendor was not in possession:

Wallwyn v. Lee, 9 Ves. 24;

Ogilvie v. Jeaffreson, 2 Giff. 353, 379.

The dictum of Jessel, M.R. in *Mumford v. Stohwasser* (30 L. T. Rep. 859; L. Rep. 18 Eq. 556, 562) is right. The decision of the Privy Council in *Barnhart v. Greenshields* (9 Moo. P. C. 18, 32) is not binding on this court, and is distinguishable on the ground that in that case the land was situate in a country where a system of registration prevailed. Preston on Abstracts (vol. 3, pp. 400, 401) says the purchaser has notice of an under-tenant's rights and of the rights of the under-tenant's lessor. Why stop at the under-tenant's lessor? Why not the tenant's lessor (or freeholder) also? It is unreasonable to spend so much care and labour in examining the paper title, but to be careless whether the vendor is in possession or not. In the examination of the title, conveyancers make many assumptions, such as the identity of persons bearing the same name and the absence of forgery or other fraud; the only safeguard in such cases is the inquiry whether the vendor is in receipt of the rents. If it is unreasonable not to examine the paper title, it is *a fortiori* unreasonable not to see that the vendor is in possession. A purchaser who knows that the vendor has not a good paper title will sometimes complete if he knows that the vendor can put him into possession; a purchaser who knows that the vendor is not in possession will not complete however good the paper title may be. If the vendor's possession is so important to the purchaser, as it undoubtedly is, the purchaser is neglecting a reasonable inquiry if he omits to ask whether the vendor is in possession or not. The test of reasonableness is not "Is the inquiry usual?" It might be shown that solicitors also neglect the inquiry as to what interest the tenants themselves claim. It is none the less settled law that a purchaser whose solicitor neglects the latter inquiry is affected with notice. The court ought to presume that the inquiry if made would have been truthfully answered:

Knight v. Bowyer, 23 Beav. 609; 2 De G. & J. 421, 443;

Re Alms Corn Charity, 85 L. T. Rep. 533; (1901) 2 Ch. 750, 762.

Hughes, K.C., *Rufus Isaacs*, K.C., and *Church*, for the respondents, were not called on.

WILLIAMS, L.J.—I think that the judgment of Farwell, J. must be affirmed. He apparently dealt with the case without reference to the pro-

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visions of the Conveyancing Acts, but he made a statement of the law as established by decisions, including decisions prior to the Conveyancing Acts, and if this question is to be determined with reference to the old law, then I still think that the conclusion of Farwell, J. was quite right. In his judgment Farwell, J., after quoting the older authorities, says: "The rule established by these two cases may be stated thus: (1) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights." Now, I do not understand that in this case it is suggested, and, if it is suggested, in my opinion the suggestion is ill-founded, that there was actual knowledge on the part of the mortgagees that the rents were paid by the tenants to some person whose receipt was inconsistent with the title of the mortgagor, Gilbert. That is not suggested in fact, and therefore we have to go back to the first of these rules. Now, what does it mean? It means that if there is a purchaser or a mortgagee and he has notice that the vendor or mortgagor is not in possession, he must make inquiries of the person in possession, of the tenant in possession, and find out from him what his, the tenant's, rights are, and that, if he does not choose to do so, then, whatever title he gets as purchaser or mortgagee, that title will be subject to the title of the tenant in possession. Now, that I believe to be a true statement of the law, and the only matter that I need allude to further is the case to which the attention of Farwell, J. was called after he had delivered his judgment, and that is the case of *Mumford v. Stohwasser* (*ubi sup.*). Farwell, J. gave an explanation which comes to this—that in his judgment the passage in *Mumford v. Stohwasser* which seems to favour the idea that notice of the tenancy is notice of the title of the lessor to the tenant, really was, if Sir George Jessel said so, a slip in his memory. Sir George Jessel did not profess to be stating new law; he professed to be reciting the old-established and unquestioned law, and it is impossible to affirm that the proposition in this passage in his judgment is right, unless one is prepared to disregard the authorities (including the case in the Privy Council of *Barnhart v. Greenshields*, *ubi sup.*) which show that notice of the tenancy has no operation whatever as affecting the question of notice of the title of the lessor of the tenant in possession. Of course if you do make inquiries and do get information, then you are affected by the notice, but not otherwise. Now, as to the Conveyancing Acts. One must look first at the definition clause in the Act of 1881. That definition clause provides, sect. 2, sub-sect. (viii.): "Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property." Now, the reason why it is necessary to quote that definition is because Mr. Webster suggested that a tenant for valuable consideration could only set up that he was without notice in the case where his vendor was in possession. That definition shows that under the Conveyancing Acts that is not so, and I have my doubts whether it was ever so, although he has cited a decision of Lord

Eldon which he said favours that view (*Wallwyn v. Lee*, *ubi sup.*). Now, passing from there to the Conveyancing Act 1882, sect. 3 deals with the question of notice, and sub-sect. 1 provides: "A purchaser"—which includes an intending mortgagee—"shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) It is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him." In my judgment the only inquiry which ought reasonably to have been made here by the intending mortgagee was an inquiry to protect himself against any right which the tenants would have in the subject-matter of the mortgage. I do not think that there is, for the purpose of ascertaining the title of the vendor, any obligation whatsoever to make these inquiries of the tenant in reference to any other thing but protection against the rights of the tenant. I wish to add that, in my judgment, on the facts of this case I do not think that if this inquiry had been made these matters as to the equitable title of Dr. Hunt and Mrs. Hunt would have come to the knowledge of the intending mortgagee. All that he would have learned, if he had made inquiries of the tenants, would have been that the tenants paid the rent to Mr. Woodrow, a local agent. In my judgment it is not true to say that the facts as to the equitable title of Dr. Hunt and Mrs. Hunt would have come to his knowledge by making those inquiries. Even if he were told that they were collected on account of Gilbert, I do not see that it would have carried the matter any further. I have not looked sufficiently into the facts to see how far this matter really was carried out by the mortgagees personally or by their solicitors. In so far as it was carried out by their solicitors, the second clause of sub-sect. 1 of sect. 3 of the Conveyancing Act 1882 applies. It provides that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless "in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the notice of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." Here, again, nobody suggests that there was actual notice, and the observations I have already made apply with reference to what inquiries ought reasonably to have been made, with this addition, that really, when one comes to deal with the question of what inquiries ought reasonably to have been made by the solicitor or other agent, it does seem to me that it would be a very strong thing to say that an inquiry ought reasonably to have been made by the solicitor or other agent which is not advised in any of the standard text-books, and which is inconsistent with the decisions prior to the Conveyancing Act, and has no countenance from any decision subsequent to the Conveyancing Act. I only wish to call attention, further, to sub-sect. 3 of sect. 3 of the Conveyancing Act 1882: "A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted." I only call attention to that

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for the purpose of vouching what has been said in the course of the argument, that, so far as this sect. 3 is concerned, the practical result is that the law prior to the Conveyancing Act can only be used as a shield, and not as extending the law beyond the code-like definition in sect. 3.

STIRLING, L.J.—I am of the same opinion, and I have really nothing to add to the reasons which have been given by Farwell, J. and by the Lord Justice.

COZENS-HARDY, L.J.—I entirely agree. I cannot bring myself to hold that an inquiry ought reasonably to have been made which is not usual; which has not, so far as we are aware, ever been recommended by any single text-book writer, and which has not even been suggested by any judge, except in that one passage in the judgment of Sir George Jessel in *Mumford v. Stohwasser* (*ubi sup.*). I think the decision is perfectly right, and that the appeal ought to be dismissed with costs.

Solicitors: Henry H. Fanshawe; Leslie and Hardy, agents for Sayer and Colt, Hastings.

Thursday, Jan. 23.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re SCHMARR. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Costs—Compulsory purchase of land—Purchase money paid into court—Petition for payment out—“Express provisions” of statute—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), ss. 80, 91—Judicature Act 1890 (53 & 54 Vict. c. 44), s. 5.

Some houses having been taken by the London County Council under their statutory powers, the compensation money was paid into court under sect. 76 of the Lands Clauses Consolidation Act 1845 by reason of the wilful neglect of the owner of the houses to make out a title to the property.

A petition for payment out of the money was presented by an incumbrancer of the owner, to which certain other persons claiming to be incumbrancers were made respondents, and the London County Council were ordered to pay the costs of the petitioner and respondents of and incident to the petition.

Held, that sect. 80 of the Lands Clauses Consolidation Act 1845 did not contain an “express provision” as to these costs, and therefore the court had jurisdiction under sect. 5 of the Judicature Act 1890 to make the order.

Held, also, that the London County Council were entitled to an order for payment to them out of the money in court of the amount of the sheriff's costs incurred by them under sect. 91 of the Lands Clauses Consolidation Act 1845 in order to obtain possession of the land, and which they had not deducted from the compensation before paying it into court as they had not then been incurred.

Decision of Byrne, J. affirmed.

This was an appeal by the London County Council against an order made by Byrne, J. that

*they should pay the costs of a petition for the payment out of court of a sum of 1000*l.*, which had been assessed by a jury as the compensation for some houses which belonged to Heinrich Schmarr, and were taken by the London County Council compulsorily under the provisions of the London County Council (Improvements) Act 1897, with which the Lands Clauses Consolidation Act 1845 was incorporated.*

The money was paid into court under the provisions of sect. 76 of that Act on the ground that there had been wilful neglect on the part of Schmarr to make out a title to the property. The petition was presented by an incumbrancer of Schmarr, and other persons claiming to be incumbrancers were made respondents.

Byrne, J. ordered the London County Council to pay the costs of the petitioner and the incumbrancers of and incident to the petition.

*The council were obliged to obtain the assistance of the sheriff under sect. 91 of the Lands Clauses Consolidation Act 1845 in order to get possession of the property, but, having paid the 1000*l.* into court, were unable to deduct his costs, amounting to 1*l.*, from it. They applied to Byrne, J. to order that sum to be paid out to them, but his Lordship refused to do so.*

From the decision on these two points the London County Council appealed.

Sect. 80 of the Lands Clauses Consolidation Act 1845 provides:

*In all cases of moneys deposited in the bank under the provisions of this or the special Act or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required it shall be lawful for the court to order the costs of the following matters . . . to be paid by the promoters of the undertaking (*inter alia*) the costs of obtaining . . . the orders . . . for the payment out of court of the principal of such moneys . . . and of all proceedings relating thereto.*

Sect. 5 of the Supreme Court of Judicature Act 1890 provides:

Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid.

F. Thompson (Upjohn, K.C. with him) for the appellants.—The costs were occasioned by the wilful neglect of Schmarr to make a title to the houses, and therefore the appellants ought not to pay them. They are entitled under sect. 91 of the Lands Clauses Consolidation Act 1845 to be paid the amount of the sheriff's costs paid by them; and, having paid the compensation money into court without deducting them, an order ought to be made for payment out to them of that amount:

Re Turner's Estate, 5 L. T. Rep. 524.

Sheldon and Ralph Combe for the petitioners.—The appellants, not having “deducted and retained” the sheriff's costs from the compensation before paying it into court, are not entitled

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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to any order now for payment out to them of the amount. They can only recover them by distress. [WILLIAMS, L.J.—We are all against you on that point.] The money was paid into court in consequence of the state of the title. The incumbrancers are not responsible for that. Byrne, J. has exercised the discretion given him by sect. 5 of the Judicature Act 1890, and the court will not interfere:

Re Fisher, 70 L. T. Rep. 62; (1894) 1 Ch. 450.

Edward Ford and G. T. Sills for the other incumbrancers.

Thompson in reply.—The provision in sect. 80 of the Lands Clauses Consolidation Act 1845 making it lawful for the court to order certain costs to be paid by the promoters, except in the case of wilful neglect to make a good title, is an express provision that they shall not be paid within sect. 5 of the Judicature Act 1890. The incumbrancers are within the exception as well as the owner, and therefore Byrne, J. had no discretion to make this order under sect. 5 of the Judicature Act 1890. In the Act under which the question arose in *Re Fisher* (*ubi sup.*) there was no provision as to costs at all; therefore no intention was expressed that they should not be paid in certain events, and therefore sect. 5 applied.

WILLIAMS, L.J.—Mr. Thompson has not been able to get over the difficulty based upon sect. 5 of the Judicature Act of 1890. That section says: "Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Now, Mr. Thompson did not argue, and could not properly have argued, but that these costs are covered by that section unless he can make out that they are excluded by the words "subject to the express provisions of any statute"; and he, in order to do that, has really to contend that the effect of sect. 80 of the Lands Clauses Consolidation Act 1845 is to say that those costs, in circumstances like those in the present case—that is, circumstances covered by the exception in sect. 80—shall not be paid. It does not seem to me that that section does anything of the sort. It is true that under sect. 80 costs were only given in cases other than those which were excepted by that section. Then the Judicature Act 1890 was passed, which places those excepted costs, in my mind, in the discretion of the court or judge. We have no power to interfere with the discretion of Byrne, J. here, and, even if we had the power, I do not see the slightest reason why we should do so.

STIRLING, L.J.—I am of the same opinion. In this case I assume that the purchase money has been paid into court by the London County Council under clause 76 of the Lands Clauses Consolidation Act 1845 by reason of the wilful neglect of Schmarr, the owner and vendor of the property represented by the money, to make out

a good title to the land. The question does not here arise as to any costs payable to Schmarr. What has happened is this, that he having incumbered the purchase money, and to some extent also the land, a petition has been presented by one of those incumbrancers for payment out of the fund which is now in court; and it is said that there is no jurisdiction in the court to make an order with reference to the costs of the petition, because those are the costs which are now in question. Now, Mr. Thompson contended that such a case does not fall within sect. 80 of the Lands Clauses Consolidation Act, and, not having heard the full argument to the contrary, as at present advised, I agree with that argument. Sect. 80 applies to all cases of moneys deposited in the bank except where such moneys have been so deposited, amongst other reasons, "by reason of the wilful neglect of any party to make out a good title to the land required," which is this case. I therefore assume that the court has no jurisdiction under sect. 80 to make an order dealing with the costs of this petition. But then by the Judicature Act of 1890, s. 5, it is enacted that "Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge," and it has been held in *Re Fisher* (*ubi sup.*) that this section applies to the costs of a petition presented under any of those old statutes which contain no provision as to payment of costs, and with reference to which it had been held by a long series of decisions in the Court of Chancery that costs could not be awarded by the court to the petitioners. Now, in order to escape from that decision, Mr. Thompson says that there is an express provision in the Lands Clauses Consolidation Act which deals with this matter, and he contends that, upon the true construction of sect. 80, it not only excepts from the operation of that section the case which has occurred here, but prohibits the court from giving costs in a case like this. I fail to see that that is so. It seems to me that all that was done by sect. 80 was to abstain from conferring any jurisdiction in a case of this sort, but it does not amount to a legislative prohibition that in no circumstances are any costs whatever to be given. As regards this particular case, it does seem to me that it would occasion very great hardship indeed if the court had no jurisdiction to deal with the costs of such a petition as this, because it is obvious, and this was the view taken by the learned judge in the court below as I understand, that, owing to the state of the title to the purchase money, it would have been necessary for the protection of the London County Council that those funds should come into court. Now, although the vendor has been in default, yet there has been no default on the part of any of the incumbrancers that we have heard of. The money cannot be got out of court without the presentation of a petition, and it does seem to me that if the court had no jurisdiction to make an order with respect to such a case as this there would be a defect in the autho-

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ity of the court. I think that sect. 5 of the Judicature Act of 1890 was meant to apply a remedy to such defect, and that this case falls entirely within the scope of it, and therefore that Byrne, J. had jurisdiction to make this order with reference to the costs, and we have no power to dispute his order.

COZENS-HARDY, L.J.—I agree. I adopt for the present purpose, although it would not be right finally to decide that point, Mr. Thompson's argument that sect. 80 has no application to this case. Sect. 80, of course, deals with much more than the costs of the proceedings in court; it includes the cost of the conveyance, the costs of the purchase, and refers to a number of other things beyond and outside altogether the costs of the proceedings in court. I assume that he is right, and that the London County Council is not liable to pay anything under and by virtue of sect. 80. But still, is there or is there not any express provision which prevents the court from possessing the discretion which is in terms given to it by sect. 5 of the Judicature Act of 1890? I think not. I think that the language of the Court of Appeal in *Re Fisher* (*ubi sup.*) clearly shows that in a case like this, which is outside sect. 80, *ex hypothesi* the court, although it could not give the costs of the reinvestment in land, has full power to give the costs of any proceedings in court, and the only order as to costs which Byrne, J. has made is as to the costs of the proceedings in court, and he does not profess to have given any other. I think, even if we had power to interfere with his discretion, I should not feel disposed to do it. The appeal must therefore be dismissed.

Solicitors: W. A. Blaxland, Solicitor to the London County Council; Stileman and Neate; G. Coote; Walter Thompson.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Nov. 27, 1901.

(Before BYRNE, J.)

Re COHEN'S EXECUTORS AND LONDON COUNTY COUNCIL. (a)

Vendor and purchaser—Will—Real estate—Special executors—General executors—Land Transfer Act 1897 (60 & 61 Vict. c. 65), ss. 1, 2, sub-s. 2; s. 24, sub-s. 2.

A. C. by his will appointed certain executors as to his property in Australia and certain general executors of his will. The executors entered into a contract for the sale to the London County Council of certain freehold property in London.

It was contended by the London County Council that under sects. 1 and 2 (2) of the Land Transfer Act 1897 (60 & 61 Vict. c. 65) it was not sufficient that the general executors alone should join in the sale, and that they could not make a good title to the property.

Held, that a good title could be made by the general executors alone.

ALL the material circumstances are stated in the judgment of Byrne, J.

Frederic Thompson for the London County Council.—A good title cannot be made under sects. 1 and 2, sub-sect. 2, of the Land Transfer Act 1897 by the general executors alone; the special executors must concur in the sale. He cited

Rose v. Bartlett, Cro. Car. 292;

In the Goods of G. T. Ford, 16 L. T. Rep. 746; L.

Rep. 1 P. & M. 449;

In the Goods of Harris, 22 L. T. Rep. 630; L.

Rep. 2 P. & M. 83;

Re Parker's Trusts, 70 L. T. Rep. 165; (1894) 1 Ch. 707;

Re Pawley and London and Provincial Bank Limited, 81 L. T. Rep. 507; (1900) 1 Ch. 58.

Vaughan Hawkins for the vendors.—The general executors can make a good title without the special executors. He cited

Swinburne on Testaments, part 4, s. 18.

[BYRNE, J. referred to *In the Goods of Murray*, (1896) P. 65.]

F. Thompson replied.

BYRNE, J.—In this case a question is raised as to the proper construction to be put upon specific sections of the Land Transfer Act 1897. The circumstances are shortly as follows: Mr. Abraham Cohen, who describes himself as "of Sydney, New South Wales, temporarily residing in London," made his will, dated the 11th July 1900, and thereby appointed his sons-in-law David, Nathan, and Edward L. Samuel executors of his will as to property and premises thereinbefore given to them (which property and premises were in Australia), and his sons Samuel Barnett, Cohen and Nathan M. Cohen and L. H. Nathan, general executors of that his will. The will was duly proved by the general executors in July 1901. The general executors of the will have entered into a contract in writing, dated the 8th July 1901, to sell the fee simple of certain premises at Hackney, forming part of the testator's estate, to the London County Council; and a vendor and purchaser summons has been taken out for the purpose of obtaining a decision, as between vendor and purchaser, whether or not the Australian executors are necessarily parties, jointly with the general executors of the will, to the conveyance of this real estate. Now, it is clear that the Australian executors are not entitled to property in this country. Moreover, it is competent for a testator to appoint executors for different portions of his property. He may appoint executors for properties situate in different counties in England. He may appoint executors of various portions of his assets in different parts of the world. That, I think, is clearly established by the authorities that have been cited to me in this case. The testator did that which was lawful. He appointed Australian executors in respect of his Australian assets, and he appointed general executors in respect of his assets in England, who would be entitled to his property here. But it is said that, reading the provision of the Land Transfer Act of 1897 together with the preamble, the Act must be read as if it had the operation of vesting the real estate situate in England in the English executors and the colonial executors jointly, and therefore that a good title cannot be made unless they all join. Now, the Act commences with a preamble:

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

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"Whereas it is expedient to establish a real representative and to amend the Land Transfer Act 1875"; and the 1st section provides that "where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." And sect. 24, sub-sect. 2, enacts that "in this Act the expression 'personal representative' means an executor or administrator;" so that, taking those words and putting them into the 1st section, it reads, "shall devolve to and be vested in his executors or administrators." Sect. 2, sub-sect. 2, provides that "all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealings with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him; save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate." Now, the real point is whether the words "become vested in his personal representatives or representative from time to time" are so large as to force me to hold that it vests in persons named as foreign executors in respect of foreign assets jointly with those named in respect of assets in England. First of all, what is the meaning of "real representative" in the preamble, and what is the object of the 1st section? It clearly is that there shall be in respect of lands coming within the provision of the Act a representative of the deceased, who shall have, with the slight exception referred to in the section I have just read, the same powers in respect of real estate as he has already in respect of personal estate. I say "as he has," because the true object of this Act is to appoint those persons already having or entitled to have control over personal estate to have and be entitled to control over the real estate. I think it is not an unfair test to apply, in order to discover the true meaning of this sub-section, to ask oneself what chattels real have vested in the colonial executors jointly with the English executors. The answer to that question is, clearly, none. Would it not be going against the true meaning of the section to hold that real estate was to vest in persons not entitled to probate in England and not entitled to chattels real? I think it would. I do not think it is the true meaning of the section; but that, when it speaks of "personal representatives or representative from time to time as if it were a chattel real vesting in them or him," it means those persons in whom as personal representatives or representative chattels real (if the testator has any) vest. I think, therefore, that a good title can be shown without joining the colonial executors.

Solicitors: W. A. Blaxland; Edwards and Cohen.

Nov. 28 and Dec. 2, 1901.

(Before BYRNE, J.)

JONES v. GARDINER. (a)

Vendor and purchaser—Contract for sale of real estate—Delay in completion—Default of vendor—Specific performance—Damages—Interest on unpaid purchase money.

By an agreement of the 21st Sept. 1900, G. agreed to sell to J. certain real estate at P., the sale to be completed on the 22nd Oct. 1900. The sale was not in fact completed until the 1st April 1901.

This action was commenced on the 6th March 1901 for specific performance of the agreement for sale and for damages in connection with the delay in completion which had been caused by reason of G.'s failure to take reasonable pains to perform his contract and not from any defect of title.

Held, that, a considerable part of the delay having arisen from the default of the vendor in doing what he reasonably could have done to fulfil the contract, the plaintiffs were entitled, in addition to specific performance, to reasonable damages, having regard to the measure as laid down in Jaques v. Millar (37 L. T. Rep. 151; 6 Ch. Div. 153) and followed in Royal Bristol Permanent Building Society v. Bomash (57 L. T. Rep. 179; 35 Ch. Div. 390), for the delay and for not having had vacant possession.

Engell v. Fitch (18 L. T. Rep. 318; L. Rep. 4 Q. B. 659) and Bain v. Fothergill (31 L. T. Rep. 387; L. Rep. 7 E. & I. App. 158) referred to.

ACTION.

By an agreement of the 21st Sept. 1900, the defendant had agreed to sell to the plaintiffs for 620*l.* two plots of freehold land at Peppard Common, in the county of Oxford, described as lots 22 and 23 in certain printed particulars and conditions of sale which had been prepared for a sale by public auction, as being sold with possession, and as being delightfully situated for the erection of country houses.

The time fixed by the agreement for completion was the 22nd Oct. 1900, and a deposit of 50*l.* had been paid on signing the contract.

Condition 3 of the printed conditions of sale, which were embodied in this contract, provided that if from any cause whatever the completion of the purchase was delayed beyond the date mentioned, "the purchaser in default" should pay interest on the remainder of his purchase money at the rate therein specified until completion.

Owing to delay in delivery of the abstract of title, and a long correspondence as to an equitable charge affecting the property, and further correspondence as to the form of the conveyance, it was not agreed to till the 1st Feb. 1901. After further delay, the writ was issued in this action for specific performance of the agreement, and upon an order made, on a summons for directions, the purchase was finally completed, the plaintiffs paying the balance of the purchase money to the defendant, and a further sum of 10*l.* 3*s.* 4*d.* (under protest and without prejudice to the rights of the plaintiffs as purchasers) for interest claimed under condition 3.

The plaintiffs alleged that, owing to the delay in the completion of the contract, they had been

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

unable to let houses erected or to be erected upon the property, and had thus lost a year's rent. They claimed in all 65*l.* damages, together with a return of the amount paid (under protest) for interest on the balance of the purchase money.

Eustace Smith for the plaintiffs.—We are entitled to damages for the loss caused by the defendant's delay:

Jaques v. Millar, 37 L. T. Rep. 151; 6 Ch. Div. 153;

Royal Bristol Permanent Building Society v. Bomash, 57 L. T. Rep. 179; 35 Ch. Div. 390.

We are not liable to pay interest on the unpaid balance of the purchase money, as the delay was caused by the vendor, and the purchaser was not in default within the terms of condition 3.

Lyttelton Chubb for the vendor.—The purchaser cannot recover damages from the vendor for the loss of his bargain, but can only recover the actual expenses to which he has been put:

Bain v. Fothergill, 31 L. T. Rep. 387; L. Rep. 7 E. & L. App. 158;

Ross v. London School Board, 57 L. T. Rep. 182; 36 Ch. Div. 619.

The vendor is entitled to interest under the condition, which provides that "if from any cause whatever" the purchase is not completed, interest is payable. The delay here was caused by the state of the title:

Sherwin v. Shakspeare, 5 D. M. & G. 517.

Eustace Smith replied.

Cur. adv. vult

Dec. 2.—BYRNE, J. stated the material portions of the contract, and continued: The first question I have to decide arises upon the terms of condition 3, under which the vendor claims interest on the balance of the purchase money from the date fixed for completion, the 22nd Oct. 1900, to the actual date of completion, the 1st April 1901. That condition contains the phrase "the purchaser in default" is to pay interest, and with reference to the meaning of this qualification I find in *Denning v. Henderson* (1 De G. & Sm. 689)—a case for which I am indebted, and not for the first time, to Mr. Webster's very useful book on Conditions of Sale—it was decided that a purchaser could not be compelled to pay interest on his purchase money where the condition as to interest for delay in completing was "the purchaser making default," and the delay was due to the state of the vendor's title. I am, therefore, of opinion that the plaintiffs, the purchasers in this case, were not in default within the meaning of this condition, and that the amount paid by them, without prejudice, for interest on the balance of purchase money must be returned. The next question is whether or not damages can be recovered for delay in completing a contract for sale of real estate, where the delay has been caused by default of the vendor, not in consequence of want of, or defect in, title, or in consequence of conveyancing difficulties, but by reason of the vendor not having cared, or troubled, or taken reasonable pains to perform his contract. There is no question in the present case of want of good faith, as evinced by any desire to repudiate the contract, or of fraud; but, having carefully considered all the proceedings and the correspondence and the evidence, I am of opinion that a very considerable part of the delay

which has occurred in carrying out the contract (after making full allowance for the time which may fairly be considered to have been due to difficulties in making out title, and to a controversy as to the form of the conveyance) has arisen entirely from the default of the vendor—default, that is, in doing what he could reasonably and fairly have done had he been duly careful to fulfil his contract. So far as the materials before me enable me to judge, the contract might certainly have been carried out, making a liberal allowance for delay in consequence of the difficulties and discussions I have referred to, three months earlier than the actual date of completion. The case of *Bain v. Fothergill* (*ubi sup.*) established what is now familiar law—namely, that a vendor of real estate, acting in good faith, is not liable to the purchaser in damages for loss of bargain, where he is unable to perform his contract owing to defect of title. He can recover the expenses he has been put to in investigating title, and what I may call proper conveyancing expenses, but nothing more. I see no reason to doubt that a similar rule ought to be applied where delay has taken place for a similar reason. On the other hand, *Engell v. Fitch* (18 L. T. Rep. 318; L. Rep. 4 Q. B. 659), which was considered in *Bain v. Fothergill* (*ubi sup.*), so far as it determines that where the breach of contract arises, not from inability to make a good title, but from refusal to take necessary steps to give the purchaser possession pursuant to the contract, further damages may be recovered, appears to remain good law. *Jaques v. Millar* (*ubi sup.*) is a distinct authority for giving damages against a vendor, in addition to specific performance, in respect of delay caused by wilful refusal to carry out a contract, and for the measure to be applied in ascertaining the damages—namely, such damages as may reasonably be said to have naturally arisen from the delay, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of contract. This case was followed in *Royal Bristol Permanent Building Society v. Bomash* (*ubi sup.*). I think that the plaintiffs were justified in bringing this action. I think they are entitled to a return of the interest paid without prejudice, the defendant taking what he can get from the tenant for the period between the named and the actual date of completion, there being, according to the statement made by his counsel, some arrangement as to this. I think that the plaintiffs are also entitled to reasonable damages, having regard to the measure as laid down in *Jaques v. Millar* (*ubi sup.*), for the delay, and for not having vacant possession. I bear in mind that one of the lots was sold as for a building site, that both were sold as with possession, and that the purchasers intended to build and have been delayed in their work by the defendant's default. On the other hand, I have had regard to the fact that some of the claims in the plaintiffs' particulars are untenable and some exaggerated, while the evidence is loose and unsatisfactory, and I award 25*l.* by way of damages. The defendant must pay the costs of the action.

Solicitors: *Hempsons; Byfield and Son.*

CHAN. DIV.]

Re WILLIAM ALDAM'S SETTLEMENT.

[CHAN. DIV.]

July 25, Nov. 20, 1901, and Jan. 15, 1902.

(Before BYRNE, J.)

Re WILLIAM ALDAM'S SETTLEMENT. (a)

Settled estate—Tenant for life—Power of Leasing—Mining lease—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 2, sub-sect. 10 (iv.); 6, 7, sub-sect. 2; 9, sub-sect. 1 (ii.); 17, sub-sect. 1—Settled Land Act 1884 (47 & 48 Vict. c. 18), s. 4.

A tenant for life when granting mining leases under the statutory powers of leasing under the Settled Land Acts is not entitled to grant a lease with a varying minimum rent by which, if rising, the increase of the rent is not so reserved as to be equal (or in the simple case of tenant for life and remaindermen absolutely entitled upon his death so as to increase) after the determination of his life interest, or, by which, if diminishing, what is truly fine cannot be separated from what is truly rent, and dealt with accordingly as capital money, even assuming that the rent proposed is the best rent that can reasonably be obtained, regard being had to any fine taken; nor, further, can he insert in the lease powers for the cesser of the minimum rent, and wayleave for foreign coal to continue after such cesser at a nominal rent.

UNDER the will of William Aldam, dated the 18th Dec. 1884, an estate at Wickersley, in the county of York, stood limited to the use of William 'Wright Warde Aldam' for life, without impeachment of waste, with remainder to the use of such one or more of his sons or daughters for such estate or estates in tail or any lesser estate or estates as he should by will or codicil appoint; and in default of such appointment to the use of an infant tenant for life in remainder without impeachment of waste, with remainder over. William W. W. Aldam and one Ford were the trustees for the purposes of the Settled Land Acts.

William W. W. Aldam had entered into an agreement, dated the 13th Feb. 1900, with the Dalton Main Collieries Limited, whereby he had agreed, as tenant for life under the settlement, to lease the Barnsley thick seam of coal under the settled estate for a term of sixty years from the 1st Jan. 1898.

The following were the material clauses of this agreement:

3. The royalty or acreage rent shall be at the rate of 30l. per foot per acre, but due allowances shall be made for bad, faulty, or unworkable coal, or coal so thin or so out off by faults of such magnitude that it cannot be worked without loss. The lessees shall also pay a similar royalty rent for all coal and slack other than the Barnsley thick seam got in the drifting and sold off.

4. The minimum or certain rent is to be: For the first year, nil; for the second year, 2s. 6d. per acre; for the third year, 5s. per acre; for the fourth year, 10s. per acre; and for the fifth year and each succeeding year, 1l. per acre. The minimum rent shall begin to be paid as from January 1, 1899.

6. Undergetting may be made up at any time during the term.

7. When all saleable coal except such parts (if any) as are not to be worked or paid for shall have been worked or paid for, a nominal rent of 10s. shall be paid for the remainder of the term, in substitution for the royalty and minimum rents.

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

9. No wayleave rent is to be paid for any other part of the Barnsley thick seam of coal under any other land in the parish of Wickersley.

13. The lessees are to commence working the coal with all reasonable diligence, and bring to the surface as much coal as can reasonably be got with proper diligence.

This was an application by the tenant for life raising the various questions as to his statutory power of leasing, which are fully stated in the judgment of Byrne J.

J. Dixon for the tenant for life.

L. S. Bristowe for the trustees and infant remainderman.

Cur. adv. vult.

Nov. 20.—BYRNE, J. (after stating the agreement of Feb. 1900, as above, continued:—) The first question raised by the summons is whether or not the tenant for life has power, under the provisions of the Settled Land Acts, to grant a mining lease as proposed for sixty years, reserving a minimum yearly rent not commencing until the second year of the term, and increasing year by year until the fifth year of the term. A mining lease may be granted for sixty years, under sect. 6 of the Act of 1882. By sect. 7, sub-sect. (2), every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. Sect. 9, sub-sect. (1) (ii.), clearly authorises the reservation of a fixed or minimum rent, but there is no provision in terms authorising a varying minimum rent. Under the Settled Estates Act 1877 there is a provision for the reservation of the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine, provided always that in the case of (amongst others) a mining lease a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease. No similar provision is contained in the Settled Land Acts, so far as regards mining leases, and apart from sect. 10 of the Act of 1882, giving the court power to sanction leases on special terms, the question turns upon the meaning of sect. 9, having regard especially to the provisions of sect. 7 and to sect. 4 of the Settled Land Act 1884, which provides that a fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act. Now, although there are no words expressly authorising a varying fixed or minimum rent, there are no words negating the reservation of such a rent, and an unreported case before Stirling, L.J. (when Stirling, J.) of *Re Lowther's Settled Estate*, referred to in MacSwinney on Mines and Minerals, at p. 178, is relied on as justifying it. I have been furnished with a copy of the summons, affidavit in support, and order made in *Re Lowther (ubi sup.)*, and it appears that the order contains, first, a declaration following the terms of the amended summons to the following effect: "This court doth declare that Sir Charles Hugh Lowther, the tenant for life under the

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above-mentioned settlement, has power to grant a lease to Bolckow, Vaughan, and Co. Limited of the ironstone and iron ore within and under the lands forming part of the above-mentioned estate for a term of sixty years from the 1st day of January 1892, at a certain yearly rent, until the 1st day of July 1900, of 6000*l.*, and after that day at the yearly rents of 6000*l.*, 5000*l.*, 4000*l.*, 3000*l.*, 2000*l.*, and 1000*l.*, according to the quantity for the time being remaining ungotten under the demise to be thereby made." Then follows a declaration in reply to pars. 2 and 3 of the amended summons: "And this court doth declare that in every year during the life of the said Sir C. H. Lowther there ought to be set aside as capital money arising under the above-mentioned Acts one-fourth part of the certain yearly rent and royalties for the time being payable under the said lease, and that in every year during the life of the said Sir C. H. Lowther in which the workings under the said lease shall be or exceed those thereby authorised in satisfaction of the certain yearly rent for the time being payable thereunder, the said Sir C. H. Lowther is entitled to receive for his own benefit the residue (after setting aside one-fourth part thereof as aforesaid) of the said certain yearly rent, and also of the royalties payable thereunder in respect of such excess workings, if any. And that in every year during the life of the said Sir C. H. Lowther in which the workings under the said lease shall be less than those thereby authorised in satisfaction of the certain yearly rent for the time being payable thereunder, but would at the rates thereby prescribed amount to or exceed 1000*l.* in value, the said Sir C. H. Lowther is entitled to receive for his own benefit the residue (after setting aside such one-fourth part thereof as aforesaid) of so much of the said certain yearly rent as at the said rates would be equivalent to such workings, and that the remainder of the said certain yearly rent in the same year ought to be set aside as capital money arising under the said Acts. And that in every year during the life of the said Sir C. H. Lowther in which the workings under the said lease shall be less than those thereby authorised in satisfaction of the certain yearly rent for the time being payable thereunder, and would also at the said rates be less than 1000*l.* in value, the said Sir C. H. Lowther is entitled to receive for his own benefit the residue (after setting aside such one-fourth part thereof as aforesaid) of the sum of 1000*l.* out of or by means of the said certain yearly rent, and that the remainder, if any, of the said certain yearly rent in the same year ought to be set aside as capital money arising under the said Acts." I think that the effect of this decision is that the fact that a varying minimum rent is reserved does not invalidate the lease, if it can be ascertained how much of such rent is in the nature of, and properly capable of being treated as, fine, but that so much as ought to be considered fine must be dealt with as capital money arising under the Act, and the way this is worked out in *Re Lowther* (*ubi sup.*) appears to be by treating so much of the varying fixed rent as exceeds the lowest amount of such rent as fine, and, therefore, capital money; no question arising where the royalty is in excess of the fixed rent for the time being. As I understand it, the tenant for life is entitled to receive what he would have received

had a uniform minimum rent at the lowest rate of those mentioned been reserved, the balance being treated as fine. There are several difficulties in applying the principle apparently applied in the case of *Re Lowther* (*ubi sup.*) to that now under consideration. In the first place, the agreement provides for no rent being paid during the first year, and I cannot find any authority for such a provision. If a peppercorn rent may not be reserved, I fail to see what justifies absence of rent. It is not a sufficient answer to say that such absence of rent cannot affect the remaindermen to their injury, if it be something unauthorised by the Act. It is said that the case of *Re Lowther* (*ubi sup.*) was the case of reservation of a diminishing fixed rent, and consequently one which may obviously be detrimental to remaindermen, while the present is the case of a rising minimum rent, apparently to the advantage of the remaindermen, and consequently it is argued the principle acted upon in *Re Lowther* (*ubi sup.*) ought not to be applied. If this were a simple case between tenant for life and persons absolutely entitled in remainder, I might see my way to holding that no part of the rent received during the first four years ought to be treated as fine, inasmuch as the rent during those years is lower than the rent subsequently reserved, and consequently favourable to the remaindermen; but in the present case there is an infant tenant for life in remainder (whose estate is, it is true, subject to be defeated by an appointment), but whose estate, unless so defeated, is a present vested interest, and the present tenant for life might die in a year without appointing, in which case the infant tenant for life would apparently, until the maximum fixed rent becomes payable, be in receipt of less than he would have received had a uniform minimum rent been reserved. Passing by the objection that there does not appear to be any authority for non-reservation of rent for the first year of the term, I do not think that I can hold that the tenant for life is justified in granting the lease he proposes. If, however, a small, though substantial, rent were reserved for the first year, and if the greatest minimum rent—i.e., the 1*l.* per acre—were made payable as from the beginning of the fifth year, or from the death of the present tenant for life, whichever shall be the earlier, I think that might be justifiable. In my opinion, there is no objection to the reservation of a rising minimum rent if such rent is so reserved as to be equal (or in the simple case of tenant for life and remaindermen absolutely entitled upon his death so as to increase) after the determination of his life interest, nor is there any valid objection to the reservation of a diminishing rent where, as in *Re Lowther* (*ubi sup.*), what is truly fine can be separated from what is truly rent, and be dealt with accordingly. This is, of course, where the rent proposed is the best rent that can reasonably be obtained, regard being had to any fine taken. The case of *Doe d. Sutton v. Harvey* (1 B. & C. 426) relates to leases of surface. There was a power to lease—"so as that in every such lease there be reserved to be payable during the continuance of the term and estate thereby to be granted the best and most beneficial yearly rent or rents to be incident to the immediate reversion of the premises that, considering the nature of the case, can be reasonably had or obtained for the same at the time of mak-

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ing such lease without taking any fine, income, premium, or foregift for or in respect of making such demises or leases." There the leases had been granted upon terms and at rents which were found to be the most beneficial rents that could be obtained, but the court pointed out that, though that might be so as between lessor and lessee, it was not so between tenant for life and reversioner. Holroyd, J. says (at p. 435): "As to the finding of the jury that the rents reserved under the two leases made under one bargain were the most beneficial that could be obtained, that may be so as between the person making the lease and the lessee; but in order to see whether it be so between the tenant for life and the reversioner we must look to the facts of the case independently of the opinion of the jury. Now, it is perfectly clear that as between them this was not the most beneficial rent. The former cannot make a bargain by which a larger rent is reserved at the first part of the term and a less at the latter." I do not read this as intending to decide that a lease may not be granted with a varying rent if it be so reserved as to be for the benefit of the remaindermen at the expense of the tenant for life. The second and third questions asked by the summons are (2) whether or not the tenant for life has power to insert in the lease a power for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof, if any, as in accordance with the lease are not to be worked or paid for, shall have been paid for at the acreage rate reserved by the lease; and (3) whether the lease may contain a wayleave for foreign coal to continue after cesser of the minimum rent at a nominal rent, or whether a substantial rent must be reserved for such wayleave. These questions are directed to the propriety of clauses 7 and 9 of the agreement. Under sect. 17, sub-sect. (1), of the Act of 1882 there is power, I consider, to grant such a wayleave as is proposed, assuming that a proper rent is reserved; but it is objected that there is no stipulation for a cesser of the term or determination of the lease when all the coal is gotten, and the proposal for a nominal rent of 10s. would in fact be for an indefinite part of the term during which undergettings might be made up and for a wayleave until quite the end of the term. It will be further observed that no separate rent is reserved in respect of the wayleave proposed to be granted, although, no doubt, it forms a substantial element in considering the rent actually payable under the lease. It appears to me that after the undergettings, if any, were made up, there would be a free wayleave for the rest of the term, payment for which would actually have been made in the rents paid during the earlier years of the term. I think that this cannot be justified, as I have no means of ascertaining what portions of the rent ought to be treated as in the nature of fine or prepayment for the free wayleave. If a separate and properly ascertained rent were reserved for the wayleave for the whole time during which it is to be enjoyed, there might be no objection, but suppose the tenant for life were to live until all the coal is exhausted, the remaindermen would for the residue of the term be subject to the burden of the wayleave without getting anything but a nominal payment for

what might have been granted for a very substantial rent. For these reasons I do not think that the lease proposed can be granted, nor do I think that I can sanction the lease under the special power conferred upon the court, although I think it is probable that, after what I have said, the parties may be able to reform or mould the agreement in such a way as to substantially carry out what is desired, while avoiding the objections to its present terms.

Jan. 15.—This case having been restored for further argument on this date as to the second question raised by the summons, his Lordship intimated that the minimum rent could be made determinable after all the coal which the lessees were bound to work had been paid for, provided that the term determined also, and that a power to make up undergettings for a reasonable period after the determination of the term might be retained.

Solicitors: R. F. and C. L. Smith, agents for Ford and Warren, Leeds.

Saturday, Jan. 25.

(Before EADY, J.)

Re ROWLAND; JONES v. ROWLAND. (a)

Will—Construction—Gift to widow—Gift over of balance, "if any," of money.

A testator bequeathed the residue of his estate to his wife for her sole use and benefit so long as she should remain his widow. In the event of her remarriage he directed that the balance, if any, of money and farm stock left, not to exceed 400l., should be divided between his brothers and sisters.

Held, that the widow took absolutely except as to a sum of 400l., which went over upon her marrying again, in the event of there being a balance of unexpended residue to that amount on the day of her second marriage.

THIS was a summons to determine the construction of a will taken out by the executrix of a testator who made his will on the 7th June 1899, and, after appointing executors and directing payment of his funeral and testamentary expenses and debts, the will proceeded:

The residue I give to my wife for her sole use and benefit so long as she shall continue my widow. Should she marry again, then the balance, if any, of the money and farm stock, not to exceed 400l., shall be divided between my brothers and sisters, if any shall be living.

The testator died on the 19th Nov. 1899, and his residuary estate consisted of 579l. cash and farming stock, which realised 598l.

The widow married again on the 1st June 1901, and alleged that at that date 150l. only of the residue remained in her hands unexpended.

Richards for the widow.—I say (1) that the gift to the widow is absolute; or (2) that, alternatively, the gift over of the balance, "if any," extends only to what was unexpended at the date of the second marriage:

Perry v. Merritt, L. Rep. 18 Eq. 152;

Watkins v. Williams, 3 Mac. & G. 622, at p. 629;

Re Jones; *Richards v. Jones*, 78 L. T. Rep. 74:

(1898) 1 Ch. 438;

Constable v. Bull, 3 De G. & Sm. 411.

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-law.

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Covens-Hardy for some brothers and sisters of the testator.—There is here no absolute gift to the widow. In all the cases cited there were words amounting to an absolute gift, so they can be distinguished. The word "balance" means what remains after providing for debts. Four hundred pounds goes over, and there is an intestacy as to the rest.

Cooke for other brothers of the testator.—There is a clear intention only to give the widow an estate for widowhood:

Re Boddington, 50 L. T. Rep. 761; 25 Ch. Div. 685;

Righton v. Cobb, 5 My. & Cr. 145;

Jordan v. Holkham, Amb. 209.

Richards replied.

EADY, J.—The true construction lies between the contentions of the plaintiff and the defendant. The will does not vest the property indefeasibly in the widow, nor, on the other hand, is income only given so long as she remains unmarried. There is no intestacy, but in the event of a second marriage the widow takes everything except a sum of 400*l.* absolutely. Events have happened on which a sum not exceeding 400*l.* goes over. If a sum of money is given to a person absolutely, a provision that so much as is not disposed of is to go over to another person is bad. But that is not the case here. "Balance" means the balance of residue unexpended on the day of the second marriage. As the plaintiff states that at that date she had in her hands 150*l.* only, I will direct an inquiry what was the amount of the balance, if any, of money and proceeds of sale of farm stock, part of the residuary estate of the testator remaining unexpended, in the hands of the plaintiff on the 1st June 1901, being the date of her second marriage.

Solicitors: *Crowders, Vizard, and Oldham*; *Robbins, Billing, and Co.*

KING'S BENCH DIVISION.

Feb. 3, 4, 5, and 10.

(Before Lord ALVERSTONE, C.J., WRIGHT and RIDLEY, JJ.)

REX v. ARCHBISHOP OF CANTERBURY; Re GORE; Ex parte COBHAM and GARBETT. (a)

Ecclesiastical law—Mandamus—Confirmation of bishop-elect by archbishop or Vicar-General—Objections as to doctrine—25 Hen. 8, c. 20.

G. having been, in pursuance of letters missive and congé d'élire, elected Bishop of W. by the dean and chapter, letters patent issued to the Archbishop of C. directing him to confirm and consecrate G.

Thereupon a citation of opposers was issued, and notice of objections in writing was ordered to be given before a certain date, a day prior to the day fixed for confirmation, and the Vicar-General sat in chambers to consider such objections before proceeding with the confirmation.

The objections handed in alleged that the bishop-elect had committed ecclesiastical offences and had published false doctrine, and had thereby contravened the articles of religion, and that he was by reason of such publications unfit to be intrusted with the care and superintendence of a diocese; that he was not a prudent and discreet

man, and not at all a fit and proper person to fill the office of bishop, by reason of certain passages in his published works; and, further, that he had been a member of certain societies mentioned in the objections.

The Vicar-General, after considering the nature of the objections, declined to hear any of the opponents in support of them at the confirmation, and, when he sat in court, after taking the names of the objectors, gave his decision that they were not objections which he could entertain, and he thereupon proceeded with the confirmation in the usual manner.

Rules nisi having been obtained on behalf of objectors for a mandamus to the Archbishop of C. or his Vicar-General to hear the objections: Held (discharging the rules), that the Vicar-General was right in not entertaining objections of this kind.

Semble, that a mandamus will not lie to the archbishop to compel him to inform his mind as to the fitness of the bishop-elect before he proceeds to confirmation.

The practice of requiring written notice of the objections to be presented before the actual ceremony of confirmation is a proper one.

CAUSE shown against two rules nisi for a mandamus directed to the Archbishop of Canterbury and his Vicar-General commanding them or one of them, at a court to be duly holden in the matter of the confirmation of the election of the Rev. Canon Gore, D.D., to the bishopric of Worcester, to permit or admit to appear in due form of law Captain Cobham and Edward Henry Garbett to oppose the confirmation of the election, and to hear and determine upon such opposition and upon the articles, matters, and proofs thereof.

The following facts appeared from the affidavits filed in support of the rule:—

The Rev. Charles Gore, D.D., Canon of Westminster, was on the 27th Dec. 1901 elected by the Dean and Chapter of the Cathedral Church of Worcester to the office or dignity of bishop of the diocese of Worcester, the same being vacant, and thereupon His Majesty issued His Royal Letters Patent, dated the 11th Jan. 1902, directing the Archbishop of Canterbury to confirm and consecrate him as bishop of the cathedral church of Worcester.

In obedience to the letters patent the Vicar-General to the Archbishop of Canterbury issued a citation against all and singular opposers as follows:

Frederick by Divine Providence Archbishop of Canterbury, Primate of All England and Metropolitan. To all and singular clerks and literate persons whomsoever they be in and throughout our whole province of Canterbury greeting. Whereas the Episcopal See of Worcester becoming lately vacant by the resignation of the Right Reverend Father in God Dr. Browne, late bishop thereof, the Dean and Chapter of the Cathedral Church of Worcester aforesaid after having petitioned for and obtained the royal licence for an election to be celebrated of a new and future bishop did capitularly assemble and making a chapter did prefix and assign a certain time and regularly proceeding at the time appointed and assigned in the business of such action did elect the Reverend Charles Gore, clerk, Doctor of Divinity, Canon of Westminster, to be their bishop and pastor of the said cathedral church of Worcester; and whereas His Most Excellent Majesty our Most Gracious Sovereign

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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Lord King Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland, of the British dominions beyond the seas, King, Defender of the Faith, hath at the humble petition of the said Dean and Chapter of the said Cathedral Church of Worcester given his royal assent and consent to the said election of the person of the said Reverend Charles Gore, clerk, Doctor of Divinity, Canon of Westminster, as he hath signified to us by his letters patent under the Great Seal of Great Britain requiring us to confirm the aforesaid election and the person elected according to the tenor and exigency of the laws and statutes of this realm with all convenient speed (as by his said letters patent under the Great Seal of Great Britain to us inscribed and directed relation being thereto had doth and may more fully appear), and whereas in obedience to His Majesty's royal commands (as is our duty) to proceed in the said business of such confirmation and according to the tenor of the laws and statutes of this realm in that case published and provided we have decreed all and singular opposers (if any such there may be) who shall say against, except to, or oppose the said election, the form thereof, or the person elected to be cited and summoned to appear on the day and hours and place and for the purposes underwritten justice so requiring it. To you therefore jointly and severally we commit and strictly enjoin and require you to cite and cause to be cited peremptorily with a loud and audible voice in the Church House in the city of Westminster, and also by affixing these presents in some proper place within the Church House or other public places where it shall be most expedient, all and singular opposers (if any such there may be) in special or in general who against the said election, the form thereof, or the person so as aforesaid elected shall say, except to, or oppose that they and any of them appear before us, our Vicar-General, or his surrogate in the Church House aforesaid, on the 22nd day of January instant, between the hours of nine in the forenoon and two in the afternoon of the same day, with continuance and prorogation to be made of days then following and places if need so require, to say against, except to, or oppose the said election, the form thereof, or the person elected if they think themselves concerned in due course of law, and further to do and receive what shall be just and the nature and quality of the said business demand and require of them. Moreover, that you intimate or cause to be intimated peremptorily in manner and form before recited all and singular opposers (if any there be) in special or in general whom we do also intimate by the tenor of these presents that if the said opposers so cited shall appear on the said day, hour, and place before us, our Vicar-General aforesaid, or his surrogate and against the said election, the form thereof, or the person elected shall say, except to, or oppose or not we will nevertheless proceed and intend to proceed in the said business of confirmation according to the exigency of the laws and statutes of this realm, or so will our Vicar-General aforesaid or his surrogate aforesaid proceed and intend to proceed, the absence or rather contumacy of the so cited, intimated, and not appearing in anywise notwithstanding, and what you shall do or cause to be done in the premises you shall duly and authentically certify us or our aforesaid Vicar-General or his surrogate, or so let one of you certify who shall execute this our mandate.—Dated this sixteenth day of Jan. in the year of our Lord 1902 and of our translation the sixth.—(Signed) HARRY W. LEE, Principal Registrar.

N.B.—Persons claiming to be heard as objectors must deliver notice of their objections in writing at the office of the Provincial Registry, 3, Creed-lane, Ludgate-hill, before 4 p.m. on Tuesday, the 21st Jan. instant.

No objection will be considered unless such written statement has been delivered. The Vicar-General will sit in chambers, at committee-room No. 2, at the said Church House, at ten o'clock a.m. on Wednesday, the

22nd instant, to consider any objection which may have been delivered, and no objector who does not appear in chambers and establish his right to appear and be heard can appear or be heard during the business of confirmation.

A copy of the citation was affixed to the door of the Church House at Westminster (instead of Bow Church as heretofore) according to the law and practice of the court.

Formal objections in writing were duly delivered.

On the 22nd Jan. 1902 the objectors appeared by counsel before the Vicar-General in chambers at 10 a.m., and protested against his holding such preliminary investigation of objections and the irregularity of the proceedings in chambers, and claimed their right to be heard in open court at the proper and usual time.

The Vicar-General subsequently sat in court and conducted the business of the confirmation.

In the course of the proceedings the Vicar-General directed the Apparitor-General of the court to make proclamation as is usual in such cases, which he did in open court in the words following:

Oyez, Oyez, Oyez! All manner of persons who shall or will object to the confirmation of the Reverend Charles Gore, D.D., to be bishop and pastor of the cathedral church of Worcester let them come forward and make their objections in due form of law and they shall be heard.

Immediately after the proclamation was made, the Vicar-General took down the names of all those who claimed to appear and had sent in written objections, and thereupon proceeded to give his reasons why he could not entertain any of the claims, as follows:

The question having been raised as to the form of procedure to be adopted and as to the power of the archbishop over matters of procedure, I propose to state the grounds on which, in my opinion, the archbishop had full power to adopt the procedure which has been adopted on the present occasion—a procedure which, in my opinion, has ample justification. The Reverend Canon Gore having been, in pursuance of letters missive and *congé d'élire*, elected Bishop of Worcester by the dean and chapter, and that also having received the royal assent, letters patent have been issued to the Archbishop of Canterbury commanding him to confirm the election. The archbishop has appointed me as Vicar-General of the province of Canterbury for the purpose of confirmation, and notice of that confirmation has been published with the citation of opposers. This citation (I think the archbishop has full power as regards the form of the citation) required the opposers to deliver their objections in writing before a date named, and stated that no objector who did not appear in chambers and establish his right to appear and be heard could appear or be heard during the business of confirmation. It is raised as a protest by counsel and others at the preliminary meeting that the archbishop has no power to issue the citation in the form in which it has been issued. In accordance with the terms of the citation certain objections in writing were delivered and certain objectors appeared before me under protest at a preliminary meeting. The only point that they raised was that there was no jurisdiction to hold the preliminary meeting, or to determine any question as regards the right of objection at that stage. Without going in detail into the written objections delivered to me under the terms of the citation, I may state that they all raised questions of doctrine—questions which can under no circumstances be introduced at the business of confirmation. The procedure to be adopted in the business of confirmation is not

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regulated by the statute 25 Hen. 8, c. 20, under which the confirmation is held and is not obligatory in form, but a particular form has been used in practice for some centuries, and it is not advisable to alter that form of procedure except so far as may be required to ensure a due and proper consideration of any objections, and to avoid unnecessary and possibly unseemly discussion during the progress of the ceremony itself. With this object it was considered advisable that all objections should be delivered in writing and should be considered by me at a preliminary stage in order to determine which under the circumstances of the citation could found a right in objectors to appear and be heard during the ceremony. I have no doubt whatever but that there is full power in the archbishop to issue the citation in the form which has been adopted. Having considered the nature of the objections delivered, I intimated to the objectors or their representatives, in chambers, and I now rule, that none of the objectors in reply to the citation are entitled to appear and be heard on the grounds mentioned in the written documents, and, further, I decide that it is not competent for me to entertain any application to appear by objectors who have not conformed with the conditions stated in the citation. The questions involved in the claims of the opposers to appear and to be heard during the progress of the confirmation have been considered, and in the case of *Reg. v. Archbishop of Canterbury* (11 Q. B. 483) Dr. Burnaby, Vicar-General of that day, who had as assistant commissioners Dr. Lushington and Sir John Dodson, decided he was bound to proceed to confirm the election certified to have been made by the Dean and Chapter of Worcester, and that the opposers, their proctors and counsel, could not appear to be heard. Of course, I have not adopted that form of procedure in that case. That decision was on a proceeding for writ of *mandamus*, but the rule *nisi* was discharged as the Court of Queen's Bench were divided in opinion. The point was again considered by Sir Travers Twiss in the case of Dr. Temple, and the report of the proceedings will be found in the *Times* of the 9th Dec. 1869. Sir Travers Twiss affirmed the power of the archbishop over matters of procedure, and allowed that opposers could only state their objection on two points—namely, that the election in some way in form had been defective and that the person selected was not the person on whom the choice of the Crown had fallen—and he pointed out that the objection would, if well founded, entitle the archbishop to rectify any informality in the form of the objection under the peculiar power which he has to supply the defects, whatever they may be, in the election. There is, in my opinion, a convenience in considering the right to appear in connection with the proposed grounds of objection, rather than as an abstract question of technical right, and the decision which I give is covered by either of the decisions of my two predecessors to which I have referred. I wish to add, to prevent any possible misunderstanding, that any objector who could establish a right to appear in accordance with the terms of the citation would be heard by me during the public ceremony of confirmation. I understand that protests have been lodged against my ruling on these questions of procedure.

Thereupon counsel for the objectors protested, and tendered their objections.

The Vicar-General then directed the confirmation to be proceeded with, and it was proceeded with according to the usual forms, save that the opposers were not publicly called a second time as is customary. The proctor for the Dean and Chapter of Worcester then accused the contumacy of all and singular the persons so as aforesaid “cited, intimated, publicly called, and not appearing” in the usual form, and the proceedings terminated by Dr. Gore taking the usual oaths and subscribing the declaration and the

signing by the Vicar-General of the usual sentence in writing, and the Vicar-General decreed that a public instrument and letters testimonial be made out concerning the premises.

The allegations of the objectors in Cobham's case were:

First, that the said Charles Gore is not a prudent and discreet man and is not and cannot be greatly or at all useful and necessary to the cathedral church of Worcester, and that he is not at all a fit and proper person to fill the office of bishop and pastor of the said cathedral church for the following reasons:

1. For that he has on several occasions, both orally by preaching and speaking and also by published writings, deliberately made use of language calculated to cause pain and distress to, as well as to shake the faith of, many earnest believers, thereby causing scandal and creating division and strife in the Church. And in particular that he did in or about the year 1890 write and print and publish in a book called *Lux Mundi*, whereof he was editor, a certain article or essay entitled “The Holy Spirit and Inspiration,” which contains (*inter alia*) the following passages: [These were then set out.]

2. For that the said Charles Gore was at the date of his nomination to the bishopric of Worcester, and has been for some twenty years previously, a member of two societies known as the English Church Union and the Confraternity of the Blessed Sacrament respectively. At a meeting of the former society held in the year 1898, the said Charles Gore stated publicly and deliberately as follows: “We claim that under the ornaments rubric we have full and frank liberty to use all the ancient ritual for the ceremonial exposition of the Prayer-book services;” and, further, he said: “While content with the services which the Prayer-book allows us with the ancient ritual exposition of them which is in accordance with the ornaments rubric, we will use gladly such liberties as we can gain or squeeze from any particular bishop in any particular diocese over and above that for additional services.”

3. For that the said Charles Gore is the founder of a monastic celibate society, known as the Community of the Resurrection, at Mirfield, in the county of York.

4. For that the said Charles Gore has expressed warm approval of the monastic Society of the Sacred Mission at Mildenhall, in the county of Suffolk, the members whereof (to the knowledge of the said Charles Gore) pledge themselves to poverty, obedience, and celibacy, and in the chapel whereof incense, mass vestments, and lights before the sacrament are (to the knowledge of the said Charles Gore) used.

Secondly, that the said Charles Gore hath not at any time or in any manner expressed disapprobation or dissent from any of the said doctrines, opinions, and positions, save in or so far as he may have done so by retiring from membership of the said English Church Union and Confraternity of the Blessed Sacrament.

Lastly, that all and singular the premises were and are true publicly and notoriously, whereof legal proof being made at any meet and convenient time and place to be appointed by the judge for that purpose the parties proponent humbly pray that the said election may not now be confirmed, and that otherwise right and justice may be effectually done and administered to them and their said parties in the premises.

Those in Garbett's case were:

1. That the said Canon Charles Gore has published books containing declarations of doctrines, which doctrines are contrary to the articles of the Church of England, and which said erroneous doctrines he has never withdrawn or disavowed.

2. That the said Canon Charles Gore has publicly declared and taught that part of the books contained in the canon of Holy Scripture as set out in the sixth of

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the articles of the Church are allegories, myths, or are only dramatic stories.

3. That the doctrines and opinions set forth in a certain book published, written, and edited by the said Canon Charles Gore and entitled *Lux Mundi* contain doctrines which are inconsistent with the articles of the Church of England and with the doctrines of the said Church, and which erroneous doctrines the said Canon Charles Gore has never withdrawn or disavowed.

4. That the said Canon Charles Gore holds views in reference to one of the sacraments of the Church which are contrary to the articles of the said Church and also to the doctrines of the said Church. Amongst other things, the said Canon Charles Gore has publicly taught and advocated views and doctrines in reference to the Sacrament of the Lord's Supper which are contrary to the 28th article of the said Church.

5. That in the year 1898 the said Canon Charles Gore declared he would endeavour to "gain or squeeze" from any particular bishop in any particular diocese additional services beyond those sanctioned and enjoined by the Book of Common Prayer, and is therefore a person unfitted to be the chief pastor and bishop of the diocese and by his declarations incapable of making the declarations required at the time of the consecration of a bishop in the sense and with the intention required by the said office of consecration.

6. That the said Canon Charles Gore was until the date of his nomination to the said diocese of Worcester a member of a certain society, amongst others, the English Church Union and the Confraternity of the Blessed Sacrament, and is the founder of the Community of the Resurrection at Mirfield, in the diocese of York. All the above societies have been formed to propagate doctrines and practices which are contrary to the articles and doctrines of the Church of England, and therefore the said Canon Charles Gore is unfitted and disqualified from truly making the declaration as to strange and erroneous doctrine and as to the sufficiency of Holy Scriptures as are required to be given by a bishop in the office of the consecration in the sense of and with the intention required by the said office of consecration.

7. The said Canon Charles Gore is by the views and opinions which he has avowed that he holds in reference to the doctrine and practices by the Church of England (and which views and opinions are inconsistent and at variance with the articles and doctrines of the said Church) unfitted to be intrusted with the care and the superintendence of a diocese, and has disabled himself from truly and faithfully and according to the rubrics and articles of the Church of England exercising the office of bishop and accepting the burden and duty imposed upon him by the pledges required to be given by a bishop of the said Church of England and pledges and views required to be given before consecration by the office of consecration of a bishop as set forth in the Book of Common Prayer.

The *Attorney-General* (Sir R. Finlay, K.C.), the *Solicitor-General* (Sir E. Carson, K.C.), and *Dibdin*, K.C. (*Sutton* with them) for the Crown.—The objections here are objections as to matters of doctrine, and the broad question is whether prior to confirmation the archbishop is bound to hear objections to a bishop-elect founded upon matters of doctrine. There will be a subsidiary point which will raise the point whether a *mandamus* will lie as the confirmation has been effected. The whole matter turns upon the statute 25 Hen. 8, c. 20. That was passed in the last months of 1533, but, owing to a change in the dates later, it becomes the early part of the year 1534. That statute was repealed by Mary, but it was re-enacted directly Elizabeth came to the throne by 1 Eliz. c. 1. In sect. 7 of that statute of Elizabeth the re-enactment will be

found, and its title is important, which is: "An Act restraining payment of annates and firstfruits to the Bishop of Rome, and of the electing and consecrating of archbishops and bishops within this realm." Upon that statute it appears that the preamble refers to the practice which prevailed before the statute, of bishops having to go to Rome for confirmation. The statute 23 Hen. 8, c. 20, which preceded 25 Hen. 8, c. 20, provided for the nomination by the King direct in case of delay. In the third place, the dean and chapter are bound to elect within a certain number of days the person mentioned in the letters missive or the Crown nominates by letters patent, and the archbishop consecrates. There is no confirmation in that case. The confirmation, consecration, and investiture are to be within twenty days under penalty of praemunire. It is important to look at what was the law before the passing of the statute. That is well summarised in the judgment of Erle, J. in *Reg. v. Archbishop of Canterbury; Hampden's case* (11 Q. B. 483; Report of the Case of Dr. Hampden, by Richard Jebb, London, 1849), where he says, at p. 568: "The reference to history leads me to the conclusion that bishoprics were the donatives of the King under the Saxon and some Norman Kings; from the charter of King John to the reign of Edward III. bishops were elected by the dean and chapter and confirmed by the archbishop; and that from the reign of Edward III. to the time of this statute the Pope had superseded the archbishop except on a few occasions when the Papal See was powerless." In the charter of John, 1214, printed in Jebb's Report of the Case of Dr. Hampden, pp. 125, 126, will be found the reservations in that charter as to the power of the Crown. A further authority as to the former state of the law is to be found in Coke upon Littleton, at p. 134a. Since Coke wrote and Erle, J. delivered his judgment, we have Dr. Stubbs' Constitutional History of England:

Small 8vo edition, vol. 1, pp. 134, 135, 316, 317, 321; vol. 3, 295 *et seq.*

The result is that there was very great fluctuation. There were two parties—viz., the King and the Pope. But whatever happened in the earlier days, in practice, except during a few years, from Edward III., the Pope had drawn to himself the right of confirmation and issued his bulls accordingly upon which consecration took place. As to contentious confirmations, the last is in 1316, but of all these cases they do not come down further than the year 1416, which was *Wakeryng's case*, and that was practically non-contentious. The only other statute is 25 Edw. 3, c. 6—the Statute of Provisors. That title—namely, "provision"—was applied to all statutes referring to all nominations of the Pope to any ecclesiastical dignity. It was passed in 1350, and goes to show by sect. 3 that the Crown presented direct when there was any reservation, collation, or provision by the Pope. Turning to 25 Hen. 8, one must construe it in the light that for 150 years before the statute was passed the confirmation was at Rome. Then comes the statute, and the dean and chapter have to elect the person mentioned in the letters missive:

Coke upon Littleton, 95a, and Hargraves' note 4.

Confirmation is a sequel of election. If the dean

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and chapter do not elect, the King appoints by letters patent and the archbishop consecrates direct, and there is no confirmation, which only comes in when there is an election. It would be astounding if there was such a difference between the prerogative of the Crown and the position of the bishop-elect according as if the dean and chapter do or do not go through the form of election. If the dean and chapter do not elect, it is clear under the statute that the archbishop proceeds without confirmation to consecration. But the argument put forward by the other side is that if the dean and chapter do their duty and elect the person in the letter missive, then the final decision whether or not the bishop-elect is a proper person rests not with the Crown, but with the archbishop after hearing objections, but that if no election takes place, the sole discretion is in the Crown. It is said that the archbishop has the right and the duty to examine the bishop-elect, and if he finds him heretical or in any way unfit he can reject him. If the archbishop does not only confirm but also consecrate within a certain period—namely, twenty days—he is liable to the penalties of *præmunire* under sect. 7 of the statute of 25 Hen. 8. There are several cases where there is no confirmation, such as where the dean and chapter do not elect; in the case of bishoprics under 31 Hen. 8, c. 9; in the case of suffragan bishops under 26 Hen. 8, c. 14; and in the Irish Church by 2 Eliz. c. 4, where the bishop is appointed by letters patent, and that result is achieved by reference to the statute of 25 Hen. 8:

O'Brien v. Knivan, Cro. Jac. 552; *Palmer*, 22; 2 Rolfe's B. 101.

All the authorities under the canon law are quite immaterial with regard to the law under the statutes of Henry VIII. There are other instances of no confirmation in the case of the bishopric of St. Albans under the statute of 1875 (38 & 39 Vict. c. 34, s. 8) and under the statute of 1878 (41 & 42 Vict. c. 68) by which the bishoprics of Liverpool, Newcastle, Wakefield, and Southwark were created; also in the case of the Bishop of Calcutta in 53 Geo. 3 and other Indian bishoprics under 3 & 4 Will. 4, c. 85. There is also the case of the Crown colonies. These cases annihilate the argument that there is anything essential to the ecclesiastical position of the bishop in confirmation being conducted either with or without examination. At p. 145 of Jebb's Report of the Case of Dr. Hampden is to be found the opinion of Sir James Marriott, from his M.S. Book of Practice, who was Queen's Advocate in 1764. He says: "Confirmation must be dispatched within twenty days otherwise a *præmunire* is incurred. Therefore there needs no citation of opposers, nor are they to be heard if they offer: see 25 Hen. 8, c. 20; M. S. No. 6; also Eden's Practical Observations." It was assumed by the objectors in the *Hampden* case that when the statute passed there was an existing form of confirmation in use in England which involved examination by the archbishop. That is a mistake, for from Edward III. onwards all this had been drawn to Rome, and the only case of confirmation was *Wakeryng's* case in 1416:

The statute of 3 Hen. 5 (Rolls of Parliament, vol. 4, 1414 to 1437, p. 71).

The form of writ based on the statute is in Rymer's

Foedera, vol. 9, p. 338, edit. of 1709. Then as to the case of *Wakeryng* (Wharton's *Anglia Sacra*, vol. 1, p. 417, edit. of 1691), that was not a contested case, and is the only case cited after 1316. The earliest instance is 1174, and then 1213. The only case in which there has been any approach to questions of doctrine being raised is that given at p. 735 of Wharton of Thomas of Melsanby, but when that is looked into it was not a question of heresy, but illiteracy. At the time of the statute and for nearly 200 years the confirmation had been transacted at Rome, and there was no existing practice of confirmation in England. [Lord ALVERSTONE.—There was at that time no such existing practice of confirmation as would be understood under the statute without any further reference.] That is so. They referred to the preamble to 1 Edw. 6, c. 2, passed in 1547. That statute was repealed, but the preamble is nearly the same as 2 Eliz. c. 4, an Irish statute, and we cite it as showing, if the form of election involved confirmation only after examination, that recital could not have been possible. Until *Hampden's* case there is no trace of opposition being raised to confirmation except *Mountain's* case (1 Burn's Ecc. Law, 206, 9th edit., 1842; Jebb's Trial of Dr. Hampden, 45; 6 State Trials, N. S. 427, note B.):

The Institution of a Christian Man (The Bishop's Book, 1537);

The Necessary Doctrine and Erudition (The King's Book, 1543).

That book is no binding authority, and deals with a great deal more than confirmation *simpliciter*, though a passage in the Bishop's Book is relied on by the other side. It does not refer to examination after nomination by the King. The passage at p. 109 only goes to show whether at that date the word "confirmation" had any special meaning as including "reject." As to the position and duties of the Vicar-General. These are very generally stated by Sir John Lambe, Dean of the Arches in 1836, and his report is printed in an appendix, at p. 26, in Mr. Rothery's return with regard to ecclesiastical appeals, printed in 1868:

Oughton's *Ordo Judiciorum*, vol. 1, the Prolegomena, ch. 3, p. 15, edit. of 1728, and 5th Title, pp. 16 and 17;

The Report of the Ecclesiastical Commissioners, vol. 24, 1883;

Coke, 4 Inst. 337.

Coke was there dealing with the Vicar-General and not the Court of Audiences, which was a court presided over by the archbishop, at least in contentious matters. The words in Oughton are: "Which Chancellor or Vicar-General in spiritual matters did not exercise those things which were of contentious jurisdiction—that is to say, of causes between parties in contentious forum (*foro contradictorio*), except such things as are objected merely as a matter of form. For instance, the business of the election of bishops." Coke says: "But dealeth with matters *pro forma*, as confirmations of bishops, elections, consecrations, and the like":

Thorpe v. Mansall, 1 Hagg. Constat. Reps. 4, n.

It is said that charges of heresy can be made against the bishop-elect, but if on confirmation the bishop-elect could be so attacked, there would be some form of procedure provided, as a charge

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such as this must be specifically and definitely made:

Williams v. Bishop of Salisbury, 9 L. T. Rep. 787; 2 Moo. P. C. Cas. 375;

Sheppard v. Bennett, 26 L. T. Rep. 923; L. Rep. 4 P. C. 371.

These cases show that where heresy is charged the charges must be specifically made. The only reason why no procedure is provided can be that charges of this kind cannot be made, as no form, no procedure, and no safeguards are provided. An inquiry such as this could not be conducted within twenty days under sect. 7 of 25 Hen. 8. It might be as well said that the word "elect" with regard to the dean and chapter should mean elect if fit and proper. It is said that the form used shows that the confirmation is a matter of substance. The form used has no binding authority, and could be altered at any time. That cannot affect the construction of the statute. The authority of the canonists has nothing to do with the statute of Henry, and, although they may show that before the statute questions of heresy or schism could be raised, our point is that it could not be so after the statute:

Lancelotti *Institutiones Juris Canonici*, 1st Bk., tits. 6, 7, 8, 9 (Lugduni (Lyons) edit., 1616; Magdeburg edit., 1717);

Ferrari's *Bibliotheca Canonica Legis* (Milan), p. 218; (Venice 1782), vol. 2, p. 457;

Corpus Juris Canonici, Decretals of Gregory IX., vol. 2, Richter's edit., Leipzig, 1881, p. 58;

Lyndwood's *Provinciale*, Oxford, 1679, p. 218;

Reg. v. Archbishop of Canterbury, 11 Q. B. 483; judgment of Erle, J.

[WRIGHT, J.—Would it not be a ground for at least delay if it was objected that the appointment had been bought?] I submit no. That is a matter that could be laid before the Crown, but the archbishop would be powerless to deal with it. All that can be considered at the confirmation is the identity of the person and the authenticity of the documents. There is also the question whether *mandamus* will lie. [Lord ALVERSTONE, C.J.—I think it was considered by all the judges in *Hampden's* case that it would.] That is so, but I take the point although the court would be bound by that case. It is worthy of note that in 23 Hen. 8, c. 20, recited in 25 Hen. 8, the "confirmation" is not mentioned from beginning to end. If the contention of the other side is correct, the only way a dean and chapter could object would be by electing on the letter missive, for, if they did not elect, the nomination by the King is made by letters patent, and consecration is made over their heads. As to the form. The whole ceremony is one of form. The election is purely formal, like the leave to elect. The court of the Vicar-General is not a court for contentious business, and in fact this matter need not have been sent to him at all, but the archbishop might have appointed a special commission as in *Hampden's* case. The bishop-elect is not cited to the court of the Vicar-General, nor is he a party, and yet the other side contend that he can be tried for any or every ecclesiastical offence. Such a contention is almost revolting to one's notions and ideas of justice. The citation is merely addressed to opposers. The objections here do not charge the bishop-elect with any ecclesiastical offence at all. If the Clergy Discipline Act 1840 is looked at, that defines for this purpose the only way in

which a clergyman can be prosecuted for an offence of doctrine or false teaching. What is necessary in order to ground jurisdiction under that Act is that he should be charged with an offence against the laws ecclesiastical, or concerning which there may exist scandal or evil report of having offended against those laws. One set of objections sets out the extracts, but the meaning of these extracts is not stated. The other says that the 6th article is controverted, but fails to set out the extracts. No doubt the other side will and must say that there is something very important in the appointment of the bishop in his confirmation. But of considerably more than 100 bishops of the Church of England, not more than twenty-five can be subject to the process of confirmation.

Sir E. Clarke and E. W. Hansell for the Archbishop of Canterbury and the Vicar-General.—Neither of the prosecutors here can ask for a *mandamus*. Captain Cobham was not at the election; he did not oppose or give notice of an objection. Mr. Garbett does not show any interest. The parties in *Hampden's* case were two incumbents in the diocese of the bishop-elect, and so they had an interest. They referred to the judgments of Coleridge and Patteson, J.J. in *Hampden's* case and *Reg. v. Bishop of Chichester* (29 L. J. 23, Q. B.; 2 El. & El. 209). [Lord ALVERSTONE, C.J.—If we were to hold that these rules should be discharged on the ground of want of interest, we need not decide anything else.] If raising this point would prevent a decision being given on the main question which it is our desire should be given, I withdraw the objection. The archbishop in this case acted throughout on the advice of his Vicar-General, and it is important to see what authority the Vicar-General had from his patent. The passage which refers to confirmation says: "And we commit and confer on you, the said Charles Alfred Cripps, the power and authority of us and our successors by virtue of these presents, and we do for us and our successor whosoever give and grant to you the authority above and full power with the faculty and right of confirming all elections whatsoever of all bishops to our province of Canterbury, according to the exigency of the law and of the statutes of this Kingdom of Great Britain." The Vicar-General is not a judicial officer. In Coke's Fourth Institute it says that he meddleth not with contentious matters, and Lord Stowell in *Thorpe v. Mansall* (*sup.*) says that he has authority only in matters of voluntary jurisdiction. There is no example of the Vicar-General exercising any contentious business at all. There is a series of authorities with regard to the position taken up by the Vicar-General:

Sir James Marriott's opinion (*sup.*);

Sir John Lamb's opinion (Rothery's Report in Return of Ecclesiastical Appeals, p. 26);

Judgments of Dr. Burnaby, Dr. Lushington, and Sir John Dodson (Jebb's report of the case of Dr. Hampden, p. 54 *et seq.*);

Reg. v. Archbishop of Canterbury, 11 Q. B. 483;

The Institution of a Christian Man (the Bishop's Book, 1537);

The Necessary Doctrine and Erudition (the King's Book, 1543).

The other side rely upon certain Italian canonists to control and defeat the operation of a statute by the authority of canons which we say are

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not part of the law of this country at all. The passage in the Bishop's Book does not deal with the confirmation of a bishop, but of the institution of priests. If any importance is to be placed upon the volume, the King's Book is undoubtedly the one of importance. And when one looks at that, we find that the passage in the Bishop's Book has disappeared and there has taken its place in the corresponding part of the book the most explicit assertion of the exclusive authority of the King in the matter:

The Remains and Letters of Archbishop Cranmer, published by the Parker Society, p. 15.

As to the order of proceedings in this matter. In 1869 there was the judgment of Sir Travers Twiss when the present archbishop was appointed Bishop of Exeter: (see 1 Phill. Ecc. Law, 42, 2nd edit.). There Sir Travers Twiss meant that if there had been defects in the form of election or error with reference to the person presented, that should be made known before confirmation. [WRIGHT, J. referred to *Evans v. Ascuthe* (Palmer, 457; s.c. 1 W. Jones, 158; Latch. 31, 233; Noy, 93; 2 Rolle's R. 450).] What really happened here was this: The persons came before the Vicar-General in chambers and stated what their objections were. They were objections as to doctrine, but disclosed no ecclesiastical offence. The Vicar-General ascertained that there was no objection to the *processum electionis* or to the personal qualifications of the bishop-elect, but only objections on questions of doctrine. They referred to the judgments of the Vicar-General (*sup.*) and the judgment of Wightman, J. in *Reg. v. Bishop of Chichester* (*sup.*). The course taken by the Vicar-General was right on two grounds. First of all, it was entirely in accord with the precedents and opinions since the statute of Henry VIII. was passed, and also was in accord with the citation upon which alone the right of these opposers to come in and be heard rests. As to precedents which have been cited, there is also the statement of Sir Henry Martin, Dean of Arches at the time of Charles I., in *Mountague's case* (6 St. Trials, N. S. 427, note B). Inasmuch as the opposers' right to appear depends on the citation, they must be bound by its terms. The citation tells them exactly what will happen, and all that has been done here is in accord with that citation.

J. G. Talbot and Rayner Goddard for the bishop-elect.

Haldane, K.C., Bramwell Davis, K.C. and Whitehead for Cobham.—The question here is what is the meaning and effect of the statute of Henry VIII. That depends upon three points—namely, what was the position of things when the statute was passed; what is the interpretation to be put upon the words used in the statute, having regard to the state of things when the Act was passed; and what light has been thrown on the construction of the statute by subsequent usage. The substance of the matter is what is the meaning of the office of confirmation, and we submit that that office cannot be separated from the office of consecration which is closely connected with it. Broadly put, our arguments are that from the earliest times, making allowance for the struggle that has gone on between the temporal and spiritual powers, the placing of the bishop has been in the hands of the temporal

power, but the making of the bishop has been in the hands of the spiritual power, and therefore both confirmation and consecration are closely allied. Confirmation is the office by which the election of the bishop is confirmed from the temporal point of view, and the consecration is the office by which the spiritual status comes to the bishop. If the other side are right, both confirmation and consecration are empty forms, both as we know them to-day and as they have been from an early period. The forms in use now are the same as were used before the statute. There is as little discretion as to consecration as to confirmation. Originally the choice of a bishop was a free choice by the laity and the clergy, and then by the clergy. Afterwards it was taken, at first irregularly, by the monarch, but at all times the spiritual control was alongside:

Novel. 123 of Justinian;

The decretals by the Third Lateran Council, 1179;

The decretals by the Council of Lyons, 1343 and 1244;

Dr. Lingard's History of the Anglo-Saxon Church, vol. 1, 1st edit., 1845, p. 89.

Matters came to a head when William II. had a quarrel with Anselm: (see Short's History of the Church of England, 1857, pp. 34 and 35). [Lord ALVERSTONE, C.J. referred to Aylliffe's Parergon.] They also referred to

Johnson's Ecclesiastical Law, vol. 2, A.D. 1107, "The Compromise of Investitures," edit. 1720.

That shows consecration was in the discretion of the spiritual power, and that consecration, like confirmation, was in the discretion of the Church. After 1316 it is said there is no evidence of opposition to confirmation, and they referred to Dr. Stubbs' Constitutional History. The reason why there was no opposition is that negotiations had gone on between the King and the Pope and an arrangement came to after the Statute of Provisors by which these questions were excluded. The reason why you do not find objections raised, which according to canon law had been raised, was because during this period the process was governed not by the act of the King, but by the act of the Pope, who had succeeded in drawing the whole matter of process to Rome. This existed from 1316 to 1533, the date of the statute. The statute of 1533 was to re-establish the normal state of things before 1316. The proposition we put forward is this, the King, on the one hand, was the great temporal power, and the Pope, on the other, the spiritual power. The normal course, if we are right, would have been for the clergy of the cathedral of the bishop to have selected the bishop—that is, the dean and chapter were to select the bishop of their own free choice—and for the metropolitan to have confirmed the election after investigation and then to have consecrated. It is quite clear that from a very early date the King had a control over the election by the dean and chapter, the first instance of the *congé d'élire* being that for the bishopric of Ely about the time of John. Therefore about 1316 the normal state of affairs was that the King interfered in the election, but that the presentation, the placing, was the act of the election of the dean and chapter, and the metropolitan of the province was the spiritual

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authority which confirmed and consecrated, both those being two very real ceremonies :

Corpus Juris Canonici, Decretum Gratiani Dist. 23, chap. 2, vol. 1, Richter's edit., Leipsic, 1879, p. 79, "Quomodo sit examinandus, qui in episcopum eligitur."

Blackstone, vol. 1, p. 83.

At the time the statute of Henry VIII. was passed the word "confirmation" had a definite meaning. There are parts of the canon law that are inconsistent with the statute, and canon law is no part of the English law. The words of the statute 25 Hen. 8, c. 20, bear out the view that we present. The statute 25 Hen. 8 was preceded by 23 Hen. 8. The object of 23 Hen. 8 was to do away with the payment to Rome of annates or first-fruits. It was not to do away with any ceremony, but to say that that ceremony should not be done in Rome, but in this country. The true theory is that the ceremony of confirmation and consecration belonged to the metropolitan and had been usurped by Rome. Nothing in that statute alters the normal relation of the temporal and spiritual powers. The statute of 25 Hen. 8 was also for the purpose of cutting down the power and interference of Rome. [Lord ALVERSTONE, C.J.—In the cases referred to by the Attorney-General, where there is no confirmation, do you allege that there is a duty on the archbishop to examine the candidate and see whether he is a proper person?] So far, and so far only, as is prescribed by the Prayer-book. The statute of 25 Hen. 8 is to restrain the interference of the See of Rome with the metropolitan in this country, which was not the normal condition of the Church. That is the view we present, taking that statute in connection with 23 Hen. 8 and its own preambles. [RIDLEY, J. referred to sect. 3 of 25 Hen. 8.] The statute is not intended to disturb, and does not disturb, the meaning of the words "confirmation" and "consecration." Consecration and confirmation must both have an exercise of the discretion of the metropolitan, and are not mere empty forms. They referred to the judgment of Lord Cairns in *Ridsdale v. Clifton* (36 L. T. Rep. 865; 2 P. Div. 276.) Contemporaneous exposition of the statute is important. Before the *Hampden* case there is no authority, but right through, the forms which have been adopted are in accord with our construction of the statute and the portion of the preface of the Prayer-book to which I have referred. As to the twenty days' limit, upon which the other side have laid stress, it is of not much importance, for only if without lawful excuse there is delay in proceeding to the office, then, and then only, is the penalty of *pæmunire* incurred :

Evans v. Ascuilhe (sup.);

The statute 3 Hen. 5;

The writs to confirm set out in Rymer's *Fœdera*.

There is nothing in the statute of 25 Hen. 8 to show what "confirm" and "consecrate" mean, but confirmation must take place with all due circumstance. The provisions of canon law, so far as regards confirmation, were clearly in force at the time of Henry VIII. That shows what interpretation should be placed on these words. As to the provision in sect. 3 that the election is to stand good for all purposes, that cannot affect the confirmation. The statute of Edward VI. says the election

is a sham, but it does not say the confirmation is to be a sham, and that, again, strengthens our position :

Gibson's *Codex*, 1st edit., 1713, p. 128; 2nd edit., 1761, p. 104.

There is no record of any opposition at some periods. As far as regards certain periods—namely, Charles II. and William III.—that was because such care was exercised in the selection of the bishops. The actual objections are for the court of the archbishop to consider, and not for this court. The objections go to the fitness of the person, and not only to questions of doctrine. The archbishop should consider these objections in order to inform his mind as to the fitness of the person to be confirmed. The only writer who says that this procedure was a mere matter of form was Sir John Marriott in 1764. That only is to be found in a note of his, and he never gave that opinion when Vicar-General. Against this there are the opinions of Burn and Phillimore : (see Burn's *Ecc. Law*, vol. 1, p. 206; and 1 Phill. *Ecc. Law*, 42). Assuming the Vicar-General does not deal with contentious matters, it would be his duty to refer them to the archbishop, who could deal with them. That was the view of all the judges in *Hampden's* case, as they all thought that a *mandamus* would lie. No forms are laid down by the statute of Henry VIII., but you have to go to the *jus commune* of the Church of Rome. There is no statutory form until Edward VI. :

The case of Bishop Horn ;

Corpus Juris Canonici, Decret. Gregory IX., Lib. 1, tit. 12, 14, vol. 2, Richter's edit., Leipsic, 1881, pp. 124, 125 ;

Van Espen's *Jus Ecclesiasticum Universum*, Tom. 1, part 1, tit. 14, "De Confirmatione Episcoporum," edit. 1753 ;

Maitland's *Roman Canon Law of the Church of England*.

Danckwerts, K.C. and *Morton Smith* for Garbett.—We rely upon all the arguments put forward by Dr. Addams and Mr. Baddeley and the judgments of Coleridge and Patteson, JJ. in the *Hampden* case. The notices delivered to the Vicar-General were mere notices of the nature of the objections, and later objections would have been put in in the form of articles which cannot be put in until the parties have appeared. Mr. Garbett's charges were ecclesiastically criminal, and so were commenced by articles, and not by libel. In civil cases interest is required, in criminal cases it is not so :

Fagg v. Lee, 30 L. T. Rep. 801; L. Rep. 4 Ad. & Ecc. 135; L. Rep. 6 P. C. 38;

25 Hen. 8, c. 20;

31 Hen. 8, c. 9;

1 Edw. 6, c. 2.

[RIDLEY, J.—After the passing of the statute of Edward VI., the bishops were nominated by the Crown without election or confirmation.] The reason why was because that statute created an artificial state of things, which placed appointment by the King in the same position as though there had been a *congé d'élire*, an election and a confirmation :

3 & 4 Edw. 6, c. 12.

As to the position of the Vicar-General, these proceedings are judicial in the Metropolitan Court of the archbishop, whether the Vicar-General disposed of them or adjourned them to

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the archbishop. They referred to the letters patent appointing the Vicar-General. Those clearly show that he has contentious jurisdiction. In Ayliffe's *Parergon* it says that the Vicar-General has power to depose:

Bishop of St. David v. Lucy, 1 Ld. Raym. 544;
Read v. Bishop of Lincoln, 14 P. Div. 88.

The citation of a bishop before the archbishop is either before himself, his Vicar-General, or any competent judge:

Reg. v. Archbishop of Canterbury, 11 Q. B. 483.

The whole procedure takes a judicial form, for the Vicar-General sits as a judge; and makes his decree as a judge. The notary public is present, and the principal registrar. An ecclesiastical judge always has to have a notary public present. From the moment the decree of confirmation is pronounced, the bishop-elect becomes a bishop complete. Therefore, he then could be tried by the archbishop in his court, and so in order to try him for heresy, he must first make him a bishop, which is absurd. Then with regard to the statutes of Henry VIII., their whole object was to free the English Episcopacy from Roman exactions, and the purpose of 25 Hen. 8, c. 20, is clearly set forth in the recitals:

25 Hen. 8, c. 20.

With reference to the particular matter we are concerned with, the words are "to confirm the election, and invest and consecrate." You cannot ascertain the meaning of the words "invest and consecrate" without resorting to ecclesiastical law, and so you must resort to ecclesiastical law as to the meaning of the word "confirm." That word cannot mean to certify without examination. It is clear, from the canonists, that confirmation has been a judicial act:

Evans v. Ascuthe (sup.);
Fermoy Peerage case, 5 H. L. Cas. 716;
Stephen v. Gosnold, Vaughan, 169;
Montrose Peerage case, 1 Macq. H. L. 401;
Justices of Dunbar v. Duchess of Roxburgh, 3 Cl. & F. 335.

It is worthy of note that in the statute of Henry VIII. both the words "confirm" and "consecrate" have the same penalty attached to them, and so the archbishop who refuses to consecrate comes under the same penalties as if he refuses to confirm. It cannot be contended seriously that consecration is a mere form, and therefore confirmation cannot be.

The *Attorney-General* (Sir R. Finlay, K.C.) in reply.—[Lord ALVERSTONE.—Mr. Attorney, we all recognise that you have the right of reply, but we do not desire a general reply]. The case put by the other side is this, that in the case of the appointment by the Crown of a person to a bishopric after election by the dean and chapter, the Crown's presentation may be rejected upon any ground which would be available in the case of a presentation to an ordinary living. But the Crown would be in a worse position, for if a presentee of a living is rejected on insufficient ground, the patron had his remedy by a *quare impedit* action, and now under the *Benefices Act*. The other side cannot point to any such proceeding by which the Crown could enforce its right. He referred to Oughton's *Ordo*, p. 17, 5 tit. para. 9 and 10, with regard to the office of Vicar-General. It is clear that the practice

Oughton mentions of the judge of the Court of Audience being Vicar-General goes back to 1597. It does not follow from the argument for the Crown that the ceremony of consecration was a mere form:

Riddale v. Clifton, 36 L. T. Rep. 865; 2 P. Div. 276;

Evans v. Ascuthe (sup.);

Rymer's Foedera;

Coke upon Littleton, 95a;

Read v. Bishop of Lincoln (sup.);

Hallam's Constitutional History, vol. 1, p. 160;

Mountague's case, 6 St. Trials, N. S. 427, note B.

Feb. 10.—Lord ALVERSTONE read the following written judgment:—These were two rules in the same terms moved on behalf of two gentlemen of the names of Cobham and Garbett calling on His Grace the Archbishop of Canterbury and Charles Alfred Cripps, his Vicar-General, "to show cause why a writ of *mandamus* should not issue directed to them, commanding them, or one of them, at a court to be therefore duly holden in the cause or business or matter of the confirmation of the election of the Rev. Charles Gore, D.D. to the Bishopric of Worcester, to permit and admit to appear in due form of law the said Alexander William Cobham, chairman of the Church Association, to oppose the said confirmation of the said election of the said Rev. Charles Gore, D.D., and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof." Cause was shown against these rules on behalf of the Crown and on behalf of the archbishop and Vicar-General. The bishop-designate was also represented. It appeared from the affidavits that the Rev. Canon Gore having been duly nominated in letters missive from His Majesty the King was elected Bishop of Worcester by the Dean and Chapter of Worcester acting under royal licence, and was then presented for confirmation to the archbishop. On the 16th Jan. the Archbishop of Canterbury had issued a citation substantially in the form which has for many years been used on such occasions, but to which was added the following note or addition: "Persons claiming to be heard as objectors must deliver notice of their objections in writing at the office of the Provincial Registry, No. 3, Creed-lane, Ludgate-hill, before 4 p.m. on Tuesday, January 21 inst. No objection will be considered unless such written statement has been delivered. The Vicar-General will sit in chambers at committee-room No. 2, at the said Church House, at 10 a.m. on Wednesday, the 22nd inst, to consider any objections which may have been delivered, and no objector who does not appear in chambers and establish his right to appear and be heard can appear or be heard during the business of confirmation." In accordance with the direction contained in such note certain persons, acting in the same interest as Mr. Cobham, appeared in chambers and handed in to the Vicar-General printed objections, which were verified by affidavit, and Mr. Garbett and certain other gentlemen handed in certain other objections in writing, to which it is not necessary to refer in detail. It is sufficient to say that the objections handed in on behalf of Mr. Garbett alleged that the Rev. Canon Gore, the bishop-elect, had committed ecclesiastical offences and had published false doctrine, and had thereby contravened the articles of religion, and that he

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was by reason of such publications unfit to be intrusted with the care and superintendence of a diocese. The other set of objections alleged among other things that Canon Gore was not a prudent and discreet man, and not at all a fit and proper person to fill the office of bishop, by reason of certain passages in his published works, and, further, that he had been a member of certain societies mentioned in the objections. The learned Vicar-General, after considering the nature of the objections, declined to hear any of the opponents in support of them, and after taking the names of the objectors gave his decision that they were not objections which he could entertain. He gave reasons for arriving at that decision, which were set out in the shorthand notes verified by affidavit, and which were read before us. The question raised is, no doubt, one of extreme importance. We have been greatly assisted by the arguments of the learned counsel who have appeared before us on both sides, and also by the full report of the arguments which took place in the case of *Reg. v. Archbishop of Canterbury; Hampden's case* (11 Q. B. 483), and also by Mr. Jebb. Without that assistance it would have been impossible for me to prepare my judgment within so short a time after the argument; but I have endeavoured to prepare the reasons for the judgment which I am about to give as quickly as possible, because we are aware that it is very important in the interests of the diocese that there should be no delay in dealing with the matter. One main ground of the contention of the learned counsel in support of the rule was that the Vicar-General was sitting as a court to which opposers had been summoned by virtue of the citation of the 16th Jan., and that they were entitled in accordance with the terms of the citation to state any ground of opposition to the election or confirmation of Canon Gore, and therefore to raise by way of opposition the charges of ecclesiastical offences and the other objections referred to in the notices. The case was in the first instance launched when the rule was moved as a claim for a *mandamus* to compel a court of limited jurisdiction to exercise jurisdiction which it was bound to exercise at the instance of the parties who demanded its exercise. I am of opinion that the rules could only be made absolute if that position can be maintained, and that unless it is made out no *mandamus* ought to issue. It was on this basis that the case was considered by the judges of the Queen's Bench in *Reg. v. Archbishop of Canterbury* (see the judgment of Coleridge, J. at p. 577, and the judgment of Patteson, J. at p. 633 of the report in 11 Q. B., and the authorities upon the point which are collected in Tapping on *Mandamus*, p. 230 and following pages). This point will be found of considerable importance in view of an alternative contention urged on behalf of Mr. Cobham by Mr. Haldane, to which I will refer later, to the effect that the court ought also to grant a *mandamus* to compel the Archbishop of Canterbury to consider these particular objections in order to inform his mind as to whether or not Canon Gore was a fit person to be confirmed and consecrated as a bishop. Dealing with the ground first mentioned—the claim thus set up is a claim that any member of the public, or at least any inhabitant of the diocese interested, who desires to oppose the confirmation and consecration of any person who has been elected a bishop

may appear in answer to the citation of the archbishop and call upon the Vicar-General or the archbishop to hear and decide alleged charges of heresy, false doctrine, or other alleged ecclesiastical offences, or, secondly, to inquire into and give judgment upon general objections to the fitness for the episcopal office of the person nominated by the Crown, duly elected by the dean and chapter, and presented to the archbishop for confirmation. It was not disputed by the learned counsel who supported the rules that, in order to make good this first contention, we must hold that the act of confirmation done by the archbishop or the Vicar-General was the act of a court having jurisdiction to hear and determine such questions at the instance of the persons raising them. The question primarily depends upon the true construction to be put upon the Act 25 Hen. 8, c. 20. Briefly summarised, that Act by sect. 4 enables the King on every voidance of an archbishopric or bishopric to grant to the dean and chapter a licence to proceed to the election of a person named in a letter missive sent by the King, and provides that the dean and chapter shall elect and choose the person so named. By sect. 5 it provides that, if the dean and chapter elect and choose such person, then their election shall stand good and effectual to all intents; and, further, that the King may by letters patent under the Great Seal signify the election to the archbishop and require and command him to confirm the election, and to invest and consecrate the person so elected. Sect. 4 contains a further provision that, if the dean and chapter defer or delay the election for more than twelve days, the King may by letters patent nominate and present to the said office such person as he thinks able and convenient. Sect. 7 provides that the failure of the dean and chapter to elect in accordance with the King's licence and letters missive or the refusal of the archbishop to confirm, invest, and consecrate such person within twenty days after the King's letters patent have come to his hands shall involve the one or the other in the dangers and penalties of the Statute of *Præmunire*. Upon the construction of this statute, speaking for myself, I can add little, if anything, to the judgment of Erle, J., in which I entirely concur. There is in the statute no mention of any examination or inquiry by the archbishop; but he is directed to confirm the election within a period of twenty days, nor does the statute on the face of it in terms contemplate or directly or indirectly suggest that the archbishop can in any way question the fitness of the person nominated by the Crown unless such power is involved in the use of the word "confirm." If the archbishop has such a general right, the position of the Crown would be extraordinary, and, as was pointed out by the Attorney-General in reply, far worse than the patron of an ordinary living in relation to his patronage. Without now enlarging upon a matter which from some aspects is of considerable importance, I may point out that bishoprics have always had largely the character of donatives; and, if the Archbishop possessed the right to veto the nominees of the Crown, I know of no legal proceedings by which the King can enforce his rights as patron. Of course, I am not there referring to *præmunire*, which is a punishment to the archbishop. We have nothing to do on this application with any question of

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refusal or unwillingness on the part of an archbishop executing his high office to refuse to confirm or consecrate; the archbishop would do so upon his own responsibility, and would incur the risk of *præmunire* contemplated by the statute. No question was, or could be, raised before us upon the argument of these rules as to the consequences of such an act. I mention this because both in the argument of *Hampden's* case and on the argument before us, what appeared to me to be extravagant suggestions were made of the archbishop being compelled to confirm as bishop a man who was not a priest in holy orders, a person under the age of thirty, a Jew or Turk, a pronounced infidel, or one having some other obvious disqualification, and there is a strong passage in the judgment of Coleridge, J. (11 Q. B. at p. 604; Jebb, p. 465) to the same effect. We are not dealing with any such case, and, in my opinion, these considerations do not assist us. We have only to read the history of the last 150 years or of our own times to know that the choice of persons to fill the high office of a bishop is a matter of most anxious consideration by the Crown, and that advice is given by those who are most competent to guide in the selection of fit persons. We, in this case, have to deal with the claim of those on behalf of whom these rules were moved to appear upon this citation before the archbishop or his Vicar-General, and to demand a judicial decision upon the objections which they have raised. I have not omitted to notice the limit of twenty days fixed by sect. 7. I am rather inclined to agree with the argument presented by Mr. Danckwerts and other learned counsel that this limit should not be considered absolutely binding if an objection was lawfully raised which would lead the archbishop to refuse or postpone confirmation. But, upon the other hand, the set limit of days does seem wholly inconsistent with the idea that the statute referred to a recognised practice whereby opponents might raise questions which might not possibly be determined except by protracted litigation. To meet the plain objection which arises upon the words of the statute, it was urged that the words "confirm such election" in sect. 5 and "confirm" in sect. 7 refer to a practice of confirmation alleged to be well known, and which was said to have existed in normal circumstances in the Church of England at some period prior to the passing of the Act, a practice under which it was contended that there was a duty on the part of the archbishop before confirming any person, although such person had been named by the King and duly elected by the dean and chapter, to inquire at the stage of confirmation as to his fitness, having regard to the qualifications of a bishop as laid down in the canons of the church, and that as a consequence persons who were of opinion that the person named was not fit to be a bishop would be entitled to appear before the archbishop and be heard. It was not suggested that this practice was actually existing in the Church of England at the date of the passing of the Act of 1533; on the contrary, Mr. Haldane admitted, and made it a part of his argument, that what he called the normal practice had been interrupted from 1316 up to 1533, a period of upwards of 200 years. But he contended strenuously that prior to 1316 the practice at any rate of examination by the archbishop

had taken place under what he called the normal state of things, and that the words "and confirm" used in sects. 5 and 7 were meant to refer to that pre-existing practice, involving, as he said, the right of opposers to appear before the archbishop and raise objections. It was also contended that the forms which were used shortly after the passing of the Act, and which have continued in use substantially in the same form from that time down to the present—a period of upwards of 375 years—must have been intended to recognise the right of the opposer to be heard and demand judicial investigation. If the evidence supported the contention that there was at the time of the passing of the Act such a practice it would have been necessary to consider more closely the true effects of the words in sect. 4 of the Act: "their election shall stand good and effectual to all intents," and, further, whether the continuance of any such practice was consistent with the express provisions of the statute. I must not be thought to express any opinion that, even if such practice had been established, persons could have claimed the benefit of it, having regard to the clear language of the statute. But, after the most careful consideration of the many matters, historical and legal, which have been brought before us, I am clearly of opinion that there is no evidence of the existence of any such established practice prior to the passing of the statute, and that the forms, which, as I have said, have been used without alteration from that time to the present, were not intended to refer to or to revive any practice of the kind. The uniform practice in usage since the year 1533 is practically conclusive against the contention that it is possible to construe the statute as referring to any such practice or right. It is absolutely essential to keep clearly in view the distinction between the state of things in the church when bishops were really elected by some electoral body and when the metropolitan had, as such, the responsibility of inquiring into and confirming the choice of the electors after that choice had been made. From the earliest days of the Church it has no doubt been recognised that a bishop should possess certain qualifications. They are to be found in many ancient ecclesiastical works and were in great part based originally upon the Epistles of St. Paul. Speaking of the foreign canon law, I think it is established that from very early times, when the choice of bishops was by actual election, there was inquiry and occasionally examination by a superior authority—not infrequently the metropolitan—as to the qualifications of the person elected; see, among other authorities, the *decretum* of Pope Nicholas (Corpus Juris Canonici, pt. I., p. 79, Richter's edit. 1879), which, I think, refers to Pope Nicholas II., who lived about 1058, and which was read to us by Mr. Haldane. So far as the foreign canon law is concerned, and the practice of the early Church, I think that substantially the same directions could be found at a very much earlier date; but I need scarcely say that, whatever may be the view adopted when any question arises in the Ecclesiastical Court, the foreign canon law, unless accepted in this country and thereby having become English canon law, does not form part of that law of England which we are administering to-day. The work of Lancelottus, to which reference was made both in the argument before us

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and in *Hampden's* case, appears to me to be treating of the qualification of bishops and the examination of bishops-designate according to the foreign canon law, and not to be treating of the practice or order of confirmation in England either before or after the statute; and I understand the reference in the judgment in *Evans v. Ascutie* (Jones, 158; Palmer, 457) to be a reference to him as a writer in that capacity: (see Palmer, p. 472). Turning now to the evidence before us of the practice in England prior to the statute and during the period suggested by Mr. Haldane as being the normal period—namely, prior to 1316—we were referred to the cases taken from Wharton's *Anglia Sacra* mentioned in the argument of Mr. Badeley (Jebb, pp. 345-349). None others were cited to us on the argument of this case, and, having regard to the great learning of the counsel who argued *Hampden's* case, I should doubt whether any can be found. I am not in a position to add to them from my own knowledge or research. I have carefully examined in the *Anglia Sacra* the cases therein cited. All except one, that of *Wakeryng*, occurred between the years 1189 and 1316. They do seem to me to establish that during that period in some instances a day was given for opposers to appear—see the case of *Rochester* in 1316 (*Anglia Sacra*, vol. 1, 357); that in some cases the archbishop did decline to confirm the election on grounds based upon the canon law—see the case of *Winchester* in 1274 (*Anglia Sacra*, vol. 1, 315); and in some cases there was an appeal to Rome—see the cases of *Ely* in 1256 (*Anglia Sacra*, vol. 1, 637), *Worcester* in 1303 (*Anglia Sacra*, vol. 1, 531), and *Ely* in 1302 (*Anglia Sacra*, vol. 1, 640); and that in some cases there was an examination as to competence and doctrine before confirmation—see the case of *Durham* in 1213 (*Anglia Sacra*, vol. 1, 735), and *Rochester*, 1227 (*Anglia Sacra*, vol. 1, 347). The only case later than 1316 which has been mentioned to us was that of *Wakeryng*, Bishop of *Norwich*, in 1416 (*Anglia Sacra*, vol. 1, 417), which does not assist the argument one way or the other. Beyond the above points, however, nothing can be gathered from the particulars given of the character of the objections, if any, raised by the opposers. It is, however, most important to note that, as far as I can gather from the statement in *Anglia Sacra*, in every one of these cases prior to 1316 there had been a real election either by the dean and chapter or by the prior and convent, so that they relate to a period when there was a real election to be confirmed. It was during this period—namely, the beginning of the thirteenth century, 1227—that the *Legatine Constitutions* of *Otho* and *Othobon* refer. They no doubt express the English canon law, but they have no reference to the actual state of things at the time of the passing of the statute, or for many years before. But from about the year 1316 down to the passing of the statute in 1533, a period of over 200 years, an entirely different state of things seems to have prevailed. At one time the Popes were insisting upon the right not only to confirm, but to select; at another the Crown was resisting the Papal claims. Sometimes the struggle would appear to have been between the Pope on the one side and the metropolitan or the electing corporation on the other be it dean and chapter or abbot and convent. Confirmations at times took place at Rome, at

times in England under bulls from the Pope, and during the last fifty years immediately preceding the statute some authorities state that the King had successfully defended his claim to nominate independently of any interference by the Pope: (see *Green's History of the English People*, and *Stubbs' Constitutional History*). In my opinion, during a period of more than 200 years prior to 1533 there was no recognised practice at all; but it is sufficient to say that there is no evidence of any such normal practice as that which was contended for by the counsel who supported the rules and that, therefore, it is, in my opinion, impossible to say that in using the word "confirm" the statute was referring to a procedure well known and understood at the time in any such sense as that which the argument of the applicants assumes. Before passing to other considerations I must notice one other argument. It was said that "confirm" must be used with reference to the canon law and that, inasmuch as by the ancient foreign canon law a bishop had to possess these qualifications, and it was the duty of the archbishop before ordaining a bishop to be satisfied that he possessed the qualifications, to that extent the canon law was recognised by and incorporated with the statute. I am wholly unable to assent to this line of argument. I need not cite authorities to show that it is well established that the foreign canon law only forms part of the law of England in so far as it has been adopted into the English common law, ecclesiastical or civil, or recognised by statute; and, unless it can be contended that by the law of England, apart from the foreign canon law the word "confirm" used in the statute 25 Hen. 8 imported this duty on the part of the archbishop and the correlative right of opposers, the foreign canon law cannot, in my opinion, be appealed to for the purpose of establishing that any such duty or right existed. If it could be successfully maintained that an examination of the fitness of a bishop-elect, to take place at the stage of confirmation, was at the date of the passing of the statute considered a necessary condition to the consecration and appointment of all bishops, the matter would stand on a very different footing. But it was contended by the counsel for the Crown and the archbishop, and not disputed by the counsel who supported the rules, that in a considerable number of instances no confirmation took place; and, as illustrative of this, it was stated by Mr. Dibdin in the course of his argument that at the present time out of upwards of 100 bishops of the Church of England, not more than twenty-five would be elected subject to confirmation. That this was to a certain extent a state of things contemplated by the statute and existing at, and shortly after, its passing cannot be disputed. It is, in my opinion, very important to observe that in the case contemplated by the statute itself—namely, of an archbishop or bishop being nominated by the King by letters patent in default of election—no confirmation was to take place, but the statute enacted that the person so nominated was to be invested and consecrated by the archbishop. Again, in the case of the bishops of the Irish Church under 2 Eliz. c. 4 (Ireland) no confirmation was necessary. It is not quite clear to me whether the bishops appointed under the statute 31 Hen. 8, c. 9, are cases in point—at any rate,

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except during the period between that date and the repeal of that statute by 1 Ph. & M. c. 8, when they came under the general law, and have been, I believe, so treated. I think it will be found *Evans v. Ascuthe* did, at any rate, show that Bristol, one of the six sees established by the Act 31 Hen. 8, c. 9, was under the general law in the time of Charles II. I have not had time to look and see whether there was any general law at the time of the passing of the statute of 31 Hen. 8, which would put those sees under it. I am not quite sure about it. I do not stop to consider the case of colonial and Indian bishops, or the appointment of bishops of St. Albans under the statute of 1875, and Liverpool, Newcastle, Wakefield, and Southwell under the Act of 1878, because they are of a much later date; but the practically contemporary statutes to which I have referred show that at that time the confirmation of a bishop by an archbishop was not in all cases an essential step in the appointment of a bishop. In the cases other than those of bishops elected by deans and chapters in obedience to *congruè* *Jure* objectors would have no opportunity of even raising, still less of obtaining, a decision upon their objections. I may here mention that the statute of 1 Edw. 6, c. 2, the preamble of which was cited by the Attorney-General and the later provisions of which were read by Mr. Danckwerts, also shows that confirmation was not regarded as a necessary or essential step in the case of every bishop. The answer attempted by the learned counsel who supported the rule was that many, if not all, of these cases were instances of appointments under direct statutory authority. But, if examination at the stage of confirmation is or was at the date of the statute regarded as a safeguard in the interests of the Church against the nomination of an unfit person, it is difficult to understand why it should be dispensed with in the case of nomination by letters patent or any of the cases referred to. That the view which I have expressed of the statute was the view taken by lawyers of eminence from an early date is not, I think, open to question. In Coke's Inst., at p. 337, it is stated that the confirmation of bishops' elections is one of the matters *pro formâ* dealt with by the Court of Audience; and although I think, as pointed out by Dr. Bayford in his argument in *Hampden's* case, it is incorrect to state that such proceedings took place in the Court of Audience, this does not affect the weight of the opinion from the point from which I am considering the question; and sect. 201, at p. 134 of Coke upon Littleton (the notes by Hargrave) is in accordance with the same view. The same may be said of Gibson's Codex, a book of very high authority, in the notes of which the various stages of the act of confirmation and the formal documents there presented are carefully discussed. This book was published in 1761, long after the *Mountague's* case, which occurred in 1628. It is extremely difficult to believe that so learned a writer dealing so exhaustively with the subject would have failed to notice such an important right as that now contended for by the opponents to the bishop's confirmation, had it existed. The order of confirmation set out in Oughton's *Ordo Judiciorum*, vol. 1. tit. 337, pp. 482-487, is another authority in which, if the charges and objections raised by opposers were intended to be judicially examined, one would certainly

have expected to find more reference to the procedure. We have not been referred to any text-books or authority, legal, historical, or ecclesiastical, contemporaneous or otherwise which asserts that the opposers had the right to call upon the archbishop at the stage of confirmation to entertain charges of ecclesiastical offences brought against the bishop-elect. The expressions "confirm the election," "examine the election," and "the person elected" do occur in some text-books; and I proceed to consider how far they support the contention; but I am at the moment dealing with the absence of any direct authority for the claim of the applicants. It was contended that the passage in Ayliffe's *Parergon* (Lond. 1726), at p. 245, supported this contention; the words are: "In granting confirmation all such persons ought to be first cited who have opposed the election, and these ought to be cited *nominatim* if the election was made by part of the electors; but if the election was made unanimously and *concorditer*, then all such persons ought to be cited in general who may or will object anything against such election; to appear at a certain day and place when the confirmation is to be performed, in order to show cause of their disapproving of the election, and to impeach the confirmation thereof." but, in my opinion, that passage refers to the confirmation of elections as such—that is to say, an investigation as to the validity of an election and does not do more than state as a general proposition relating to all canonical elections that persons opposing may allege that the election was irregular and that the person submitted for confirmation was not duly elected having regard to all the preliminary proceedings. The chapter of the work in which one would have expected to find that opposers had the right to call upon the archbishop to hear and determine objections to the bishop-elect at the stage of confirmation would be that commencing on p. 118, entitled "Of a Bishop, his use, power, and office in the Church." At pp. 127-129 all proceedings strictly in accordance with the statute are duly set out, and reference is made in the earlier part of the chapter to the historical disputes between the King and the Pope, to which we have been referred. It is difficult to believe that, if there had been a well-known and recognised practice, there would be no reference to it in that chapter, or elsewhere in the book. The only other authority upon which reliance was placed was *Evans v. Ascuthe*; the fuller report of this case is in Palmer, 457, in Norman French. The two points decided in that case seem to me to have been those mentioned by the Attorney-General in his reply on behalf of the Crown—namely, as to the sufficiency of the original licence and whether the licence to hold the deanery of York was good. But in the course of the argument some passages were referred to upon which reliance was placed by the counsel supporting the rule. At p. 474, Whitlock, J. is reported to have said, "Without confirmation the elect can refuse, and for that reason there is before the confirmation a citation of opposers to this day," and the Chief Justice and Doddridge, J., at p. 475, "The bishop has no more in England by election than the parson has by presentation." There is, however, in this case as far as I can find, no discussion, still less decision, as to the rights of opposers or persons cited

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or the nature of the questions which may be raised. The passage in Burn's Ecclesiastical Law, vol. 1, p. 206, which was relied upon by Mr. Bramwell Davis, does not appear to me to express any definite opinion of the learned writer. It is true that speaking of opponents he says: "But if any appear it seemeth that they shall be admitted to make their exceptions in due form of law"; but for this the only authority given is the reference to Collier's Ecclesiastical History, vol. 2, p. 745, and a commentary upon *Mountague's* case, which certainly does not seem to be warranted by any record of the proceedings as far as the materials that have been laid before us throw any light upon it. In the same way the opinion of Sir Robert Phillimore at p. 42 of the second edition of his work appears to be based entirely on a supposed implication to be drawn from the forms, by which I think he means the citation. The passage from 3 Salk., p. 71, where the words are "Whereupon the archbishop examines the election and the party and then confirms the election" carries the matter no further. It is important to observe that in none of these cases is the character of the objections which could be entertained considered. On the other hand, there is, in the first place, the opinion of Sir James Marriott, quoted by Sir John Jervis upon the argument of *Hampden's* case (Jebb, p. 145). I have unfortunately not had the time or means to verify the quotation. It was said in argument only to be from the note-book of a student; if this be so, of course it would not be of great weight. I need only mention the opinions of Dr. Burnaby, Dr. Lushington, and Sir John Dodson in 1848, not only in the *Hampden* case, but in that of Bishop Lee, reported in the supplement to the 5 Notes of Cases, p. ix., and of Sir T. Twiss in 1869—opinions which are in my judgment entitled to very considerable weight. I must not omit to refer to a publication referred to in the argument and cited in the note to Jebb's report at p. 138, though not referred to in the argument in the *Hampden* case—I mean an extract from a publication of the year 1537, entitled *The Institution of a Christian Man*, commonly called the Bishop's Book, said to have been prepared by Cranmer, in which occurs the passage, "And unto the priests and bishops belongeth by the authority of the Gospel to approve and confirm the person which shall be by the King's highness or the other patrons so nominated, elected, and presented unto them to have the cure of these certain people within this certain parish or diocese, or else to reject him as was said before from the same for his demerits or unworthiness." Our attention has been called to a publication in the same volume referred to as the King's Book published in 1543, in which the same subject is dealt with. The passage quoted does not appear, nor anything to the same effect. The passage from *The Institution of a Christian Man*, was not, so far as I can see, referred to at any part of the argument in *Hampden's* case, though I think the very learned counsel engaged in that case must have been acquainted with it. After careful consideration of the whole matter, I am clearly of opinion that the statements in the pamphlet referred to, *The Institution of a Christian Man*, so far as they can be considered as having authority, are superseded by the later book, *The Necessary Doctrine and Erudition*. I

would refer on this matter to the publication of the Parker Society, referred to in the argument of the Attorney-General and Sir Edward Clarke. See also some valuable observations on these works by Sir Robert Phillimore in *Sheppard v. Bennett* (L. Rep. 3 Adm. & Eccl. 184). The case of Bishop Mountague, which came before Dr. Rives in 1628, is the only case in which, so far as I know, any attempt was made to bring forward charges of ecclesiastical offences against the bishop-elect between the date of the statute and 1848—a period of upwards of 300 years. For the reasons given by Dr. Lushington in his judgment in the *Hampden* case (Jebb, p. 59) and from what appears in the notes to the State Trials, vol. 6, N. S., p. 427, I am of opinion that that case cannot be regarded as any authority in favour of the applicants. I can find no authority for the passage in Burn's Ecclesiastical Law to the effect that Dr. Rives admitted that the opposition was good and valid, had it been legally offered. Special reliance was placed in the argument of Mr. Haldane and Mr. Danckwerts upon the preface in the Prayer-book to the making, ordaining, and consecrating of bishops, priests, and deacons, in which it is stated that "No man may presume to execute any of the offices except he be first called, tried, examined, and known to have such qualities as are requisite for the same." This form, said to have been approved by Cranmer, has, I believe, been retained in the Prayer-book ever since the Reformation; but it is only necessary to read the next sentence in the preface to show that it refers not to any examination at the stage of confirmation, or even prior to nomination by letters missive or the King's letters patent, because the words are distinct that "no man shall be taken to be a lawful bishop except he be called, tried, examined, and admitted thereto according to the form hereafter following"; and I am not aware of any authority for the suggestion that the words in the preface on which so much reliance was placed by Mr. Haldane referred to anything except the very solemn service of consecration in which the archbishop is directed to put to the bishop-elect eight questions, which must be, and, I have no doubt, are answered always by the bishop-elect upon his conscience. These questions replaced the questions previously required to be put to the bishop on consecration by the Sarum Missal, which dates, I believe, from the twelfth century. In this connection the terms of the 36th article of religion are not unimportant. The reference to this preface does not appear to me to in any way support the claims of the opponents to raise and ask for judicial determination of their objections at the stage of confirmation. I pass now to consider the other main ground upon which the rules *nisi* were attempted to be supported. It was said the forms in use for the purpose of election and confirmation under the statute are in all material parts substantially the same as those which were used immediately after the passing of the statute. They contain a citation of opposers, all and singular, whoever such there be, especial or in general, that they appear before the Vicar-General at a time and place fixed to say against, except to or oppose the said election, the form thereof, or the person elected, if they think themselves concerned, in due course of law. It was strenuously contended that these words must be taken to refer

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to some known existing practice whereby opposers had the right to appear and raise any objections, including charges of ecclesiastical offences, against the bishop-elect on any grounds on which they thought fit to allege that the bishop-elect was not a fit person. If the forms themselves were consistent only with this contention, it would no doubt raise an argument which would make it difficult to explain the practice which has prevailed ever since the passing of the Act; but, in my opinion, when the forms are carefully examined they not only do not give any support to that argument but they tell against it. The Latin forms used on the occasion of the election of Archbishop Parker in the year 1559 are set out in Mr. Jebb's valuable report of the *Hampden* case, at pp. 57 to 74. We were informed by Mr. Hansell, one of the counsel appearing for the archbishop, that there exists in the registry at Lambeth the corresponding forms which were used in the case of the election of Bishop Goodrich in the year 1534—that is to say, practically contemporaneously with the statute. This statement is confirmed by a communication made to me since the argument by Mr. Morton Smith and Mr. Whitehead, counsel for the applicants. We understand that they may be taken to be substantially in the same forms as those used on the occasion of the confirmation of Archbishop Parker. From a careful perusal of these forms it will be seen that, although persons are cited to appear and oppose if they think fit, they are distinctly told in more than one place, that whether they appear or not, nevertheless the confirmation will be proceeded with. It can, therefore, be scarcely urged that such forms are consistent with the right effectively to oppose or delay the confirmation by demanding an examination by the archbishop into charges which could only be dealt with after protracted and in some cases independent proceedings. I say independent, for a reason which will appear later on. This leads one to consider why these forms may have been adopted. I need scarcely say that in former and down to comparatively recent times many old forms of summonses, proclamations, and public citations were in use, which had no legal effect or operation, but still were kept up; and many old forms continued to be used long after they ceased to represent any real proceedings. It is unfortunate that we are unable to find any direct evidence as to the forms in use before the statute on the occasions on which the archbishops confirmed elections of bishops; but if I may be allowed to hazard an opinion, I think that these forms were adopted from those which had been previously in use when elections really had to be inquired into, and that the reference in Ayliffe, to which I have already referred as to the summoning of persons *nominatim* (p. 245) who had opposed the election, and in general where there had been no opposition, gives an indication of the genesis of the forms. We were referred by the Attorney-General to the practice on the confirmation of the election of deans (Coke upon Littleton, 96a). The forms in use on these occasions are set out in Oughton's *Ordo Judiciorum*, vol. 2, p. 97 *et seq.*, form. 127. The commission to the Vicar-General there directs him to approve, ratify, confirm, *ac si opus fuerit, ac res ita exigerit* . . . annul and make void the election. The whole passage is important, and will repay exami-

nation in connection with the matter under discussion. The citation to opposers is set out at page 99, which corresponds in many respects with the citation in use in the case of a bishop since 1535, and was published in a similar manner. The words are *infirmandum, annullandum, et cassandum*. A comparison between these documents and those added on the occasion of the confirmation of a bishop after 1533 leads me to surmise that in all probability the view suggested by Mr. Bramwell Davis is correct—namely, that the forms are based on forms in use before the statute, having been originally framed to meet the practice existing as far back as the eleventh century, in the case of the confirmation of elections generally, and that the important and fundamental differences which exist between the two forms subsequent to the statute may be due to the fact that old forms were properly adapted to the new state of things, the words *infirmandum, annullandum, et cassandum* being omitted, and the words *confirmatio* and *confirmari* alone retained, the public notices and citation of opposers being advisedly retained in case there should be any defect in the election, and also to preserve the public character of the proceedings. I have not been able to find in Oughton a corresponding form in the case of the confirmation of a bishop; the earlier chapter on the subject in his work I have already referred to. It must be remembered that ever since the statute, although, in my opinion, the proceedings by way of confirmation are formal in the sense that no general opposition can be raised at that stage to the fitness of the person elected, they were still proceedings of a solemn character, in which, after the original licence, return of the election letters patent, and other necessary steps were formally proved, confirmation by the archbishop or his representative, the Vicar-General, followed. It seems to me not unnatural that the desire to maintain the dignity and public character of the act of confirmation of the election should have led to the retention of the ancient practice of summoning opposers to appear if they thought fit. It was further contended that, because the proceedings include a summary petition which alleges the various steps, and contains, among other allegations, a statement (see Jebb, p. 64) that the bishop-elect is a learned person and fulfils some of the qualifications which were from the earliest days considered necessary for a bishop, and that, as this allegation in *Parker's* case was supported or formally proved by the evidence of two witnesses, who deposed to the various paragraphs of the summary petition, this showed that the proceedings were in the nature of proceedings before a court, and that opponents could traverse those allegations, be heard upon them, and the Vicar-General might either pass judgment, or, if he thought fit, delay the confirmation, and refer the matter to the archbishop. It is to be noted, however, that these witnesses are called by the proctor for the dean and chapter; and, in my judgment, they are the formal proof of matters which has to be given if I may borrow an expression from the Probate Court, "in solemn form" as laying the foundation for the confirmation. We were informed by Mr. Dibdin in the course of the argument that a summary petition is a petition which has evidence attached to it, but is not proved like a formal suit by libel or articles. It was urged by Mr.

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Bramwell Davis that because the writs, as set out in various volumes of Rymer's *Foedera*, both before and after the statute, were in the same form, it must be assumed that the forms and practice in use immediately after the statute had been in use before. Even assuming this to be the case, I do not think it assists us materially in dealing with the question, because the writs, as I understand them, only direct the archbishop to confirm, but do not contain any words indicating that which was included or covered by the word confirmation. I should, however, observe that an examination of the forms as set out in *Parker's* case shows that they could not have been in all respects the same as those before the statute, because reference is made in them to the statute. For the same reasons the statute 3 Hen. 5 (1418), set out at p. 350 of Jebb, does not carry the matter any further, as it only refers in general terms to confirmation. We were pressed to say that the opinion of Bishop Fell, p. 389 of Dr. Nicholls' *Commentary on the Book of Common Prayer*, cited at p. 390 of Jebb, is only consistent with the view that there was a judicial inquiry into the qualifications of the bishop at the stage of confirmation. Having regard to the object with which these works were written, as indicated by Mr. Badeley in his argument in the *Hampden* case, and looking to the language of the passages quoted themselves, they fall far short of any such proposition, and cannot, in my opinion, be regarded as authorities upon the legal questions argued before us. There is, in my opinion, another fundamental difficulty in the view that the proceedings of confirmation before the Vicar-General are to be regarded as the proceedings of a court, in which it is the duty of the Vicar-General or the archbishop to adjudicate judicially upon the grounds of objection raised by the opponents. It is to this that I alluded when I referred earlier in my judgment to the necessity, if the arguments in support of the rule are correct, for independent legal proceedings to be taken at the stage of confirmation. This difficulty arises from the fact that, as far as I can see, the bishop-elect, though present at the confirmation and taking certain oaths there, is not a party to the proceedings in the proper sense of the word. The proceedings are initiated by the dean and chapter, and the citation is not addressed to the bishop-elect. If charges of ecclesiastical offences can at that stage, and as a part of those proceedings, be preferred against the bishop-elect, there is no trace of any machinery or practice for getting him before the court for this purpose, or for dealing with the numerous questions of procedure or costs which are likely to arise. I put this difficulty to Mr. Danckwerts, who contended, as a part of his argument, that among the objections raised by the opposer for whom he appeared were charges of ecclesiastical offences. He replied that it would be the duty of the Vicar-General to permit the opposer to appear and bring in articles, or, in effect, to commence formal criminal proceedings against the bishop-elect. I can see no trace of any such procedure, and it seems to me to be utterly foreign to the nature of the proceedings on confirmation, as it has existed in the United Kingdom for upwards of 600 years. When pressed with the difficulty which lay in the way of contending that the proceeding of the Vicar-General was in

the nature of a judicial proceeding by a court of limited jurisdiction, and that a *mandamus* would go, at the instance of the party aggrieved, to compel the court to exercise its jurisdiction, Mr. Haldane based his contention upon another ground—namely, that the archbishop had a duty to inform his mind before he confirmed the bishop-elect, and, that being so, he was bound to inquire into any objection raised by objectors and postpone the confirmation until he had so inquired; or, in other words, that he was bound to inform his mind upon any matters which the objectors chose to raise. I hope I have not done the argument injustice. I endeavoured to appreciate it at the time, and have refreshed my memory by reference to the shorthand note. If the application for *mandamus* can only be based on the duty of the archbishop to inform his mind as to the fitness of the bishop-elect before he proceeds to confirm the election, or consecrate the person elected, it must fail. We cannot direct him to inform his mind in any particular way. The distinction between such a case and the case of refusal to exercise jurisdiction is well pointed out in the judgments of the Court of King's Bench in *Rex v. Archbishop of Canterbury* (15 East, 117; 13 R. R. 409) and *Reg. v. Bishop of Chichester* (29 L. J. 23, Q. B.). As I have pointed out at the beginning of my judgment, no question of that kind can possibly arise before us, and there is, as far as I know, no precedent for a *mandamus* being granted in such a case as that suggested by Mr. Haldane. If the claim of the opposers to appear based upon their charges against the bishop-elect of ecclesiastical offences cannot be supported, I am clearly of opinion that the other vague allegations contained in the objections are not charges which any ecclesiastical court could entertain; nor can they be regarded as grounds which, in the view of the law already indicated, either the Vicar-General or archbishop should entertain at the stage of confirmation. So far as the objections were based upon charges of heresy or ecclesiastical offences, there is a further objection which should, I think, receive attention. It has been invariably laid down by writers on ecclesiastical law that such charges must be alleged with precision and particularity (see, among many others, Ayliffe, p. 345), so that the person charged may know exactly what offence is alleged against him. This view of the law has been repeatedly enforced by the ecclesiastical courts and Privy Council. As I understand them, these decisions rest not on any modern rule or practice, but upon the nature of the alleged offences, as, for instance, breaches of the various statutes. If this be so, it seems to afford an additional argument against the possibility of such charges being entertained in such proceedings as those which are now under consideration. A point was raised in argument by the Attorney-General, on which I do not express any opinion, but which I ought not to leave entirely unnoticed. These proceedings for confirmation have for a great many years taken place before the Vicar-General. As far as I can gather from the authorities cited on the argument and from some others which I have been able to consult, the court of the Vicar-General does not entertain contentious cases. This is clearly laid down in Oughton's *Prolegomena*, p. 16, and is supported by Ayliffe's *Parergon*, p. 160; Lyndwood, liber. 2,

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tit. 4, p. 104; and there is the high authority of Lord Stowell in the case of *Thorpe v. Mansall* (1 Haggard's Consistory Cases, p. 4 n), in which the limit of the jurisdiction of the Vicar-General in such matters is clearly pointed out. But inasmuch as the letters patent to Mr. Cripps appointing him Vicar-General also appointed him Official Principal, I am not sure that the objection raised by the Attorney-General is of substance; the point may require further consideration should the extent of the jurisdiction of the Vicar-General ever become a matter for decision. It is not, in my opinion, necessary to decide that in no case can any objection be raised at the stage of confirmation which might have to be investigated by the Vicar-General or the archbishop, as—e.g., an objection to the validity of the election or the genuineness of the documents produced, the identity of the person elected with the person named in the letters missive or possibly some action or conduct of the bishop-elect since the time of his election; but I hold for the reasons I have given, that the Vicar-General ought not to entertain, still less adjudicate, upon charges of the character alleged in the objections tendered by either of the opponents to the confirmation in this case. As regards the note or addendum to the citation, I need only repeat that which I said upon the motion for the rules *nisi* that, in my opinion, it would be no ground for *mandamus* that the archbishop or Vicar-General had required objections to be presented in writing before the actual ceremony; but I may add that, in view of the questions that have been raised, I think it a proper course, so that the character of the proposed objections, if any, may be fully considered. For the above reasons, which I have expressed I fear at too great length, and yet not with the clearness with which I might have expressed them had more time for research and consideration been at my disposal, I am clearly of opinion that these rules should be discharged. I cannot part with the case without observing that it seems to me worthy of consideration whether the form of public citation, which ought to be retained for some purposes, should not be modified so as to meet the real case and remove the possibility of the observation that it is a temptation to people to raise questions at an unsuitable time and place. If the facilities for trying questions of heresy or other ecclesiastical offences are not sufficient the law should be amended. But, if the view which I have expressed is correct, I venture to deprecate the attempt to raise in a proceeding wholly unfitted for the purposes matters which must have received the anxious consideration of the responsible advisers of the Crown before the name of any person is inserted in the letters missive to the dean and chapter.

WRIGHT, J. read the following written judgment:—I can add nothing of importance to the judgment which has just been read; and it is only because of the division of opinion in Bishop Hampden's case that it is necessary to state the manner in which I arrive at the same conclusion as my Lord. Even if the case depended solely upon the language of the statute 25 Hen. 8, c. 20, I should have strongly inclined to the opinion of Erle, J. that the language of the statute precludes the archbishop from entertaining judicially any objection whatever to the election made in accord-

ance with the Sovereign's command. If, indeed, anything were brought to his notice by opposers or otherwise which might suggest to him that the Sovereign had been deceived or misinformed, he might, in my opinion, properly delay confirmation or consecration until the Sovereign's direction could be taken. But it seems to me nearly impossible to construe the statute as authorising the archbishop to declare judicially that the election which the statute says is to stand good and effectual to all intents, and which he is expressly directed to confirm is void. If it had been intended to give him such a power or discretion some provision must have been made for the manner and consequences of rejection. And, I think, there is much force in the Attorney-General's argument that it is incredible that the Crown should have been intended to be in a worse position than any private patron, who can enforce his nomination by *quare impedit*. No doubt the Crown has in a *præmunire* a more effectual remedy in a case in which it is appropriate than the subject has, and it is appropriate enough if the archbishop has no jurisdiction or discretion; but it would not be appropriate for determining whether the archbishop has rightly exercised a jurisdiction or discretion vested in him by law. But the case does not depend solely on the language of the statute. About 350 years have elapsed since the statute was passed, and it is admitted that there has not during all that time been any case in which the archbishop has entertained an objection to the election of a bishop on the Crown's nomination. Nor does the case stand as if the matter had never been considered. It was definitely raised so early as 1629 in *Montague's* case, and it has been the subject of observation and discussion by text writers during the whole period since the passing of the statute. It has twice, at least, been the subject of decision by eminent civilians—in the case of Bishop Hampden and again in the case of Bishop Temple, and, in my judgment, there is a great preponderance of opinion in favour of this construction. We do not know with any accuracy what was the reality of opposition to confirmation of elections of bishops before the statute of Henry VIII., but we have abundant and uncontradicted evidence that since that statute the opposition has been treated as a mere form. We have a complete register of the proceedings at the confirmation of Archbishop Parker in 1559, shortly after the date of the statute, and substantially the same forms have been continued to the present day, and they show in the most convincing manner that although the ancient form of objection has been preserved it has never since the statute retained, if it ever possessed, any reality. The only judicial inquiry has been whether the proper forms of election have been followed, and whether the bishop-elect was qualified as the law requires; and even this inquiry has always, so far as we know, taken the form of summary and *ex parte* proof by the electoral chapter without any admission of traverse by objectors. Then, even if it is still necessary to cite opposers, and even if they ought to be heard to state their objections, I think that the only conclusion would be that the opposers have no *locus standi* to do more than to suggest to the archbishop the matters of objection, not as matters for decision by him, but at most as matters

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which in his discretion he may take into consideration for the purpose of deciding whether he will make any representation to the Sovereign; and, if so, *mandamus* will not lie. The case is not like *Rex v. Archbishop of Canterbury* (1812, 15 East, 117), where the archbishop was bound to exercise a judicial discretion as to the licensing of a lecturer, and where it was said that he ought not to reject proper means of information to guide his judicial discretion. Here there is no judicial discretion to exercise as to the particular objections raised. The principal opposers' objection in this case is one of heresy; and when the archbishop is called upon to refuse the confirmation on a ground of this kind it is not immaterial to ask what means he has for trying such a question. Consistently with the forms in use for 350 years there is no room for such an inquiry. No procedure is provided, or ever has been provided, for it. The bishop-elect is not made a party. No sentence could be pronounced. If in such a case a *mandamus* was to go we should in effect be directing the archbishop to try and determine issues of heresy without any established form of procedure and without power to pass any sentence or to do anything but inform his own conscience. I know of nothing to show that he can have any such right or power which could properly be described as jurisdiction; and, if he has not what amounts to jurisdiction, the *mandamus* cannot go.

RIDLEY, J. read the following written judgment:—But for the importance of this case I should not have thought it necessary to add anything to the judgments of my Lord and my brother Wright, with which I agree. The question is, whether a *mandamus* ought to go to the Archbishop of Canterbury to order him to hear and decide on objections made by the applicants on doctrinal grounds to the confirmation of the election of the Rev. Canon Gore to the Bishopric of Worcester. The answer depends upon the proper construction of 25 Hen. 8, c. 20. Does that statute place on the archbishop the duty of hearing objections put forward and of judicially determining, after hearing them, on the validity or invalidity of the election, and on the fitness, or unfitness of the person elected? Or, on the other hand, on proper evidence being offered, informing the archbishop that the election had been in fact held according to the *congé d'élire*, and as to the personal qualifications of the elected is he bound to confirm? I am not proposing to examine all the authorities which have been quoted in the very learned arguments addressed to us on the hearing; but I shall endeavour to summarise them and to bring the results to bear on the main question—namely, the construction of the statute. First of all, the usages prevailing at the time of the passing of a statute are of importance, and must be considered when the meaning of the phrases or expressions which it contains is to be determined, though they cannot be used to contradict the plain terms of an enactment. What, then, was at that time the usage or custom in England as to the election, confirmation, and consecration of bishops? I think the fair deduction from the authorities is that bishops were at this time appointed by the Pope on the nomination of the Crown, and that the election by dean and chapter had long become a formal matter (Green's History of the English

People, vol. 2, p. 160; Stubbs' Constitutional History, vol. 3, pp. 339-341). But it is necessary to inquire more precisely what was the nature of the confirmation required. And I think that in the earlier centuries, and as a part of the foreign canon law, it is probable that the ecclesiastical authority did, before confirming a bishop, summon objectors and determine their causes of objection. Authority was quoted to that effect, and it would seem, from Justinian's Novel 123, that, in those times, if objections were found on inquiry to be without substance, those who made them were subject to expulsion from the province. There is no trace of any such custom or law as that having been in use in England, although it appears that down to the year 1316, according to the instances quoted from Wharton's *Anglia Sacra*, objectors were summoned, appeared, and were heard, and that in some cases confirmation was refused. These instances occur chiefly in the thirteenth century, after the Charter of King John. Between the year 1316, however, and the reign of Henry VIII. no instance was quoted in which objectors had appealed; and I think this much is certain—that during this period of about 200 years, although it was the duty of the archbishop to inform himself of the identity of the bishop-elect, and of his qualifications, he did not at the ceremony of the confirmation hold anything like a judicial inquiry. During this same period, with a brief interval (to which I need not further allude), the confirmations were in the hands of the Pope. In some instances he issued bulls, ordering the confirmation to be held in England, but when that was not done it took place at Rome, and objectors to a bishop elected to an English see could hardly have appeared there to make their objections. At the outset of this period (though with vicissitudes) it seems that the Papal influence was predominant upon the whole; but later on, in return for the annates, the Popes were willing to accept the nominees of the Crown. "They had other objects in view than the influencing of the National Churches, and the end of their spiritual dominion was at hand" (Stubbs' Constitutional History, vol. 3, s. 341). There is no instance, I believe, to the contrary of this in the reigns of Henry VII. or Henry VIII.—a period of about fifty years, reckoning to the date of this statute. If that is correct, it shows that at the time now in question the ceremony of confirmation was one of form rather than of substance; nor do the historians seem to have considered that it required any special mention while discussing, as between the Crown, the Pope, and the deans and chapters, the right to the election and appointment of bishops—a fact, in my opinion, of much cogency. Certainly it was not a judicial process. It should be added, however, that in the documents it still appears to have been stated, as a matter of form, that opposers had been cited and had not appeared. In this state of things the statute 25 Hen. 8, c. 20, was passed, which begins by reciting what is known as the Annates Act (23 Hen. 8, c. 20), and then enacts that it shall stand, and that no annates shall be sent to Rome, and no bulls received from Rome. Thus was done away with the jurisdiction of the Pope in this country. No doubt this was one of the main objects of the statute; but I pause to say that I cannot accept the argument of Mr. Haldane, who contended

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that it was the only one. To do so is to give no effect to the further sections of the statute, and particularly to sect. 3, which, in a preamble of its own, states that "it is not plainly and certainly expressed in the recited statute in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm." Another object of the statute, therefore, was to settle that matter for the future. Sect. 4 directs that the dean and chapter shall within twelve days elect the person named in the letters missive of the King; and in case of default that the King may nominate and present to the archbishop such person as he may think able and convenient for the vacant bishopric; and then comes sect. 5, which enacts, first, that in case of such nomination and appointment the archbishop shall, with all speed, invest and consecrate without any recourse to Rome; and, secondly, that in case the dean and chapter shall elect the person named in the letters missive their election shall stand good and effectual to all intents, and the person so elected shall be reputed and taken by the name of the Lord-elect of the bishopric; then, the oath and fealty appointed for the same being made to the King by the person so elected, the King shall signify the election to the archbishop, commanding and requiring him to confirm the said election, and invest and consecrate the person so elected. Sect. 7 further provides that if the archbishop shall refuse and do not confirm and consecrate the person so elected or nominated within twenty days, he shall incur the penalties of prebend. Now, upon the natural meaning of the words contained in these enactments, I accept the reasoning of Erle, J. in the *Hampden* case (11 Q. B., at p. 566). It appears to me clear that the intention was to give the nomination of bishops to the King. As to the choice of person, no one was to have power to interfere. Certainly if the dean and chapter do not elect, the person named as nominee of the King, thought by him able and convenient, is to be consecrated by the archbishop without any power in the latter to refuse or delay; and it is extremely difficult to follow an argument contending that in the alternative case, where the dean and chapter do elect the person named, there is to be any difference in the power left to the archbishop. It can hardly be contended that the King's nomination is to be without question in the one case where his letters are not obeyed, and is to be questioned in the other where they are obeyed. I further agree with Erle, J. that, if these words be taken in their strict natural meaning a command to confirm involves no authority to annul. A cogent argument in the same sense is, in my opinion, to be founded on the enactment that the election shall "stand good and effectual to all intents." Yet, according to the argument for the rule in this case, it is precisely in that event—namely, in the event of the person named being elected—that there is to be a discretion in the archbishop in the exercise of which he might annul the election. This being the natural meaning of the statute, it is argued that we must read it otherwise, because the word "confirm" had a recognised sense at that time, in which we must read it—namely, that it included an examination into the validity of the election and the qualifications of the elected, and a judicial determination upon all objections put forward before the confirming authority. By this reading would be

given to the archbishop power and authority to disaffirm and annul the election, a power and authority which it is at least foreign to the general scope of the statute if not contradictory of the terms that he should have. If the word had at the time such a definite meaning, it may be that it should be so read, although it is strange that, having so important an effect on the operation of the statute, it should have found no place in the recited statute, or in the preamble. But the true answer to this argument is that it has not been made out that the archbishop did in fact at that time (even if he ever had done so) hold any such court, or exercise any such authority or jurisdiction. This, as is shown in the elaborate judgment of the Lord Chief Justice, and so far as can now be ascertained, is the result of the authorities. Next it was argued that the practice ever since the time of Henry VIII. has been such as to support the contention of those who apply for the rule. But this, again, is not the fact, for it appears to have proceeded on the former lines. Archbishop Parker's case has not been treated as an authority, and the circumstances were unusual; but in this particular it does not seem to have differed from other instances, for the evidence was not given by an opposer; and, on examining the register of that case, it appears that in the citation of opposers it was there expressly stated that, whether opposers should come or not, the court would proceed. The words are to be found at more places than one in the record (see p. 62 of Dr. Jebb's report of *Dr. Hampden's* case). I think it is clear that the words attributed to Dr. Rives in *Mountague's* case, 1628, cannot be treated as an authority for this purpose; and there is no later instance to be found in which opposers have either appeared or been heard, except in the cases of *Dr. Hampden* and *Dr. Temple*. With regard to the passage quoted from Bishop Fell's Epistle of St. Clement (see Jebb's report of the *Hampden* case, pp. 388, 389), in which he says, *et nemine comparente quod tamen non semper evenit*, it appears that this publication dates from about 1669, and therefore these words, which indicate that on some occasions opposers might appear, may be taken as referring to *Mountague's* case, which had happened about forty years before. It was further argued that as the words of the statute are "confirm, invest, and consecrate," if from our decision it follows that confirmation is a form, it must also follow that consecration is so. I would strongly repudiate this intention. Consecration of a bishop to his sacred office can never be a mere form; it is the solemn and sacred service performed by the Church, by which the bishop-elect is admitted to execute his office. Confirmation, on the other hand, is merely the confirmation of an election already held. Consecration will be performed according to the solemn ritual of the Church in that behalf, and after examination held as prescribed by that ritual. Confirmation may be in any form—possibly not dictated by any law, though probably shaped by precedent. And, so far as confirmation is concerned, if the election by the dean and chapter was to be nothing but a form, solemn, indeed, yet but a form, I can see no reason why the confirming of it should not be a form also. But it is hardly necessary to point out that this has no application to consecration. There are other

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reasons in favour of the construction of the statute, which I think the right one, and I have not omitted them in arriving at this decision. Thus, where is the form of procedure? How is the court to determine such questions as those raised in this case? Are they to be heard in the absence of the person concerned? Between whom are the issues to be joined, and how are they to be considered? If that was intended, the legislators surely must have made provision on these subjects! There is also a forcible argument derived from the recital in 1. Edw. 6, c. 2, and there is the high authority of Coke, Gibson's Codex, and others, in later times, including Dr. Lushington. And, on the other side, I find no authority which has similar weight. I am, therefore, of opinion that the rules should be discharged.

Rules discharged.

Solicitors: *The Solicitor to the Treasury; Lee, Bolton, and Lee; Peacock and Goddard; Wainwright and Co.; R. Todd.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Dec. 9, 1901.

(Before COLLINS, M.R., STIRLING and MATHEW, L.J.J.)

GORDON v. LONDON, CITY, AND MIDLAND BANK;
GORDON v. CAPITAL AND COUNTIES BANK. (a)
APPEAL FROM THE QUEEN'S BENCH DIVISION.

Banker—Cheque—Crossed cheque—Receiving payment for customer—Draft drawn by one branch on another branch of same bank—Conversion—Liability of banker—Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), ss. 60, 79, 82.

A banker who receives a crossed cheque from a customer and, before it is paid by the bank on which it is drawn, credits the account of the customer with the amount of the cheque, does not receive payment of the cheque for the customer, within the meaning of sect. 82 of the Bills of Exchange Act 1882, and is not protected by that section.

A cheque which is not crossed when received by a banker from a customer, but is crossed by the banker after he receives it, is not a crossed cheque within sect. 82 of the Act.

A draft drawn by one branch of a bank on another branch is not a "cheque" within the meaning of the Act, as extended by sect. 17 of the Revenue Act 1883.

When a crossed cheque drawn on one branch of a bank is handed to another branch by a customer for collection, and the amount is entered to the credit of the customer's account at the branch at which he is a customer, and is debited to the branch on which it is drawn, the cheque is paid by a banker to a banker, within sects. 60 and 79 of the Act.

THESE were appeals by the plaintiff from the judgments of Bucknill, J. in two actions tried without a jury, and a cross-appeal by the defendants in the first action.

In each case the plaintiff sued the defendants to recover damages for the wrongful conversion of certain cheques which were the property of the plaintiff, or, alternatively, for the proceeds of the cheques as money had and received to the use of the plaintiff.

The plaintiff, who carried on business at Birmingham under the firm name of Gordon and Munro, had had in his employment for a long time a confidential clerk named Jones.

It was part of the duties of Jones to take the letters from the letter-box at the place of business of Gordon and Munro and to place them on the desk of the plaintiff.

When the plaintiff went to his place of business he opened the letters himself, and, when the cheques and remittances from customers were sent by post, he entered them in his cash-book and then paid them into the account of the firm at their bank.

When the plaintiff did not go to his place of business, Jones was authorised to open letters, and it was then his duty to set aside all cheques and remittances until the plaintiff returned to business.

Jones had no authority to indorse any cheques, or to deal with any cheques or remittances in any way whatever.

Jones, who carried on a small business on his own account, had an account at the Sparkbrook branch of the London, City, and Midland Bank, and also at a branch of the Capital and Counties Bank.

In the years 1895-1899 Jones on many occasions stole from letters sent to Gordon and Munro at their place of business various cheques and orders for the payment of money which had been sent by customers of Gordon and Munro.

These cheques and orders for payment of money were indorsed by Jones, when they were payable to order, with the name of Gordon and Munro, and were paid by him into one or other of his above-mentioned accounts.

Those which were paid by Jones into his account at the Sparkbrook branch of the London, City, and Midland Bank were, for the purposes of the action, divided into eight classes, which were as follows: (1) Cheques which were drawn on banks other than the London, City, and Midland Bank, and not crossed when received by them. (2) One cheque, payable to bearer, drawn on a bank other than the defendants' bank, and not crossed when received by the defendants. (3) Bankers' drafts, addressed to the defendants' head office in London, signed by one Henn, the manager of the defendants' Leamington branch, as such manager, requiring the head office to pay on demand on account of the branch a sum of money to the order of the plaintiff's firm, which drafts were not crossed when received by the defendants. (4) Cheques drawn on branches of the defendants' bank other than the Sparkbrook branch, payable to the order of the plaintiff's firm, and crossed before the defendants received them. (5) Cheques drawn on banks other than the defendant's bank, payable to the order of the plaintiffs' firm, marked "not negotiable," and crossed before the defendants received them. (6) Cheques drawn on banks other than the defendants' bank, payable to the order of the plaintiff's firm and crossed before the defendants received them. (7) Cheques, payable to bearer, drawn on banks other than the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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defendants' bank and crossed before they were received by the defendants. (8) Orders addressed to a bank other than the defendants' bank for the payment of money to the plaintiff's firm conditional on the signature and presentation of a subjoined receipt for the same, and crossed when the defendants received them.

There was no arrangement between Jones and the defendants that Jones should be allowed to overdraw his account; but he was in fact allowed from time to time to overdraw his account.

When Jones took to the bank the cheques which he had stolen, and upon which he had forged the indorsement of the name of the plaintiff's firm, he also indorsed them with his own name. At the trial the defendants' manager admitted that, if Jones did not indorse the cheques without being required to do so, he would have been asked by the cashiers to indorse the cheques with his own name, and that Jones would have been required to do so in order that the bank might have the security of his name.

The defendants crossed all the cheques which they received from Jones, whether they were already crossed or not, with a rubber stamp as follows: "The London, City, and Midland Bank Limited, Sparkbrook, Birmingham, to Head Office, London."

The cheques which were drawn on the defendants' bank were collected by means of credit and debit entries at the head office, and the amounts were entered to the credit of the Sparkbrook branch.

The defendants placed to the credit of Jones' account the amounts of all the cheques which they received from him as soon as they were received, without waiting until they were collected in the ordinary course.

In the years 1897-1899 the account of Jones would frequently have been overdrawn but for the amounts so placed to his credit as aforesaid.

In the case of the Capital and Counties Bank all the stolen cheques which were received by the bank from Jones were, with two exceptions, of the class described as No. 6 in the case of the London, City, and Midland Bank. Some of these cheques, however, were not indorsed by Jones with his own name.

The Capital and Counties Bank, as soon as the cheques were received from Jones, placed the amounts thereof to the credit of his account, without waiting until they were collected in the ordinary course, and allowed Jones to draw against those credits.

The actions were tried before Bucknill, J., with a jury, and the jury found that the defendants had acted without negligence.

All other questions were, by agreement between the parties, left to the decision of the learned judge, with power to draw all necessary inferences of fact.

The learned judge, in the action against the London, City, and Midland Bank, held that the plaintiff was entitled to succeed in respect of classes 1 and 2, but that the defendants were protected in respect of all the other classes of cheques by the provisions of the Bills of Exchange Act 1882.

In the action against the Capital and Counties Bank the learned judge held that the defendants were, except as to the two cheques, protected by sect. 82 of the Bills of Exchange Act 1882.

The Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) provides:

Sect. 3 (1). A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.

Sect. 24. Subject to the provisions of this Act, where a signature in a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

Sect. 60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

Sect. 73. A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

Sect. 79 (1). Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. (2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or, if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Sect. 82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

The Revenue Act 1883 (46 & 47 Vict. c. 55) provides:

Sect. 17. Sections seventy-six to eighty-two both inclusive of the Bills of Exchange Act 1882, and section twenty-five of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight, intitled "An Act to consolidate and amend the Statute Law of England and Ireland relating to indictable offences by forgery," shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument.

The defendants in each action having paid into court a sum sufficient to satisfy their respective liabilities in respect of the cheques with regard to which the learned judge decided against them, judgment was given in favour of the defendants in each action.

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The plaintiff appealed from the judgment in the action against the London, City, and Midland Bank, except so far as the decision was in his favour in respect of the cheques comprised in classes 1 and 2, and the defendants gave notice of a cross-appeal in respect of classes 1 and 2. The plaintiff also appealed from the judgment in the action against the Capital and Counties Bank. The plaintiff also applied for a new trial upon the question of negligence.

A. T. Lawrence, K.C. and J. Leslie for the appellant.—The judgment of the learned judge was wrong so far as he decided that the defendants were protected by the provisions of the Bills of Exchange Act in respect of the cheques comprised in classes 3 to 8, and in respect of the cheques in question in the action against the Capital and Counties Bank. The most important question in these appeals is the question, with regard to the cheques comprised in class 6, whether the banks are protected by the provisions of sect. 82. The provisions of that section apply only when a banker receives payment of a cheque as agent for collection for a customer. If the banker takes a cheque from a customer in such a way that the banker becomes the holder of the cheque and does not merely collect the amount for the customer, then the case is not within sect. 82. The defendant banks did not receive payment of these cheques merely as agents for collection for Jones; they took them in such a manner that they at once became holders for the value of the cheques and collected the amount thereof for their own benefit and not for Jones, their customer. They took the cheques as cash, and at once gave credit to Jones for the amounts thereof, and then collected the amounts to repay themselves. The fact that the banks took the indorsement of Jones upon most of these cheques shows that they took the cheques as holders for value, for that indorsement was quite unnecessary for the purpose of collecting the amounts of the cheques for Jones, but was very material for the purpose of giving the banks the further security of Jones' warranty, as provided by sect. 55 (2) of the Act. The defendant banks, therefore, are not within the protection of sect. 82 and are liable for conversion of the cheques:

Matthiessen v. London and County Bank, 41 L. T. Rep. 35; 5 C. P. Div. 7;

Ex parte Richdale, 46 L. T. Rep. 116; 19 Ch. Div. 409;

Royal Bank of Scotland v. Tottenham, 71 L. T. Rep. 168; (1894) 2 Q. B. 715;

M'Lean v. Clydesdale Banking Company, 50 L. T. Rep. 457; 9 App. Cas. 95;

National Bank v. Silke, 63 L. T. Rep. 787; (1891) 1 Q. B. 435;

Bissell v. Fox, 51 L. T. Rep. 663; 53 L. T. Rep. 193;

Hollins v. Fowler, 33 L. T. Rep. 73; L. Rep. 7 H. L. 757.

In *Great Western Railway Company v. London and County Bank* (82 L. T. Rep. 746; 85 L. T. Rep. 152; (1900) 2 Q. B. 464; (1901) A. C. 414) the decision in the House of Lords was upon the point that the person from whom the bank took the cheque was not a "customer," but there are many expressions of opinion that, in a case of this kind, the bank does not merely collect the amount of the cheque, but becomes the holder for value and is guilty of

conversion. The acts of the defendants in obtaining the indorsement of Jones, and in crossing the cheques with their own rubber stamp, were in themselves acts of conversion sufficient to make the defendants liable, and they were not any necessary part of the process of collection so as to come within sect. 82. The cheques comprised in class 2 were not crossed when the bank received them, and sect. 82 applies only to cheques which are crossed when the banker receives them for collection. The bank cannot bring them within the protection of sect. 82 by crossing them after they have received them:

Bissell v. Fox (ubi sup.).

If, however, the contention of the plaintiff, that the defendants became holders for value and did not receive payment of the cheques for their customer, is good, then it must be admitted that the plaintiff cannot succeed, for the cheques were payable to "bearer," and the defendants became holders in due course within the protection of sect. 38. The bankers' drafts comprised in class 3 were not "cheques" at all within the meaning of the Bills of Exchange Act, as extended by sect. 17 of the Revenue Act 1883. Sect. 73 defines a cheque as "a bill of exchange drawn on a banker," and sect. 3 defines a bill of exchange as an order "addressed by one person to another." These drafts, being drawn by the manager of a branch upon the head office, were not addressed by one person to another, for the bank and its branches are all one bank for this purpose:

Garnett v. McKewan, 27 L. T. Rep. 560; L. Rep. 8 Ex. 10;

Prince v. Oriental Bank, 38 L. T. Rep. 41; 3 App. Cas. 325.

The cheques comprised in class 4 were not paid to a banker, because the bank could not pay itself, and therefore are not within the protection of sect. 79 (2). Crossed cheques are not within the protection given by sect. 60, because they are specially dealt with by the later sections, and therefore the payment of these cheques by the defendants is not protected by sect. 60. The same arguments are applicable to the cheques comprised in class 5 as to the cheques in class 6, but the fact that these cheques were marked "not negotiable" still further shows that they were taken by the defendants as holders for value and not as agents for their customer, Jones. The cheques comprised in class 7 are in the same position as those in class 2. The orders for payment comprised in class 8, not being "unconditional" orders, are not within the definition of a bill of exchange in sect. 3 (1) of the Bills of Exchange Act 1882; sect. 17 of the Revenue Act 1883 does, however, make some of the provisions of the Bills of Exchange Act applicable to those orders as if they were cheques. But, even if the provisions of sect. 82 are applicable to those orders as "cheques," yet the bankers took them as holders for value and not for the purpose of collection only, and therefore are not within the protection of sect. 82.

Haldane, K.C., Hugo Young, K.C., and P. G. Henriques for the London, City, and Midland Bank.—With regard to the cheques comprised in class 6, upon which the main question in this appeal depends, the judgment of Bucknill, J. was right. The bankers are entitled to the protec-

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tion of sect 82 in respect of those cheques. That section was intended to protect bankers who in good faith and without negligence deal with crossed cheques in the ordinary course of business. In the case of country banks, the ordinary course of business is to give credit to the customer for cheques paid in as soon as they are paid in, without waiting until the amounts are collected in the ordinary course, though in the case of most London banks, and of Scotch banks, that is not the practice. If the banker cannot collect the amount of any cheque for which he has so given credit to his customer, the amount is then debited to the customer's account. By adopting that practice, which is the usual and ordinary course of business, the banker is none the less the agent for collection for his customer; he collects the amount for the benefit of his customer and not for his own benefit. The reasonable construction of sect. 82 is that the words "by reason only of having received such payment" apply to all cases except those in which the banker does not at any time place the amount of a cheque to the credit of a customer's account. In *Great Western Railway Company v. London and County Bank* (*ubi sup.*) the decision of the House of Lords proceeded entirely upon the ground that the cheque had not been received from a customer. The judgment of Romer, L.J. in that case in the Court of Appeal shows that a banker, even if he becomes the holder for value, may still collect the amount of cheque as agent and receive payment for the customer. The transaction of collecting the amount of a cheque for a customer includes more than merely receiving payment, and everything done by a banker as incidental or ancillary to the process of collection is within the protection of sect. 82; the crossing of the cheques by the defendants and the taking of the indorsement of Jones himself were such acts. The only act of conversion of which the plaintiff could complain was the receipt of payment of the amount of the stolen cheque:

Bavins v. London and South Western Bank, 81 L. T. Rep. 655; (1900) 1 Q. B. 270.

But that act is protected by sect. 82. If the plaintiff's contention were correct, a banker would never be able with safety to collect the amount of a crossed cheque for a customer whose account was overdrawn, because it would be said that they were collecting the amount for themselves in order to reduce the overdraft. As to the cheques in class 1, the defendants were entitled, by sect. 77 (6) of the Bills of Exchange Act, to cross the uncrossed cheques specially to themselves. A cheque crossed by a banker in pursuance of sect. 77 (6) is a crossed cheque within sect. 82. If the defendants did not become the holders for value of the cheque in class 2, the same argument applies as to the cheques in class 1. The defendants are protected in respect of the drafts comprised in class 3 by the provisions of sect. 60 of the Act, which protect a banker who pays an "order" cheque drawn on him, in the ordinary course of business, although the indorsement has been forged. These cheques were drawn upon the defendants, and were paid by them in the ordinary course of business:

Charles v. Blackwell, 36 L. T. Rep. 195; 2 C. P. Div. 151.

For this purpose the bank and its branches must

be treated as separate banks, and these cheques were drawn by one bank upon another bank:

Prince v. Oriental Bank (*ubi sup.*).

Willans v. Ayers, 37 L. T. Rep. 732; 3 App. Cas. 133.

If these drafts were not cheques within the definition in the Bills of Exchange Act, yet sect. 17 of the Revenue Act 1883 makes sect. 82 applicable to them. Sect. 60 protects the defendants in respect of the cheques in class 4; they were paid by the bank and to the bank, and it is not necessary that the paying bank and receiving bank should be different banks. The fact that the cheques in class 5 were marked "not negotiable" cannot make the position with respect to those cheques different from the position with respect to class 6. If the defendants are not protected as to the cheques in class 7 by sect. 82, then they were the holders in due course of those cheques under sect. 38. Although the orders comprised in class 8 are not "cheques" within the definition in the Bills of Exchange Act, yet the provisions of sect. 17 of the Revenue Act 1883 extends the provisions of sect. 82 of the Bills of Exchange Act to those orders as if they were cheques.

Cohen, K.C. and Spencer Bower for the Capital and Counties Bank.—The contention on behalf of the plaintiff as to the meaning of sect. 82 is that the banker is only protected from liability for the receipt of payment, but that he is left unprotected in respect of every other dealing with the cheque, except the mere receipt of payment. That construction would really make the provisions of sect. 82 nugatory, for in order to obtain payment the banker must necessarily deal with the cheque in a manner which would be conversion at common law, if the piece of paper is considered as a chattel. The conversion of a cheque which renders a banker liable for conversion at common law, is really the receipt of payment and not the mere dealing with the piece of paper:

Ogden v. Benas, 30 L. T. Rep. 683; L. Rep. 9 C. P. 513;

Arnold v. Cheque Bank, 34 L. T. Rep. 729; 1 C. P. Div. 578.

And the provisions of sect. 82 are intended to protect the banker from that liability. All acts which are incidental or ancillary to the process of collection are within the protection of sect. 82. The fact that credit was given to the customer before the amount of a cheque is collected, does not make the banker any the less an agent for collection for the customer so as to be protected by sect. 82:

Clarke v. London and County Bank, 76 L. T. Rep. 293; (1897) 1 Q. B. 552.

A. T. Lawrence, K.C. replied.

COLLINS, M.R.—These cases raise questions of considerable difficulty and complication. We have in fact but two cases before us, but one is subdivided into eight compartments. The questions arise in this way. In the first case *Messrs. Gordon and Munro* had a clerk called Jones, and Jones had accounts at the defendants' banks. In the first case the bank was the London, City, and Midland Bank. The circumstances under which he opened that account were dealt with because the question of negligence on the part of the bankers arose for discussion in the course of this case, and I will deal with it in a moment.

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After Jones had become a customer of the bank, he began a series of dealings with cheques that had been made payable to his masters, Messrs. Gordon and Munro, and in most cases made payable to their order. He got possession of those cheques, forged their indorsement upon them, took them to the bank, in the majority of instances crossed at the time he took them to the bank, and the bank credited him with the amount of them in account, and he continued to draw as and when he required money out of his account. His account, we are told, would have been, for the greater part of the period during which these transactions went on, in debit but for the fact of these cheques having been paid in. This action was brought by the true owners of the cheques, Messrs. Gordon and Munro, against the bank, and the question is whether the bank, who are *prima facie* without protection in dealing with cheques with forged indorsements contrary to the right of the true owner, is protected by certain provisions of the Bills of Exchange Act 1882. There are a number of different instances of cheques drawn in different manners with which I shall have to deal in detail when I come to them; but the most important class of cases is that to which I have already referred—namely, cheques drawn by persons on banks, other than the defendant bank, in favour of Gordon and Munro, whose indorsement was forged by Jones, and paid in crossed to the defendant bank. Now, there was a question raised at the trial as to whether the bank had not been guilty of negligence in treating these cheques in the manner in which they did treat them. Two questions were left to the jury by Bucknill, J., who tried the case, on the question of negligence. One was whether the circumstances were such as to put the bank on inquiry as to Jones. The second question was also put whether the bank had been negligent in what they did, but the jury answered the first question to the effect that there was nothing to put the bank on inquiry, and they appended to that a general rider that they thought that banks in general did not behave with sufficient caution. I do not know whether I have given the exact words, but it was to that effect, and they were not asked to give a specific answer to the second question whether the defendants were guilty of negligence. However, the learned judge and counsel treated, it seems to me, those answers as an answer on the question whether the defendants were guilty of negligence. No further question was suggested by the learned counsel, and no other answer was invited from the jury. It seems to me that that was essentially a question of fact for the jury. We have had the learned judge's summing up read to us. It seems to me a perfectly fair summing up, leaving the question to the jury; and, though I think there was cogent evidence in this case of negligence on the part of the defendants, which might perfectly well have justified a verdict adverse to the defendants, on the other hand I cannot say there was not evidence the other way. Therefore, it seems to me that that was essentially a question for the jury, and, the jury having decided the question in favour of the defendants, that verdict cannot be disturbed. I come then to the questions of law. Sect. 24 of the Bills of Exchange Act says that no one can get any title under a forged indorsement. It provides that: "Subject to the

provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall effect the ratification of an unauthorised signature not amounting to a forgery." Now, there are no circumstances in this case precluding the plaintiff from setting up the forgery or want of authority. That particular line of defence does not arise, and the question really turns upon the effect of sect. 82 of the Bills of Exchange Act, which deals with the case of cheques handed to a banker for the purpose of collection. That section enacts that: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Therefore, the bank, as I have said, standing without protection but for the special protection given by the Act, invoke sect. 82 as a ground of defence, and the question is whether they bring themselves within it or not. If they do, of course they are protected. If they do not, they stand in the ordinary position, as I have pointed out, under sect. 24. It is important in dealing with this case to consider what the position of bankers was as to cheques in general before the comparatively recent legislation. If it happened that there was forgery of one of the signatures on the cheque, they simply took the risk themselves, and, if they dealt with the cheque, they were liable at the suit of the true owner. Then came the legislation as to crossed cheques, and the principal object of that legislation was to prevent crossed cheques being paid otherwise than through a banker. That involved two things. First of all, that the cheque should be presented for payment through a banker, and secondly that it should be paid by the bank upon which it was drawn. It involves, therefore, two banks, one the bank through which the cheque must be presented, because it must be presented through a bank; and, secondly, the bank which has to pay the cheque when so presented. Consequently the legislature provided that a crossed cheque could not be presented otherwise than through a banker. Sect. 79 (1) deals with that in these words: "Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof"; and sub-sect. 2 says: "Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid." There is, therefore, by this legislation with respect

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to crossed cheques a certain facility given to the public with an incidental advantage probably to the bankers, namely, facility given to the public to secure their cheques by making it impossible for anybody not having a banking account to get them paid and a certain incidental advantage given to the bankers in that it is a greater facility and therefore a greater inducement to customers to give them their banking business; and since the legislature has invited the public to use banks for the purposes of collecting crossed cheques, it has also given a protection to the bankers who do so. I think it would be *prima facie* improbable that a protection so given to bankers in respect of a particular class of cheques should be wider than the occasion and the incidence of that particular duty imposed on them would demand. If they collect cheques other than crossed cheques they take the risk. They are only invited to collect cheques which are crossed, and being so invited by the legislature they are protected in the discharge of that duty only. That duty is to receive payment for a customer in the only way in which, in the case of such a cheque, it can be received, namely, through presentation by the presenting bank to the other bank, and therefore one would expect, having regard to the history of the legislation, that that which the Legislature would protect would be, not the dealing with these cheques just as they dealt with cheques generally before this legislation, but the particular kind of dealing which is invited by the Legislature in this legislation as to crossed cheques and which therefore needs protection, namely, the receiving payment for a customer of a crossed cheque. Then we come to the words of sect. 82 which I have read. "Where a banker in good faith and without negligence receives payment for a customer" he shall not "incur any liability to the true owner of the cheque by reason only of having received such payment." In this case the facts appear to me to show that, both in the case where the defendants received these crossed cheques drawn on other bankers to the order of Gordon and Munro and purporting to be indorsed by them, and credited the customer in account with them without waiting to see whether these cheques would be paid by the paying banks or not, and in the other case in which they invited or insisted upon, and certainly received, the indorsement of Jones himself, in both these classes of cases, and in one more clearly perhaps than in the other, the defendants did not merely receive these cheques for the customer and only receive payment for such customer. It seems to me that, taking first of all the case where Jones indorsed these cheques, that was clearly an act outside of sect. 82, because the evidence is that these cheques would not have been received from Jones for the purpose of collection unless he did indorse them. Jones, the forger who had already forged the indorsement on these cheques, superadded his own name. It is perfectly clear to me on the facts that that was done at the instance or with the consent of the defendants. If a bank receives a cheque to which the holder has no title at all, and takes a right from him purporting to be in effect a right against the true owner by indorsement from him, it seems to me that that is clearly a case, if there were no statute in the matter, where they would be con-

verting the cheque at common law. If authority were needed for that, I think there is abundant authority in the case that has been cited of *Fine Art Society v. Union Bank of London* (55 L. T. Rep. 536; 17 Q. B. Div. 705, 711). The passage I am about to read is from the considered judgment of Fry and Bowen, L.J.J.: "Now first as to conversion. We are of opinion that, when Mugford handed a post-office order across the counter of the bank with a direction to the defendants to take it and to receive the money for it and to carry that money to the credit of his account, and when the bank clerk so took the post-office order, the bank converted it; for, to use the language of Lord Ellenborough in *M'Combie v. Davies* (6 East, 538, 540; 8 R. B. 534), a man is guilty of conversion who takes any property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?" In those cases where the defendants took the indorsement of Jones, which was given at their instance or with their consent, it appears to me that there could be no question at all that that was outside of sect. 82. No reason can be suggested, for any purpose ancillary to sect. 82, why in receiving money for the customer they should have gone out of their way to deal with this cheque in this manner and become holders of it with a right of action over against Jones, and therefore in all cases where that incident exists I do not think there could be any real discussion as to whether or not the case is included within sect. 82. They have chosen, as part of the process in the collection of the cheques, to take this step, which clearly to my mind is entirely outside the necessities of collection, and which does give them an independent right, sought to be secured by them, to this cheque as holders against Jones as well as against the true owners. However, I do not desire to rest the decision merely on that principle, because I think it rests on a larger principle which will cover the other cases as well as this, and that is, that the protection of the Act must be, for the reasons I have given, limited necessarily to the carrying out of that duty which the Legislature has imposed, in a sense, on the bank, and, the protection being limited to that, it does not give them power to go out of their way to get Jones' indorsement. If bankers deal with crossed cheques in the ordinary way of business in which bankers dealt heretofore with ordinary cheques, and are dealing now with cheques other than crossed cheques—namely, crediting their customers with them and treating them as cash in the ordinary way—if they choose to do that instead of allowing themselves to be a mere conduit pipe to carry a cheque to its place of destination and there ascertain whether it would be paid or not and receive the money under the protection of the section, if they choose to treat it as cash before they convey it to its destination at all, it seems to me that when they have done that they are not collecting the money for the customer, not receiving payment for the customer, but chiefly for themselves. That I should have thought to be the law if the question were free from authority; but it is not free from authority. We have had the case cited before us, which has been reaffirmed in the House of Lords recently, of *Matthiessen v. London and County Bank* (41 L. T. Rep. 35; 5 C. P. Div. 7, 16). In that case

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Lindley, J. said: "The second part of the section does not relate to cheques, but to the proceeds of cheques. The customer of the bank gets no better title than his transferor, not only when the cheque is marked 'not negotiable,' but when it is not so marked, if it is not an open but a crossed cheque. The bank in either case deals with the proceeds. If the bank has the cheque, it may be stopped in their hands. The customer gets no better title than the person from whom he took it. But, when the bank has got the proceeds, and the true owner says to the bank, 'hand me those proceeds,' the Legislature in the second part of the 12th section says 'No.'" (That was the Act which was then in force, which was substantially the same as sect. 82, which combines in one the two sections of the earlier Act.) "If you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds when you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more, if you have applied it to your own use, that is another matter; but, if you have simply collected it through the clearing house in the only way in which a banker collects cheques, and that is all you have done, the true owner shall look through you to your customer, and he and not you must be responsible to the true owner for the proceeds." It seems to me that what the defendants have done here falls within those words of Lindley, J., and that by treating these cheques as cash, dealing with them in the way in which they have done, they have gone outside the protection of the statute. We must remember that they are dealing all through with stolen property, and that every act of theirs inconsistent with the right of the true owner would be a tort at common law, and, therefore, except so far as they are protected by the statute, they have no right to deal with the cheques at all. After *Matthiessen's* case this very question came before Denman, J. in the case of *Bissell v. Fox* (51 L. T. Rep. 663; 53 L. T. Rep. 198). There the same question with which we have to deal came before Denman, J. in respect of a certain number of cheques. There were really seven cheques in question altogether, six of them in one category and the seventh in another, and of those six cheques three were cheques drawn on other bankers payable to order and crossed, precisely the same case as that with which we are now dealing. As to those three cheques, Denman, J. came to a clear conclusion, as one of the grounds of his judgment, that they had been so dealt with by the bank by which they were received for collection that they had put themselves outside the protection of sect. 82. What the bankers had done, in the opinion of Denman, J., to put them outside that section was that they had treated certain stolen drafts with forged indorsements, as is the case here, as cash; that is to say, instead of waiting and collecting the proceeds from the bank on which they were drawn, and then receiving them for the customer, they treated them as cash, that is to say, credited them to the customer's account. It seems to me that that is absolutely on all fours with this case. Denman, J. gave that as one of the grounds of his decision. He also held, and there was abundant evidence of it, that the bankers had been negligent in what they did, but

that was a totally independent ground. That question came before the Court of Appeal, and the Court of Appeal, without in the slightest degree impugning, as far as the reports show, anything whatever that had been said by Denman, J. on this matter in the court below, decided the appeal on the ground of negligence only. There was abundant evidence of negligence, and it was not necessary to consider the matter on the legal question. There is that authority in favour of the decision which I am now giving, an authority which purported to follow the authority of *Matthiessen's* case (*ubi sup.*), which I have just quoted. Then, last year there came the case which has been so much discussed before us, of the *Great Western Railway Company v. London and County Bank* (85 L. T. Rep. 152; (1901) A. C. 414). That case came to this court, and it was decided by this court that the bankers were protected. In that particular case one Huggins, who had been in the habit of taking crossed cheques drawn to the order of other people to the bankers and getting them to deal with them for him, was treated by the court as a person who stood in the relation of a customer to the bank. He had no account with the bank, but had been in the habit for a good many years of getting them to deal with crossed cheques, and, in the particular instance that came up for discussion, he had forged indorsements on cheques drawn in favour of the plaintiffs, and had taken them to the defendant bank, who had given him some part of the amount of those cheques in cash, and had applied other parts of them to the credit of a particular customer of their bank at his direction. The protection of sect. 82 was claimed, and this court held that the defendants were entitled to it; but the House of Lords took another view, and held that Huggins was not a customer, and therefore that the defendants had not brought themselves within the protection of the section. The other point which has been argued before us—namely, on the footing that Huggins was a customer, was argued and, though I do not say that it was in terms decided, it seems to me that the weight of the opinions of the individual Lords all goes to support the view which I am now stating. I have looked through their judgments, and I will very shortly refer to a few passages in each of them. Lord Halsbury, L.C. deals with the case on the point that Huggins was not a customer, but he adds this: "The language of the statute seems to me to be clear enough. It would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money. The 82nd section, which contemplates the receipt of such a cheque received in the ordinary course of business for a customer of the bank, seems to me to contemplate a totally different class of transactions from what is disclosed in this case. The bank thought proper to take this cheque as representing its face value, and if Huggins had no title, as he certainly had not, there is nothing in the 82nd section which will enable them to treat it as receiving payment for a customer." That appears to me to point rather in the direction of the reasons which I have been giving. Then Lord Shand says he agrees with the judgment about to be given by Lord Lindley. Lord Davey does not deal with this particular part of the question; he deals with two other parts, but not

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with this. Then comes Lord Brampton, and it seems to me that his speech bears very distinctly on this point in more than one passage. He states what would have protected the defendants. True he does not in terms define what would not. He says that what they did in that particular case would not protect them; but he then says what he thinks would protect them. He says: "Huggins had no banking account at all anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential to constitute a person a customer of a bank, for if it were shown that the cheques were habitually lodged with a bank for presentation on behalf of the person lodging them, and that when honoured the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such person a customer within the meaning of the 82nd section; indeed, I think they would. But as between Huggins and the Wantage branch of the respondents' bank the transactions amounted to nothing of the sort." It seems to me he is there suggesting a standard which would comply with sect. 82, which would imply that something which fell short of it might not. Then he goes on: "In the case before your Lordships, on every occasion of cheques so cashed, the money had already been given to Huggins in exchange for the cheque, the money paid to the respondents had been received on their own account to reimburse them, and not on account of Huggins at all." Then Lord Lindley says: "Upon the other point, it is plain to me that the bank obtained payment of the cheque for themselves and not for Huggins"; and then further on he says: "The construction put upon that Act in the case of *Matthiessen v. London and County Bank* (*ubi sup.*) was, in my opinion, correct; in *Clarke v. London and County Bank* (76 L. T. Rep. 293; (1897) 1 Q. B. 552) the cheque was paid in for collection, and this was the *ratio decidendi*." I think, therefore, that it may be inferred from these judgments that their Lordships would have taken the view which I am now taking, if the facts of the case had rendered it necessary for them to decide the question. One word with regard to the case of *Clarke v. London and County Bank* (*ubi sup.*). Whether that case was rightly decided or not is immaterial for the purpose of this discussion, but Cave, J. dealt with it on the footing that the cheque had been received for collection, and that no credit was given in respect of it until it had actually been collected. The facts of that case as stated in the report I think make it clear that that was the case. Fisher, who had an account at the Dartford branch of the defendants' bank, forged the indorsement of the plaintiff's name, and "paid the cheque as indorsed into his own account for collection. At that time Fisher's account was overdrawn to the extent of £13 9s. Upon the receipt of the said cheque, the defendants allowed Fisher to draw a cheque upon them for £5 8s. 6d., which they cashed. Subsequently the defendants received payment of the first-mentioned cheque from the Bank of England and placed the amount to the credit of Fisher's account." So that apparently, as a matter of fact, they did not credit him till after they had received the money from the paying bank, and Cave, J. treated it as a case in which they had

collected the money before they gave credit for it. There is no doubt that they did cash a cheque drawn, not on any funds received by them from bankers, because they deliberately abstained from giving him any credit in respect of that cheque until after they had obtained the proceeds, and Cave, J. rightly or wrongly treated that as a case of mere collection, and that was the ground on which he decided the case. Up to this point it seems to me that the authorities are all one way, and that, unless the bank, setting up the protection of sect. 82 can show that it has adhered strictly to the lines of it, it stands outside the protection of that section. Now it is clear law, and we have had many cases cited to us in support of it, that the defendants by what they did in this case became holders for value of these cheques. By giving the customer credit in his account they would have acquired a title against the drawer himself and against every person whose name was on the cheque. They must have done that for some reason. My brother Mathew, L.J. put the question to Mr. Cohen, Why was it done; how did it assist collection? In answer, Mr. Cohen said it was customary to do it. It is a curious thing that, in the instances actually brought before us, we have not found that custom followed out in the way Mr. Cohen suggests. The case which I have just cited appears to be an instance; and another case, reported in the same volume, of *Lacave v. Credit Lyonnais*, (1897) 1 Q. B. 143, which was the case of an English bank with a French name with branches in Paris. The practice followed there in Paris was that, when it was sought to obtain payment of the cheque, the branch there waited till they had heard the result of inquiry in London to find out that the cheque would be honoured before they paid the person in France. It is true he was not a customer and was not far different in position from Huggins, but still their practice was to wait until they had ascertained what the position of affairs was at the paying bank before they dealt with the cheque as cash at the collecting bank. As I have said, cases have been cited—*Bissell v. Fox* (*ubi sup.*) and *Ex parte Richdale* (46 L. T. Rep. 116; 19 Ch. Div. 409)—in which it was held that crediting in account constituted the bank holders for value; and in the last case cited for the plaintiff, *Royal Bank of Scotland v. Tottenham* (71 L. T. Rep. 168; (1894) 2 Q. B. 715), the position was pushed to its logical result, and, though the bank had sought to debit the customer again for the value on not getting the proceeds of the cheque, nevertheless it was held that they were in a position to sue the drawer. I now come to a number of subsidiary points which are rather complicated, but are, I think, capable of being treated more or less briefly. We have, as I have said, eight cases to deal with altogether. The first is a case where the cheques, not being crossed at the time when they were received by the bank, were crossed by the bank afterwards, and they claim the benefit of the protection of sect. 82 for them as crossed cheques. It is perfectly true that one of the sections of the Act empowers the bank itself to cross a cheque. No doubt that gives facilities for protection during the process of collection that supervenes after the crossing; but they appear to have begun the transaction by dealing with a cheque which was not protected at all—a cheque uncrossed when it came to them, drawn upon

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another bank, and with a forged indorsement. How are they protected in their dealing with that cheque up to the time when they crossed it? It appears to me clearly that they did convert it, within the authorities which I have mentioned. They have taken a cheque which is entirely unprotected, with a forged indorsement; they have become holders for value of it, and they have therefore converted that cheque; and they do not purge that conversion by trying to collect it afterwards. It appears to me that taking the cheque without the crossing on it they put themselves in no better position when they cross it themselves. The wrong was done, and therefore in that case it seems to me that judgment must be for the plaintiff. Then, with regard to class 2—that is, the “bearer” cheques. On behalf of the plaintiff it was very properly conceded that he cannot succeed. The bank are the holders for value, the cheque being within sect. 31 as a cheque payable to bearer. Then we come to a case which raises some difficulty—that is, where a draft is drawn by one of the branches of this bank upon another branch. It is signed by the manager of the drawing branch, but it seems to me that the wording of the cheque and the description of Mr. Henn as “manager” obviously make it a cheque drawn by him merely in his managerial capacity as agent for the drawing bank. That is a cheque drawn by the drawing bank, or purporting to be drawn by the drawing bank, on another branch of the same bank, and the plaintiff’s contention is that that is not a cheque within the meaning of the Bills of Exchange Act, and therefore stands outside any protection given by the Act. If it were a cheque it would be covered by sect. 60 of the Bills of Exchange Act, which provides that “Where a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.” In this case the argument is that this particular document is not a “cheque.” A “cheque” is defined by sect. 73 to be a “bill of exchange drawn on a banker and payable on demand;” and a bill of exchange is defined by sect. 3 as being “an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, &c.” That is to say, it must be drawn by one person upon another, and the plaintiff contends, and I do not see any answer to it, that this is not drawn by one person on another. It is drawn by one branch of a bank, which is a limited company, upon another branch of that bank, and there is an enactment which defines how a limited company can draw. Sect. 47 of the Companies Act 1862 provides that “A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed, in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed, by or on behalf of or on

account of the company by any person acting under the authority of the company.” Therefore, it seems to me that *prima facie* this is not a cheque within the Bills of Exchange Act. But then it is said that, by virtue of the Revenue Act of 1883, s. 17, it is brought within the Bills of Exchange Act. That section is in these words: “Sections seventy-six to eighty-two, both inclusive, of the Bills of Exchange Act 1882, and section 25 of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight, intituled ‘An Act to consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery,’ shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque.” Then, by sect. 2 of the Bills of Exchange Act: “‘Issue’ means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.” Here the only issue was not by a customer, but, in point of fact, by the manager of the drawing bank to a customer, and therefore it seems to me that it falls outside that section also. Therefore that section does not suffice to bring it within the Bills of Exchange Act, and it is one of those documents which are not covered by sect. 2. Therefore upon that part of the case the plaintiff succeeds also. Then we come to the fourth class, which raises rather a curious point, though I think on common sense, if one may apply common sense to this subject-matter, the defendants ought to succeed. The case is this: Crossed cheques drawn on one branch of defendants’ bank were handed to another branch for collection, and the process by which those cheques were paid was this: Entries were made in the books of the bank in favour of the customer who paid in the cheques, and entries were made in the books of the other branch whereby they are debited and the other branch credited with the amounts. That is a transaction between two branches of one bank; but in the result this one bank has, in point of fact, paid by that process a crossed cheque. It is said that they stand unprotected because sect. 79 enacts that: “Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed,” he will be liable. It is said that this is a case where the defendants have not paid to a banker at all, but that these were crossed cheques which the defendants in substance paid to the customer, and that therefore they have violated the mandate of this section. On the other hand, but for this section and but for the crossing, it is quite clear they would be protected by sect. 60, which I have already read. So that it would be a rather curious and anomalous result if they became liable for paying a cheque, which but for this crossed cheque legislation they would have paid with impunity under sect. 60. It seems to me that the difficulty can be met by construing the words of this Act with some strictness. The bank certainly received payment as a bank. It may be they have paid themselves. Still the payment is made to a bank, and, since the persons who pay are also a bank, it is made by a bank, and therefore

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I think that perhaps with some straining of the words of the section, the case may be brought within it. It seems to me that it is possible here for the defendants to say that they have done nothing wrong; that they are outside the legislation as to crossed cheques, which cannot apply when the circumstances do not admit of the existence of two banks in the transaction, and, therefore, are protected by sect. 60; or that, if they are within sect. 79, they have satisfied it by such a payment by one banker to another. Then we come to the fifth class, and the only difference is this, I think, that these cheques were "not negotiable." "Not negotiable" on the cheque would not of itself, and it is not contended it would, have deprived the bank of the protection of sect. 82, if they had in all other respects conformed to the conditions of that section; but the fact of these cheques being not negotiable is urged as an additional ground for the inference that in dealing with them as they did the defendants were acting outside of sect. 82 because they were constituting themselves the holders, deliberately and intentionally constituting themselves the holders and going out of their way to do so, in the case of a non-negotiable instrument, which certainly did not invite them to do so. Therefore that may be used as an additional argument in favour of the view that what they did is something outside the mere duty of receiving payment for the customer, which is the only thing that sect. 82 purports to protect. Then the seventh class was abandoned during the argument, and I need not trouble about that. The eighth class simply raises again the question of the words "not negotiable." That deals with the whole of the first case and incidentally with the second case. It is not necessary for me, I think, therefore to follow out the argument for the defendants in that case upon the question of conversion, with every word of which almost I agree. There is, however, this incidental difficulty in that argument. I agree that, if the narrower construction which they sought to insist that the plaintiff put on sect. 82 were put—namely, that nothing was protected but the actual receipt—then a great deal of their argument would have to be accepted; but I do not think it was part of the plaintiff's argument that the word "only" bore the significance which Mr. Cohen sought to put upon it. He said that, if the plaintiff's argument was correct, there would be several conversions before the payment, and that the statute would therefore become quite nugatory if it were limited in the way he said that the plaintiff sought to limit it; but I did not so understand the argument for the plaintiff. It seems to me that the fair reading of the statute is that, where a banker receives payment for a customer, he shall not incur liability to the true owner by reason only of having received such payment. I think that that covers, and was meant to cover, the whole transaction of receiving payment, and the whole transaction on receiving payment embraces a great deal more than somehow or other getting access to the paying banker and then receiving the money. It involves dealing with the cheque from the time it is placed in the hands of the collecting bank until it gets to the hands of the paying bank, and dealing with the proceeds of it. All that comes into the transaction of receiving payment for the customer, and

everything that is reasonably incidental to that process is, I think, covered by the wording of the section, but everything that is outside of it remains uncovered. Therefore, I think that incidentally the section does cover the crossing with their own stamp and some other matters that the plaintiff relied on as an independent conversion. All those things that simply facilitate collection fall within the protection. Therefore, for the reasons I have given, I think that these appeals in the main succeed.

STIRLING, L.J.—I have come to the same conclusion. In dealing with these two actions I shall first direct my observations to the class of cheques which have been described as class 6 in the case of *Gordon v. London, City, and Midland Bank*, and to the cheques which form the subject of the second action. In both of these the subject-matter consists of cheques drawn to the order of the plaintiff and crossed. Those cheques were stolen by one Jones, the plaintiff's confidential clerk, who indorsed the cheques by forging the name of the plaintiff's firm upon them, and then handed them to the defendants, with whom he had an account, and the defendants subsequently received payment of the cheques. Now, it is not disputed that but for sect. 82 of the Bills of Exchange Act 1882 the defendants would be liable to the plaintiff as the true owner of these cheques. The defendants would have in fact committed a tort by converting the cheques to their own use, as is shown by the cases, amongst others, which have been referred to of *Arnold v. Cheque Bank* (34 L. T. Rep. 729; 1 C. P. Div. 578) and *Fine Art Society v. Union Bank of London* (*ubi sup.*). Sect. 82 of the Bills of Exchange Act 1882 is taken from sect. 12 of the Crossed Cheques Act 1876, by which crossed cheques were for the first time made payable only through a banker, and the object of this clause in both Acts is obviously to afford protection to bankers, who were up to that time practically compelled to collect these cheques. Neither in the Act of 1876, nor in the Act of 1882, is the clause expressed in language which is perfectly apt to protect the banker from liability to the true owner of the cheques in every case of technical conversion. The clause appears to be framed as if the liability of the true owner only arose by reason of the receipt of payment of the cheques; but it is quite plain from the judgment which is given by Fry, L.J. on behalf of himself and Bowen, L.J. in *Fine Art Society v. Union Bank of London* (*ubi sup.*), that in such cases as the present the banker is guilty of at least two acts of conversion—the first when he receives the cheque, and the second when he receives payment of it. Nevertheless, it is perfectly plain that it was the intention of the Legislature to protect the banker against liability in respect of the first conversion no less than in respect of the second. Indeed, to protect the banker against the second act of conversion which arose on the receipt of the payment would be perfectly futile if the banker were left liable for converting the cheque at an earlier stage. It seems to me that the section must be so construed as to cover every act which takes place, including the receipt of the cheque in the first instance, down to the conclusion of the transaction when the payment is received by the bank, and I read the word "only" in the section, not as referring simply to payment, but as referring to payment in the cir-

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cumstances detailed in the earlier part of the section—that is, that the banker shall have received the payment of a crossed cheque in good faith and without negligence and for a customer. That is the interpretation which has been put upon the Act in the case of *Matthiessen v. London and County Bank* (*ubi sup.*) by Lord Lindley, then a judge of first instance, who says: "If you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds when you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more; if you have applied it to your own use, that is another matter; but, if you have simply collected it through the clearing house in the only way in which a banker collects cheques, and that is all you have done, the true owner shall look through you to your customer, and he and not you must be held responsible to the true owner for the proceeds." In the present case what has happened is this. It is not disputed that both of the defendant banks acted in perfect good faith; and, in both actions, the bankers acted without negligence. Jones was certainly a customer of both banks. The only question which remains is whether the defendants received payment of the cheques for Jones as their customer. The question in each action which has to be considered is exactly, as it seems to me, that which was put by Lord Blackburn in the case of *M'Lean v. Clydesdale Banking Company* (50 L. T. Rep. 457; 9 App. Cas. 95), whether the bank got the proceeds as a mere agent and nothing else, or whether they got the cheques in order that they might have the property in them transferred to them, and that they might become holders of them. That brings us to the facts in each case. In the first case, that of the London, City, and Midland Bank, the course of business was this: each cheque as received was at once credited to Jones in his account, and he was at liberty to draw in respect of it. Overdraft was permitted upon the account to the extent which the manager in his discretion saw fit. Further, Jones always indorsed the cheques, and the bank manager in his cross-examination admitted that, if he had not done so, he, that is the manager, would have required him to indorse them in order, as he said, to get the security of his name. I draw the inference that it was understood and agreed between Jones and this bank that the cheques were handed to them and received by the bank, not for collection merely, but so that the bank should acquire a property in them. So much for the case of the London, City, and Midland Bank. In the other case, the cheques were at once credited in every case to Jones in the books of the bank. There is no evidence of any special bargain in words between the manager of the bank and Jones, but it does appear from an examination of the account, that, in certain cases, on the same day on which the cheque is paid in Jones drew cheques upon the account as against those cheques which had been paid in, and to an amount which could not have been met except for the credit which he received by means of those cheques. I think that, dealing with the case generally, the same inference ought to be drawn as in the other case, that there was an agreement between the banker and the customer that the customer should have the benefit

of the credit, or should be entitled to draw, and in that way it appears to me that the case is brought within the authority of *Ex parte Richdale* (*ubi sup.*) and *Royal Bank of Scotland v. Tottenham* (*ubi sup.*). In both cases, therefore, on the ground that the bank did not confine itself to simply acting as agent to collect the cheques, but made themselves holders and holders for value of the cheques, I think that the plaintiff is entitled to succeed. I ought to say that I come to the conclusion that that applies equally to the cheques in the second action which were not indorsed by Jones; the same reasoning applies. Then, as regards the remaining classes of cheques which form the subject of the action against the London, City, and Midland Bank, there are some few remarks I desire to make. The first class consists of cheques which were drawn to order and which were uncrossed when received but were crossed by the defendant bank. It is contended that the bank, by crossing these cheques, were able to bring themselves within the protection of sect. 82. That really would be, if the contention were well founded, to hold that a banker who receives an uncrossed cheque may protect himself against liability to the true owner by crossing it. I do not think that is the meaning of the Act, and it is inconsistent with what seems to me to be the true object of sect. 82, namely, to protect bankers in collecting for their customers cheques which from their nature could only be received by a bank. It will be observed that sect. 77 (6) does not afford any protection to the banker in this respect because it enacts that, "where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself." When he acts simply for the purpose of collecting the cheque, he is at liberty to cross it specially to himself; but in this case he took the cheques for the purpose of becoming the holder for value. Then, passing by class 2, namely, cheques payable to bearer, as to which no question arises, we come to class 3, which were cheques drawn by the manager of a branch of the defendant bank on the defendant bank, and which were uncrossed. The objection here is that these documents were not really cheques and that they were not within the definition in sect. 3 (1). Sect. 3 (1) defines a bill of exchange as being an order in writing addressed by one person to another, and here in reality these documents are orders addressed by the manager of one branch of a bank to the bank itself. It seems to me that they are not really bills within the meaning of this Act, and that sect. 26 (1) does not assist the bank. Sect. 5 (2) was also relied upon, which says that: "Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note." But the difficulty here is this, that, as against the plaintiff, the bankers were not holders, because the indorsement was a forgery, and therefore gave no title. I agree therefore that, as regards this class, the banker is not protected. As regards the Revenue Act of 1883, it appears to me that it only applies to documents which are issued by a customer. This was not issued by a customer of the bank, but was issued by the bank to their

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customer, and consequently this defence also does not avail the bank. Then, as regards class 4, that consists of crossed cheques drawn on the defendant bank itself. These were drawn by customers of the defendant bank, they were crossed specially to the defendant bank, and the defendant bank dealt with the cheques by debiting one customer—that is to say, the drawer of the cheques—in its books, with the amount, and crediting another customer, who was ostensibly the holder of the cheque. It was contended on behalf of the bank that, if sect. 82 does not apply, sect. 60 does. Sect. 60 applies where a bill payable to order on demand is drawn on a banker and a banker pays it in good faith, and in the ordinary course of business. Sect. 73 provides that “A cheque is a bill of exchange drawn on a banker payable on demand,” and a cheque therefore falls in terms within sect. 60. Then sect. 79 proceeds: “Except as otherwise provided in this part”—that is, Part 3 of the Act—“the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque;” and, therefore, unless there is found in Part 3 some provision to the contrary, sect. 60 applies. In answer to that, it is said that sects. 79 and 80 provide to the contrary of sect. 60; but it seems to me that, on looking at both these sections, they are sections which are directed to the case where the cheque is drawn on one banker and has been crossed to another banker for collection. If that be so, there is no provision in Part 3 of the Act which takes the case out of sect. 60. In fact, that point seems to me to stand thus: that either sects. 79 and 80 give the required protection to a banker, or, if these sections are inapplicable, then there is nothing to take away the general protection of sect. 60. I have already pointed out the mode in which these cheques were dealt with by the bank, and in the case of *Bissell v. Fox* (*ubi sup.*) it was held by the Court of Appeal that the carrying of the amount of the cheque to the credit of the customer in the way it was done here was a good payment within sect. 60. In these circumstances, I think that the defendant bank was entitled to the benefit of sect. 60. With regard to class 5—that is, crossed cheques which were marked “not negotiable”—the defendant bank certainly cannot be in a better position with regard to them than with regard to class 6. As to class 8, which are all crossed cheques with a form of receipt attached, these seem to me to be really not cheques. But the protection which is given by sect. 17 of the Revenue Act 1883 is again claimed for them, and it seems to me that it fails for the same reason that it failed in respect of class 3. I think, therefore, that in both these cases the appeal should be allowed.

MATHEW, L.J.—In the first case the question was raised and debated at very great length, whether or not the verdict was against the weight of evidence. It is clear that everybody understood at the trial that the bank had not been guilty of negligence in cashing the cheques, but at the request of the jury the learned judge permitted a rider to be added. As a general rule, riders are not permitted to be added, but I do not presume for one moment to complain of the discretion that was exercised in this case. The rider may be added with impunity so long as it is clearly understood that it shall not be permitted

to qualify any answer to a clear question put by the court. This rider, treated in that way, amounts to nothing. It was not a very wise or prudent comment on the part of the jury on the way in which bankers carried on their business. Bankers might very well say that they understand their own business. Then, as to the large number of cheques described as class 6 in the first action, and cheques of the same character in the second action, it could not be disputed, and was not disputed, that, if it were not for sect. 82, whether the cheque was given for collection or not, the bankers would not be protected. That was the result of authorities which, it is said, led to this legislation. If these cheques had been handed into the banks and the banks had taken them upon the understanding that the customer was not to be credited until the cheques were cleared, apart from sect. 82 the banks which cleared the cheques and appropriated the money to the customer would not be protected. Now, it is said that in order to prevent that happening to bankers in that position sect. 82 was passed. Before we consider what its operation is, it is desirable to refer shortly to the evidence with regard to Jones' account. Jones was a man in a small way of business, and had been dealing with the banks for some time. Apart from the cheques which he had stolen, his account would not have been worth keeping, but with the help of his larcenous conduct the account was kept in fair credit. The manager of the bank was examined closely as to what he knew of Jones. Now, the manager was in a difficult position. He knew very well the importance of making out that these cheques were given for collection only, and accordingly he fought the learned counsel and would make no concession on that point, but in the end he had to admit that the indorsement of Jones was taken in every case, and taken for the purpose of securing the bank. There is a course of dealing established in reference to this account. In every instance the manager of the bank required the indorsement of the customer before the cheques were dealt with in any way. As we know and have been told, in banks in the City and in Scotch banks it is not usual to credit the account of a customer until the cheque has been cleared, and we have all seen over and over again a statement on the face of a cheque to the effect “not cleared,” which meant that payment had not been made of the cheque. In this particular case a different course of business was adopted, and one can well understand why it should be extremely desirable for the banks, on the one hand, who desire small accounts in different parts of the country, and for small traders on the other hand, that they should have cash for a cheque when it arrives, and that there should be no interval for clearing. Accordingly, in accordance with what appeared to be a perfectly reasonable and business-like course, it seems that with reference to these cheques, and generally with reference to country cheques, the course is to credit the customer at once with the amount of the cheque and then proceed to clear it. As we know, difficulties do not often arise. It is fatal to credit if there is any difficulty about a man's cheque, and therefore it goes through perfectly well. That course being taken, what was the position of the bank? They gave cash for the cheque, and handed the money to the customer on

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the terms that he paid it back into his account, and it remained there to be drawn on, and upon condition that, if the particular cheque was not met, he should be debited at once with the amount. That was the arrangement between them. Can any reasonable person doubt that the bank placed itself in the position, and wisely and reasonably placed itself in the position, in the event of a dishonoured cheque, to exercise all the rights of a *bonâ fide* holder for value, and, if necessary, as they would have lost credit by insolvency on the part of the customer, to sue the other party to the cheque. In the case of *Royal Bank of Scotland v. Tottenham (ubi sup.)*, which has been referred to, the course of business pursued was this. In that particular case the bank debited the customer on the dishonouring of the cheque with the amount of the cheque, and it was held at the same time to be entitled as holder of the cheque, having taken it in the same circumstances as those of the present case, to sue the other party. It is said, whatever the course of business may be, that sect. 82 protects the bank in this case. We must turn to the language of the section. What is its history? It deals with crossed cheques, and crossed cheques only, and does not profess to protect the banker in respect of any other transactions than those of crossed cheques. The legislation followed upon the new course of business, apparently, of crossed cheques; crossing is an intimation to the person who receives the cheque that it must be paid through a banker, so that in the case of anything going wrong it might be easily traced. That really put on bankers the obligation of helping their customers to present those cheques, and the Legislature enacted that, where crossed cheques were given to bankers for the purpose of collecting, and they collected them in the ordinary course of business and accounted for the proceeds to their customer, the banker who collected a cheque, acting as the agent for the customer to present it, should not be personally liable. Now, let us look at the language of the Act: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." To my mind that clearly deals with the case of a banker employed to collect cheques. In London cases and in Scotch cases there can be no question that the cheque was handed for that purpose and that purpose only, and, where the usual course is taken with reference to cheques, to every step auxiliary to the presentation or payment of the cheque this section applies. So that if the customer hands the cheque to the banker and is told, and he would in many places be told, that he shall have credit for it when the cheque is cleared, and the banker takes the ordinary steps for clearing the cheque and passes the cheque in the ordinary way of business to secure the presentation and payment, then every step of that sort appears to me to be protected by the section. That implies the existence of a customer, and the existence of an account, and payment to the customer in the ordinary course of business—namely, by crediting the customer with the amount of the cheque. The statute goes not

a hair's breadth beyond that; it is confined to crossed cheques, and to crossed cheques only, payment of which is received in the ordinary course of business and accounted for to the customer in the ordinary course of business. Was this section intended to apply to this case? The bank, in this case, had the right to sue the other party to the cheque; the bank, although it is a remote suggestion, would have the right to transfer the cheque, and a right to pledge it by way of security for any account of their own. How can it be said, in those circumstances, that the liability is to be established only from the fact of payment? The language of the section needs most particular attention, and the word "only" has not been got rid of. "The banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." According to the argument, the meaning of the section is that a crossed cheque might be dealt with by a banker in most cases with perfect impunity, in any way he liked, whether he acquired a title by indorsement or in any other way had become the holder of it, and demand payment. Once he got payment of that cheque it was said the section was intended to protect him. I cannot come to any such conclusion. As a matter of fact I am satisfied from the evidence that the course of business of the bank was to secure to themselves the position of indorsees for value, and *bonâ fide* holders of the cheque. That being so, they are not within the protection of sect. 82. I do not propose to go through the cases in detail that have been examined by the Master of the Rolls, nor to deal with the subsidiary points, on which I have nothing to add. We are all agreed with reference to these questions, and have discussed them with some anxiety, because they are numerous and puzzling. Every conundrum possible seems to have been presented with reference to these cheques by both parties. In the result, therefore, I decide these points in favour of the plaintiff, and the judgments of the learned judge must, therefore, be reversed.

Appeals allowed.

Solicitors for the appellant, *Pepper, Tangye, and Co.*, for *Pepper, Tangye, and Winterton*, Birmingham.

Solicitors for the London, City, and Midland Bank, *Keen, Rogers, and Co.*

Solicitors for the Capital and Counties Bank, *Cameron, Kemm, and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Dec. 12, 13, 14, 16, 17, 18, 19, 20, 1901, and Jan. 21, 1902.

(Before KEKEWICH, J.)

WRIGHT v. CARTER. (a)

Solicitor and client—Gift—Bargain—Deeds—Validity—Competent and independent advice.

On the 15th May 1900 the plaintiff W. executed two deeds, by the first of which some real estate and other property was settled upon trust for W. for life, and after his death as to part, in

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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trust for his son and daughter, and as to one-tenth of the ultimate residue upon trust for the defendant C. his solicitor. By the second deed certain furniture and chattels were vested in trustees for sale, and out of the proceeds thereof the defendant C. was to receive 500*l*. The deeds were prepared in the office of the defendant C. but were submitted by the plaintiff to A., an independent solicitor.

Held, that the plaintiff under the circumstances did not have the competent and independent advice required, and the deeds were voidable.

On the 14th March 1901 the plaintiff executed a further deed supplemental to the first deed of the 15th May 1900, whereby the trusts of the former deed were in effect revoked, and the plaintiff assigned the whole of his property of every description present and future to his son and the defendant C. upon trust for his son and daughter and the defendant C. in equal shares in consideration of a covenant by them to pay the plaintiff an annuity of 500*l*. a year to be increased to 800*l*. in certain events. This deed was prepared by the defendant Tarbet, an independent solicitor.

On the 13th July 1901, the plaintiff executed a further deed supplemental to the second deed of the 15th May 1900, whereby a portion of the furniture was to be purchased by the plaintiff's daughter at a valuation, and the residue was to be sold and the proceeds applied first in paying 200*l*. to the plaintiff in lieu of his life interest in the furniture under the former deed, and 425*l*. to the defendant C., and the residue to be divided equally between the son and the daughter of the plaintiff. This deed was prepared by independent solicitors, Tarbet acting on behalf of the plaintiff.

Held, that the new scheme carried out by the deeds of 1901 was one of purchase and sale, and the plaintiff having deliberately, with competent and independent advice, executed the deeds for valuable consideration, could not now set them aside.

ACTION by the plaintiff Colonel Charles Ichabod Wright claiming that four deeds should be delivered up and cancelled, that all property passing under the deeds should be reconveyed, and an injunction against any other dealings with such property; also a receiver and damages for fraud and fraudulent conspiracy.

Up to 1898, the plaintiff was carrying on the business of a banker in partnership with others at Nottingham under an agreement dated the 27th May 1898. The firm sold the business to the Capital and Counties Bank for 110,000*l*., but it was agreed that the purchasers might reject any of the assets which were included in the sale, in the event of their not considering them to be of the value at which they stood in the books of the firm. The assets so rejected were to be realised, and the amount by which on realisation, they fell short of the value at which they stood in the books of the firm were to be deducted from the purchase money, and if the deficit should exceed the purchase money the partners covenanted to make good the balance. The purchasers rejected assets to the value of 350,000*l*. The plaintiff had also considerable real and personal estate, but this was subject to considerable charges under settlements in favour of his children.

In 1897 the plaintiff consulted the defendant Francis John Carter, a solicitor at Torquay, on some business, and between 1899 and Aug. 1901 Carter acted as the plaintiff's solicitor in all his affairs, and in particular in realising the assets which the Capital and Counties Bank had rejected.

On the 15th May 1900 the plaintiff executed two indentures; both deeds were made between the plaintiff of the one part and the defendants Carter and Nevill Wright (a son of the plaintiff) of the other part.

By the first indenture the plaintiff conveyed to Carter and Nevill Wright all the freehold hereditaments of which he was possessed, subject to incumbrances, upon trust for the plaintiff for life, and after his death for sale and conversion and investment of the proceeds, and he also assigned to them the benefit of the agreement of the 27th May 1898 and all his share in the rejected assets, and in all moneys payable to him under the agreement, upon trust to get in and convert the same and invest the proceeds, and pay the income thereof to the plaintiff for life, and after the death of the plaintiff to pay certain sums due from him under the settlements above-mentioned, and subject thereto, upon trust as to nine-twentieths for the defendant Nevill Wright, as to nine-twentieths for the defendant Blanche Theodosia Wright, and as to two twentieths for the defendant Carter.

By the second indenture of the 15th May 1900 the plaintiff assigned all the furniture and chattels in and about the two houses belonging to him, upon trust to allow the plaintiff to enjoy the same during his life, and after his death for sale, and out of the proceeds to pay 500*l*. to Carter, and to divide the residue equally between the defendants Nevill Wright and Blanche Theodosia Wright.

The drafts of the indentures were drawn in the defendant Carter's office, and were handed to the plaintiff in order that he might get independent advice.

The plaintiff took the deeds to the defendant Almy at Torquay, and under his advice executed them.

Almy had no knowledge of the plaintiff's relations with Carter nor of the bank affairs.

In Feb. 1901 the Capital and Counties Bank commenced proceedings against the plaintiff, and the trustees of one of the children's settlements also commenced proceedings, claiming 10,000*l*. under a covenant.

The plaintiff then at the suggestion of Carter on the 13th March 1901 executed another document; this was prepared by another solicitor, the defendant Tarbet.

Carter made some alterations in this deed and returned it to Tarbet, and the deed was re-engrossed and re-executed on the 14th March 1901.

The deed was made between the plaintiff of the first part, the defendants Nevill Wright and Carter of the second part, and the defendants B. T. Wright, Nevill Wright, and Carter (thereinafter called the reversioners) of the third part, and was expressed to be supplemental to the first deed of the 15th May 1900.

It was thereby witnessed that in consideration of the joint and several covenants of the reversioners, thereafter contained, the trustees

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should stand possessed of the trust premises comprised in the principal indenture freed and discharged from the trusts in favour of the plaintiff, and the reversioners declared by the principal indenture, upon trusts for the three reversioners in equal shares, and by the said indenture the plaintiff assigned to the defendants, Nevill Wright and Carter, first, all real and leasehold hereditaments not comprised in the principal indenture to which he was beneficially entitled; secondly, all moneys owing upon the security of certain mortgages; thirdly, all the real and leasehold hereditaments comprised in such mortgages; and fourthly, all personal effects which he might then be, or might thereafter become entitled to or acquire, upon the trusts declared by the principal indenture, and the now stating indenture, and the indenture contained a covenant by the reversioners to pay the plaintiff during his life an annuity of 500*l.*, to be increased to 800*l.* in certain events.

On the 13th July 1901 the plaintiff executed a further document expressed to be supplemental to the second deed of the 15th May 1900, under which a portion of the furniture was to be purchased by the defendant Blanche T. Wright at a valuation, and the residue was to be sold forthwith and the proceeds applied, first, in paying 200*l.* to the plaintiff instead of his life interest in the furniture under the former deed, and 425*l.* to Carter, the balance to be divided equally between Nevill Wright and Blanche Theodosia Wright. This deed was prepared by independent solicitors, and perused and approved by the defendant Tarbet on behalf of the plaintiff.

During the trial the plaintiff abandoned the plea of fraud and conspiracy and the question of law was argued as to whether the deeds were binding on the plaintiff or not. The defendant Nevill Wright by his pleadings consented to account for all that he had received, and to submit to the cancellation of the deeds. As trustee he submitted to act as the court might direct.

Warrington, K.C., *Marshall Hall*, K.C., and *A. à-Beckett Terrell* for the plaintiff.—The propositions of law in this case are two: (1) A gift to a solicitor by a client for whom he is acting is absolutely void, and it makes no difference whether the client had independent advice or not. (2) If the deeds are held void as regards the solicitor, they are further not binding as regards the son and the daughter. The confidential relationship between the solicitor and client must be severed:

Morgan v. Minett, 36 L. T. Rep. 948; 6 Ch. Div. 648.

The influence after the relationship of solicitor and client has ceased still continues:

Holman v. Loynes, 4 De G. M. & G. 270, 279.

It is said that the deeds may be good as regards the daughter and son though void as regards the solicitor. We submit that the whole transaction is invalid:

Huguenin v. Baseley, 14 Ves. 273;

Bainbridge v. Browne, 44 L. T. Rep. 705; 18 Ch. Div. 188;

Barron v. Willis, 82 L. T. Rep. 729; (1900) 2 Ch. 121.

Sir *Edward Clarke*, K.C., *Warrington*, K.C., *P. O. Lawrence*, K.C., and *Christopher James* for the defendant Francis John Carter.—Up to May

1900 the defendant was still acting as the solicitor of the plaintiff, but afterwards in collecting assets and special matters only. It is for the court to decide whether the case comes within the rule. Mr. Warrington said that during the continuance of the relationship the gift to the solicitor would be void, and quoted *Morgan v. Minett* (*ubi sup.*). But there there was no independent advice. Here Almy had no relationship with Carter, and his advice was quite independent. In the case of a purchase a solicitor need not have independent advice. There is no case where a gift by a client to a solicitor has been set aside, where the gift has been made with competent and independent advice. Assuming that the deeds of May 1900 are void or voidable, the deeds of 1901 are valid, being a bargain and sale for valuable consideration, and there at all events the plaintiff had independent advice:

Walker v. Smith, 29 Beav. 394;

Re Holmes' Estate; *Bevan's case*, 3 Giff. 337;

Rhodes v. Bate, 13 L. T. Rep. 778; L. Rep. 1 Ch. App. 252.

As to parent and child:

Wright v. Vanderplank, 8 De G. M. & G. 133, 146.

As to physician and patient:

Mitchell v. Homfray, 45 L. T. Rep. 694; 8 Q. B. Div. 587.

As to religious influence:

Allcard v. Skinner, 57 L. T. Rep. 61; 36 Ch. Div. 145.

In all the cases all that is required is competent and independent advice:

Liles v. Terry, 73 L. T. Rep. 428; (1895) 2 Q. B. 679.

Carter has taken just the steps suggested by the court:

Powell v. Powell, 82 L. T. Rep. 84; (1900) 1 Ch. 243.

Rufus Isaacs, K.C., Hon. *Frank Russell*, and *F. Bodilly* for the defendant Blanche Theodosia Wright.—Assuming the deeds to be good, we adopt Mr. Warrington's argument, but assuming that they are not binding in the case of Carter, still they are good as regards Miss Wright:

Huguenin v. Baseley, 14 Ves. 273;

Bainbridge v. Browne, 44 L. T. Rep. 705; 18 Ch. Div. 188, 197;

Hoblyn v. Hoblyn, 60 L. T. Rep. 499; 41 Ch. Div. 200.

As to the deeds of 1901, they constituted a bargain between Miss Wright and her father and cannot be upset.

Duke, K.C. and *Coldridge* for W. H. Tarbet.

Renshaw, K.C., and *E. Beaumont* for P. H. Almy.

Badcock, K.C. and *G. N. Marcy* for Nevill Wright.

Warrington, K.C. in reply.—The defendant Carter's influence continued after he had ceased to act as solicitor to the plaintiff. Almy did not know the details of the bank business:

Montesquieu v. Sandy, 18 Ves. 301;

Wood v. Downes, 18 Ves. 120, 126.

If the deeds of 1900 are gone, the deeds of 1901 cannot stand.

Cur. adv. vult.

KEKEWICH, J. delivered the following written judgment:—Before attempting to determine, or even to formulate, any of the questions falling for decision, or to investigate the facts which give rise to them, it is necessary to ascertain the rule applicable to a case, by no means of infrequent occurrence, where a client seeks to set aside a gift made by him to his solicitor. After reflection on the numerous authorities cited in argument and the comments of counsel thereon, I am satisfied that the accepted rule of the court is as stated by Turner, L.J. in *Rhodes v. Bate* (13 L. T. Rep. 778; 1 Ch. 252), and that, notwithstanding large differences in the language employed by different judges in other cases, there has been no intention to depart and really no departure from that statement. This is what Turner, L.J., says at p. 257: "I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." The Lord Justice there speaks of persons standing in a confidential relation generally, but he intended to embrace solicitors in that description, and what he says has always been so understood. There are many cases to show that other relations, and especially that of parent and child, stand on the same footing as that of solicitor and client, but to the latter there is applied more strongly than to any other the principle stated by Kay, L.J. in *Liles v. Terry* (73 L. T. Rep. 428; (1895) 2 Q. B. 679)—that while the confidential relation exists it is impossible to rebut the presumption of undue influence unless the donor had competent and independent advice. This presumption of influence is the key to all the declarations on the subject. A good example may be taken from the judgment of Turner, L.J. in *Holman v. Loynes* (4 De G. M. & G. 270), where he says at p. 283: "Gifts from clients to their attorneys can be maintained only when not only the relation has ceased, but the influence may rationally be supposed to have ceased also." It would be embarrassing and useless to refer to the titles and language of the numerous authorities, especially as none of them lay down any rule by which one can determine whether the client has had the competent and independent advice which is required to preclude the presumed influence, and there is no case in which a gift from a client to a solicitor has been upheld on the ground that competent and independent advice was given. There are many passages in many judgments which seem to say that the relation of solicitor and client must be dissolved or shown not to subsist before a good gift can be made, but they are observations of judges who also recognise the possibility of competent and independent advice maintaining the gift, and I think that all the judgments must be read as intended to be consistent with *Rhodes v. Bate*. *Morgan v. Minetti* 36 L. T. Rep. 948; 6 Ch. Div. 638 is no exception. No doubt Bacon, V.C. did there lay down the unqualified rule that while the relation of solicitor and client subsists the solicitor cannot take a gift from his client, but it is to be observed that in that case it was not argued that independent advice had been given, and the Vice-

Chancellor's judgment must be read as assuming that the qualification being out of question it need not be mentioned. It is impossible that he can have intended in the slightest degree to differ from *Rhodes v. Bate*, which was more than once cited in argument. Taking, then, the rule to be what was laid down in that case, I have to consider whether in making the gift made by the deeds of May 1900 the plaintiff had such competent and independent legal advice as prevents him from now saying that the gift ought to be avoided by reason of the presumed influence of the defendant Carter, who undoubtedly was then his solicitor. This question was put in the forefront by counsel on either side and must be discussed by me before all others, because until that has been done those others cannot be even understood. In order to do that I must first consider what were the relative positions of the plaintiff and the defendant Carter, next what was done to protect the plaintiff, and then I must determine whether what was done was sufficient. I am not sure that I could satisfactorily define what is sufficient, competent, independent legal advice so as to lay down a general rule, and then apply it to the particular case, and I must content myself with considering the facts of this case, and must leave the general rule to be settled hereafter. The relative positions of the plaintiff and the defendant Carter at the commencement of 1900 are abundantly clear. The plaintiff had some years before consulted the defendant on a peculiarly delicate matter of business, and from that time forward the connection steadily grew, with the result that the defendant became the confidential solicitor of the plaintiff and was employed by him in all matters requiring legal advice, and the defendant's brother and partner, who had before, though apparently not to the same extent, enjoyed the plaintiff's confidence, was set aside. The plaintiff had urgent need for legal advice, and it was asked for and given without stint. Add to this the undoubted fact that the plaintiff's affairs were in a perilous condition, and that the problem how he could be righted or saved from overwhelming disaster was, to say the least, extremely difficult, and further, that for many arduous services the defendant had received no remuneration, and we at once see that the relations were as close as could possibly be conceived. It was under these circumstances that the plaintiff was moved and, I think it may fairly be said, advised to make a settlement of a considerable portion of his property. It was not his intention to denude himself of all beneficial ownership, for part of the scheme was the creation by the settlement of a life interest in himself, but the main object was to provide for those for whom he was morally bound to do the best and to protect the settled property for their benefit from the claims of strangers. The plaintiff wished to take advantage of the opportunity of giving something to the defendant Carter. It was necessarily a gift, but, on the other hand, it was intended to be the fulfilment of an obligation imposed by the reflection that that gentleman had done much and received nothing. The scheme was effected by two deeds, by the first of which some real estate and other property, which need not be here specified, were vested in trustees and the plaintiff proposed to give the defendant Carter one-tenth of the ultimate residue thereof after making the

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provisions above indicated. Probably he thought that it would amount to a substantial sum, and probably the defendant Carter also hoped that it would do so, though, knowing what he did, he is not likely to have taken a sanguine view. By the second deed certain furniture and chattels were vested in trustees for sale, and out of the proceeds thereof the defendant Carter was to receive 500*l*. The furniture and chattels were known to be of considerable value, and, inasmuch as the 500*l*. was to be first paid and only the residue was settled, I take it that this sum was deemed to be well secured. It is, however, unnecessary to consider, and I have no materials to enable me to consider, what either of them thought might or would be the maximum or minimum amount realised. Haply a nice sense of honour might have told the defendant Carter peremptorily to reject the proffered gift, or a completely-balanced judgment might have warned him to see mischief, and little else but mischief, emanating from it. But these are counsels of perfection into which I need not further enter. Far more important than all this is the observation that the gift was not in anywise suggested by the defendant and that it at once occurred to him that if it was to go forward the plaintiff must be protected against himself, and for that purpose must have independent advice in the matter. We have next to examine what was done. I must accept the defendant's statement, confirmed by the plaintiff himself, that when asked by the plaintiff to whom he should go for independent advice he named several firms, including that of Eastley and Eastley—admitted to be one of repute in Torquay and the neighbourhood. It seems that their chief office is at Paignton and that the business of their Torquay office is conducted by their clerk, the defendant Almy, himself a solicitor, with but occasional supervision. It is possible, and I think likely, that the defendant Carter, who must have known this, mentioned it to the plaintiff and that so the name of Almy came forward, but I think that the true result of the evidence is that the defendant mentioned the firm of Eastley and Eastley, and Almy, if at all, as their clerk, transacting their Torquay business. The plaintiff determined to adopt this recommendation, and he sought the advice of the defendant Almy as the representative of the firm, but it occurred to him to suggest that the drafts should be prepared by the defendant, or in the defendant's office. This was natural enough, because the provision for the defendant Carter, respecting which alone he required independent advice, formed only a part of the whole scheme, and therefore it was convenient that the preparation of the settlement embodying that scheme should not be left to the defendant Almy, who up to that time was wholly unacquainted with the plaintiff and his affairs, but should be intrusted to the defendant, who had the requisite knowledge and also the materials available. The defendant Carter saw no objection to this deed being prepared in his office, and fell in thus far with the suggestion. It was an error of judgment, but not one for which he can be reasonably blamed, as the reasons in favour of it were, as already pointed out, obvious and urgent. The drafts were accordingly prepared in the defendant's office, though not by him or under his supervision, and were settled by counsel, whose instructions came from the defendant's

office, but not from him personally. It was the drafts so settled that the plaintiff took to the defendant Almy. He also took to him, sooner or later, some papers (selected, I suppose, by the defendant Carter) deemed sufficient, and, subject to one remark, probably sufficient to enable the defendant Almy to understand the condition of affairs, and what was proposed to be done. The defendant Almy seems to have given his best attention to the matter, and, after explaining it to the plaintiff and consulting with one of the partners, he came to the conclusion that the plaintiff might safely be advised to execute the deeds. The plaintiff himself seems to have studied the drafts, and to have entertained and expressed a strong desire that they should be executed in the form in which counsel had settled them. This was accordingly done. The defendant Almy acted throughout independently of the defendant Carter. He treated himself as responsible to the plaintiff alone, and in the usual course he charged the costs to the plaintiff, who paid them. That the firm was competent, and that the defendant Almy was also competent, to advise the plaintiff is not in question, and that the plaintiff was honestly advised in the matter is equally clear. The more difficult question is whether the plaintiff can be said in truth and in law to have received the competent and independent advice without which the gift to his solicitor could not stand good. There was, I think, no occasion to explain to the plaintiff that what he proposed to do was a gift. Of that I think he was perfectly aware. He conceived himself to be discharging a moral obligation, but he also knew that he was doing it by means of a gift. But he came to the defendant Almy pledged to make the gift. He had not only stated his intention to the defendant Carter, but he had had the documents prepared in that defendant's office, and he brought the whole thing to the defendant Almy cut and dried. Of course, he might have declined to go forward with it, but it would have been difficult for any man at that stage to have turned back, and I am satisfied from what I have seen of the plaintiff in the witness-box that he would not have considered it consistent with his duty so to do. I have above said that the papers handed by the plaintiff to Almy were, subject to one remark, sufficient to enable the latter to understand the position of affairs. The one remark is, to my mind, of vast importance. The papers included a list of what are known in this case as the rejected assets, which were included in the first deed; but there is nothing to indicate that the defendant Almy knew or had the means of ascertaining, or even of estimating, the value of those rejected assets, or the extent of the burden cast upon the plaintiff by the agreement with the Capital and Counties Bank, which made him responsible for them. For aught the defendant Almy knew, or could have known, the plaintiff was a man of wealth, pressed, perhaps, for the moment by the lock up of some securities, but ultimately sure to be in the position which one naturally ascribes to a member of an old-established banking firm. For aught the defendant Almy knew, or could have known, the plaintiff was capable of making the provision for his children which he desired to make, and leaving a margin sufficient to justify generosity to others, including his solicitor. Again, there is no evi-

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dence that the defendant Almy knew or had the means of knowing the approximate value of the furniture, or what was likely to be realised thereby. As already stated, I am not prepared to lay down any general rule which will assist others to determine in other cases what is sufficient competent and independent advice to uphold a gift by a client to a solicitor; but I am satisfied not so much that the advice was not given in this instance as that the circumstances precluded the possibility of its being given. In considering the further questions, I must assume that if nothing more had happened the deeds of May 1900 must have been set aside on the ground that they conferred a benefit on the defendant Carter, and that the plaintiff, his client, had not sufficient competent and independent advice in the matter. I must assume, also, that the deeds fail altogether, and that the provisions for others which in no wise depended on the gift to the defendant Carter must fail with it. I am expressing no opinion that this would be the proper result, still less am I indicating by what argument or authority such an opinion could be supported: but, in order properly to understand what followed and to appreciate what was done by the plaintiff and others, I must assume that there was at least a good deal to be said in favour of the plaintiff's right to set aside the deeds of May 1900, wholly and not partially; and I think it will conduce to a better treatment of the next stage of the case to assume that that view would have prevailed. In order better to consider what took place in March 1901 it is well to reflect on the relative positions of the parties then subsisting, and how they had been affected by what had occurred in the interval between that date and May 1900. The defendant Carter was still the confidential solicitor and friend of the plaintiff. I see no reason for thinking that the confidence had in the slightest degree been impaired, and what had occurred must naturally have tended in an opposite direction. But the plot had thickened. There had been actions and talk of actions, some, perhaps, friendly, but all pointing to the conclusion that the plaintiff's embarrassments were great, and that time and skill were urgently required to save anything substantial out of the wreck which the impending storm was sure to consummate. The plaintiff's health had occasionally given way, he was worried beyond measure, there were actual and fancied disagreements with his former partners, there were indications of family differences, and altogether the prospect was an alarming one. The plaintiff knew that he could no longer continue to live where he had lived as a country gentleman; his income was reduced and threatened to disappear; and he had reached that period of life when even a thoroughly successful man begins to long for peace as the only one desirable thing. I dwell on this because without it I deem it impossible to understand the position, and also because it accentuates the self-abandonment which characterises the plaintiff's actions. One thing must be noticed before we proceed to what actually took place. It was proposed to substitute a new scheme for that of May 1900. About the other details of that scheme I will say nothing at present, but it was proposed that a certain income should be assured to the plaintiff by a covenant, and that the defendant Carter should

be one of the covenantors. There is no occasion to enter into a nice disquisition on the difference between a gift by a client to a solicitor and a purchase by a solicitor from the client, or to expatiate on the precaution necessary to uphold the latter as distinguished from the former. Suffice it to say that in the case of a purchase it is essential that the solicitor and client should be put at arm's length, but that if that condition is fulfilled there is no reason why the transaction should not stand. I will not pause to enunciate or apply any rule by which it can be determined whether the relation of solicitor and client once constituted still subsists, because it is clear from what I have said and is abundantly proved that the defendant Carter was the solicitor of the plaintiff in March 1901, and that notwithstanding his duties were then and thenceforward of a limited character and extent he continued to be his solicitor until immediately before writ issued. That the transaction effected by the deed of the 14th March 1901 was one of purchase is not open to doubt. It did not, on the face of it, wholly abrogate the first deed of May 1900, for under that interests were limited to certain persons who were not parties to the deed of the 14th March 1901, and whose interests, therefore, could not be affected by it; but apart from this difficulty, which was not overlooked but was probably treated as insuperable, it purported to be the substitution of an entirely new scheme and to secure to the plaintiff a certain income of 500*l.* a year, and contingently more in consideration of the surrender by the plaintiff of the life interest reserved by the principal deed and a conveyance of all he possessed and all that he might by any means or at any time become possessed other than the furniture and chattels the subject of the second deed of May 1900. The covenant may or may not have been a thoroughly sound security for the annuity and the consideration for it may or may not have been excessive or incommensurate; but the scheme is not attacked on any such ground, and this short, but for the present purpose sufficient, statement of it shows it to have been one of purchase and sale. The history of its preparation has given rise to suggestions and evidence in which are embodied the most painful passages of this unhappy litigation. To avoid prolixity I will not pause to consider how the plaintiff first became acquainted with the defendant Tarbet, or why the preparation of this deed was intrusted to him by the plaintiff. Having at the conclusion of the trial completely acquitted that defendant of all charges of fraud, for which there was not the slightest foundation, I think it but fair to him here to add that if any other charge had been made against him as a solicitor—and none was in the pleadings—it would have equally failed. He appears to me to have discharged a difficult duty with complete independence, integrity, and intelligence. The case made against the deed of the 14th March 1901, standing by itself, was that the plaintiff was induced to believe, and did believe, it to be merely another copy of the deed which he had executed on the previous day, whereas it in fact essentially differed from it in comprising other actual property, and also any to which the plaintiff might thereafter become entitled, and that this was done because otherwise it would not have been sufficient to satisfy the defendant Carter's

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determination to become possessed of all the plaintiff possessed or might possess. This attack on the deed depends entirely on the plaintiff's evidence, which is in direct conflict with that of the defendant Tarbet, and although there is some other evidence bearing on the point, I propose to disregard it to the extent of not specifically referring to it here. That the deed of the 14th March essentially differed from the document executed on the preceding day, and in the particulars mentioned, and that this difference was the result of the defendant Carter's intervention, is common ground, and that the alterations were made with the assistance of the counsel who settled the original draft, and in order to express what the defendant Carter intended to be and the defendant Tarbet assented to as the purport of the deed, is established; but the question remains whether the plaintiff was properly advised, or to put it more strongly and more correctly, whether he was induced to execute the deed as it stands by a mistaken belief that it did not differ from, and in truth was the same as, the document of the 13th of March. The plaintiff was in the witness-box many hours, and was, of course, subjected to long and severe cross-examination. He came here with the conviction that his confidence in the defendant Carter had been grossly abused, that he had been unfairly treated by others, and this conviction he did not hesitate to express. That this conviction was erroneous detracts from the weight of his evidence, but does not induce me to think that he was otherwise than a witness of truth. In my judgment, the plaintiff gave his evidence as a gentleman and a man of honour unable to shake off prejudices which obscured his view of facts, but sincerely anxious to state the facts as he believed them to exist. But his memory cannot be trusted. For the purpose of investigating and sifting facts it is useless, and may without exaggeration be said to be gone. He himself practically admitted this more than once. He was in the habit of keeping a diary, and he kept it with more pains and constancy than are usually exhibited by a non-professional man, but that has, not unnaturally, weakened his memory. That which is recorded in his diary is true as a matter of faith, but of knowledge there is none. This is no harsh judgment. The struggle, the disappointment, and the physical ills to which he has been subjected have all induced to make him older in this respect than he is in years of life, and I venture to say that no one who watched him in the witness-box as closely as it was my painful duty to do, could fail to appreciate the result or the cause. On the other hand, I have in the defendant Tarbet, an intelligent solicitor, devoting his best faculties and powers to the business in hand, necessarily impressed with the importance of details in a transaction of no common character, and with notes sufficient to refresh his memory in the proper sense, that is, to bring back to his mind and to enable him to state with confidence what actually took place. He tells me in short that the deed was fully explained to the plaintiff, and that the statement about its merely being a copy of the other document is imaginary. I believe him. It matters not whether the deed was read over, or even whether the particular passages which constituted the difference from the other document, were read, nor can I attach

much importance to the haste (for haste there was) in the completion. I am satisfied that the plaintiff knew what the deed purported to be, and what he was doing in executing it, and that he did this, if hurriedly, deliberately. It follows that the deed of the 14th March 1901 cannot be set aside on any ground peculiar to itself and that if it can be set aside at all it must be by reason of its connection with and dependence on the first deed of May 1900. A few words must be said about the deed of the 13th July 1901. The pleaded account of its preparation is altogether erroneous. It was prepared neither directly nor indirectly by the defendant Carter or the defendant Tarbet, but by independent solicitors, who did not act or purport to act for the plaintiff, and his interests were guarded with proper jealousy by the defendant Tarbet, who acted for him and for him alone. About the reduction of the defendant Carter's share of the proceeds of sale from 500*l.* to 425*l.*, I need say nothing, but the provision for payment to the plaintiff of 200*l.* in consideration of the surrender of his life interest was appreciated and welcomed by the plaintiff, who here, too, I am satisfied thoroughly understood what was being done and executed the deed deliberately. It cannot be set aside, if at all, except for its connection with and dependence on the second deed of May 1901. We now approach the critical question in the case, but first it will be convenient to dispose of an argument urged on behalf of the defendants who are interested in maintaining the deeds of 1901. They say that by those deeds the plaintiff confirmed the deeds of May 1900, and that these latter deeds having been confirmed, the objection to those of 1901 necessarily falls to the ground. They further say that the plaintiff has lost his right to the intervention of the court, if ever he had any, by laches and acquiescence, or, in other words, that the plaintiff's conduct has disentitled him to relief, but this view has such slender support in fact that I may pass it by without further notice. Not so the argument for confirmation, which is supported by the fact that by the deeds of 1901 the plaintiff not only recognised the deeds of 1900 on which they were based, but he received substantial consideration for the surrender of interests created by the earlier documents, which he must, therefore, be taken to have treated as irrevocable. To this I think there is a complete answer. The deeds of 1900 were voidable by the plaintiff on the ground that they conferred a gift by client to solicitor under circumstances which did not rebut the presumed influence of the donee on the donor, and on that ground alone. There is not a tittle of evidence to show that the plaintiff was ever aware that they were thus voidable. The defendant Tarbet was not concerned to call, and it is not pretended that he did call, the plaintiff's attention to it, and it is not only possible, but probable that the question whether they were voidable or not never occurred to the defendant Tarbet's mind. His business was to accept the situation as he found it, and out of it to create another to the advantage of his client. But how can the plaintiff be properly said to have confirmed a transaction the voidable character of which was unknown to him, and to have released a right of which he was not aware? That he had no desire to avoid the deeds of May 1900, nay, more, that if informed that it was in his power to do so he

would have repudiated the suggestion with scorn, I have no manner of doubt, but confirmation or approbation or adoption (for all these terms are occasionally employed) is an act of the will, and there is no room for it, no possibility of it, where ignorance of the ability to do otherwise subsists. Restitution of the benefits received he would of course have to make as a condition of asserting his right, but the reception of them cannot, to my mind, be regarded as an obstacle in any other sense to his asserting it. So far without hesitation. The several points have required careful consideration, but, the situation once grasped and the facts illustrating it mastered there has been no doubt in my mind touching the proper conclusions. Not so as regards the critical question remaining to be dealt with. It presents great difficulties, and I have found the task of decision embarrassing. Ought the deed of the 14th March 1901 (for it may fairly and conveniently be taken alone) to be set aside by reason of its connection with and dependence on the first deed of May 1900? The plaintiff's case is that what has been said about the want of confirmation carries him home, and it is forcibly urged on his behalf that, if in March 1901, the right to avoid the deed of May 1900 was not present to his mind, was not in fact a right with the existence of which he was acquainted, then it is impossible to treat him as having conveyed that right by general words, their aptitude for the purpose notwithstanding, and that the only equitable conclusion is that the bargain cannot stand and that he must be held not to have released his life interest created by the deed of May 1900. If this argument is sound and I am right in holding that the deed of May 1900 was avoidable in March 1901, and was not and has not since been confirmed, it follows that the foundation of the deed of March 1901 fails and the plaintiff is entitled to be restored to his original position. The argument is based on recognised equitable principles from which one must be careful not to depart, but I think it is a misapplication of them, and that to adopt it would be to sacrifice the substance to the form of the transaction. The object of the plaintiff was, I am convinced by the evidence, to part with everything he possessed in consideration of a life annuity, and that was what he and all others concerned intended should be done. I say it was the plaintiff's object because it was he who prompted and pressed a scheme of the character which was eventually carried through. But those who prepared the deed of the 14th March 1901 were confronted with the fact that, as regards the greater part of his possessions, the plaintiff had already disposed of it and had merely a life interest. The abrogation, so far as it was possible, of that disposition was a necessary antecedent to the fulfilment of the object in view, and, though in form the plaintiff released his life interest, what really was effected was the substitution of a new scheme for one which was regarded on all hands as unsatisfactory. That others also surrendered rights and that the abrogation could not be, and was not, complete seems to me immaterial. Complete abrogation and a new departure were desired, and it not the plaintiff who suffers by the incompleteness. His annuity is secured, and he bargained for nothing more. I say this deliberately, bearing in mind the observation more than once made by the

plaintiff and put forward by him as a ground of complaint that he intended and believed that the payments to his son and daughter should also be secured. I do not say that this idea did not enter into his mind at the time, or that he does not now believe that what he says was part of the arrangement was in fact part of it, but I can find no trace of that in the history of the transaction. The rights of other parties which could not be abrogated without their consent were expressly left intact, and the covenants accepted conveyance subject to them. It has not been suggested that the price was otherwise than fair, indeed, the doubt was whether the annuity was in excess of what the covenants could manage to pay; and, as already stated, the result of the evidence is that the plaintiff was willing, nay, anxious, to yield up for that all that he had or ever could have in the world. The right to set aside the deed of May 1900 sinks into insignificance from this point of view, and the transaction is equally complete whether the right existed or not. But if the deed of May 1900 has been abrogated, how can it now be set aside? In my judgment the plaintiff's right now to avoid it is gone, not because he has confirmed it, but because he has agreed that it should be treated as a nullity. To allow him now to go back and say that the deed of May 1900 is still operative, and because originally avoidable ought now to be avoided, would be inconsistent with honesty, which is the basis of equity. Thus far I have considered only the deed of the 14th March 1901, apart from the deed of the 13th July 1901. By that deed the plaintiff obtained the payment of 200*l.* as the equivalent of his life interest in the furniture and chattels conveyed by the second deed of May 1900, he being at the time unaware that the creation of that interest was voidable and that he could have insisted on the furniture and chattels being restored. If that were all, the deed of the 13th July 1901 could not stand, and the plaintiff's right to avoid that, and with it the deed of May 1900, on which it depends, would be undeniable. But although I have treated the deed of the 14th March 1901, separately from the deed of the 13th July 1901, I cannot treat the latter separately from the former. The two formed one transaction. The latter deed was the necessary sequel of the former, the complement of the scheme intended to comprise all the plaintiff's property in the legal expression of which this particular item was expressly, but yet, perhaps, by oversight, omitted. What is true of the deed of the 14th March is therefore equally true of the deed of the 13th July, and what is true of one deed of May 1900 is equally true of the other. Taking this view of the case, I need not further consider the question whether if the plaintiff succeeded in setting aside the deeds (I group them altogether for this purpose), he would be entitled to set them aside as against all parties interested thereunder and not only against the defendant Carter. I have assumed an answer to the question merely for the purposes of my judgment. I have not consulted the cases bearing on it, or reflected on the arguments founded on them, and I repeat that I must not be understood to be expressing any opinion. Also, I am able to give the go-by to the question whether the deeds could be set aside against some of the parties interested thereunder in their

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absence. On this I express no concluded opinion, but deem it right to add that I am not disposed to accept the plaintiff's contention that for this purpose the trustees of the deeds sufficiently represent their *cestuis que trust*. This is eminently a case in which the costs ought to follow the event. That would probably have been my view, even had it been argued on its merits without any charge of fraud, but the application of the general rule is peremptory where a charge of fraud is made. I think it only fair to the defendants Carter, Tarbet, and Almy to repeat emphatically what I have already said, that it was made without a shadow of justification. The defendant Nevill Wright, who was prepared to submit to judgment, and, in truth, came here to support the plaintiff's contention, can of course, have no costs. As against all the other defendants, the action will be dismissed with costs.

Solicitors: *Horace W. Chatterton; E. and J. Mote; Charles Russell and Co.; Stow, Preston, and Lyttelton; Gribble, Oddie, Sinclair, and Johnson, for Eastley and Eastley, Torquay; Tucker, Lake, and Lyon, for Henry Wing, Nottingham.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Thursday, Dec. 5, 1901.

(Before BARNES, J.)

BIRCH v. BIRCH AND ANOTHER. (a)

Probate—Grant—Action to set aside judgment—Allegation of fraud—Res judicata—No allegation against a party to former suit—Jurisdiction of court.

Although there is no allegation of fraud against a party to a probate suit in which judgment has been given, an action may be maintained to set aside the judgment on the ground that it was obtained by the fraud of a person who was interested under the suit.

THIS was a motion by the defendants to dismiss the action on the ground that the subject-matter thereof had been already adjudicated upon.

The case was argued on the 18th Nov. 1901.

Bargrave Deane, K.C. and Pritchard for the defendants, in support of the motion, submitted that the matter was *res judicata* and could not be reopened. They cited:

Barnesly v. Powell, 1 Ves. Sen. 119, 283;

Wytherley v. Andrews, 25 L. T. Rep. 134; L. Rep. 2 P. & D. 327;

Priestman v. Thomas, 51 L. T. Rep. 843; 9 P. Div. 70, 210.

Inderwick, K.C. and Willock for the plaintiff.—The only way in which a judgment, alleged to have been obtained by fraud, could be questioned after the time for appealing against it has gone by was by an action. They cited:

Flower v. Lloyd, 35 L. T. Rep. 454; 37 L. T. Rep. 419; 6 Ch. Div. 297; 10 Ch. Div. 327;

Cole v. Langford, (1898) 2 Q. B. 36;

Wyatt v. Palmer, 80 L. T. Rep. 639; (1899) 2 Q. B. 106.

W. L. Richards appeared for parties interested.

At the conclusion of the arguments the court adjourned, holding that an affidavit should be

sworn by the plaintiff verifying the allegations in the statement of claim.

BARNES, J. (after referring to the nature of the motion).—There are two points to be dealt with, and they must be referred to with some particularity. It appears that two actions were brought in this court, the first on the 12th Dec. 1899, by Ada Rose Guise against Edwin Birch and others, and the second on the 16th Dec. 1899 by Edwin Birch against Walter George Birch, and these actions were consolidated. On the 14th June 1899 letters of administration of the estate of the deceased, Arthur Birch, had been granted to Walter George Birch, Jesse John Birch and Edwin Birch, the brothers of Arthur Birch, he having died intestate on the 18th April 1899. In the first action the plaintiff claimed revocation of the letters of administration, and propounded a will of the 8th Dec. 1897. In the second action revocation of the letters of administration was also claimed, and a will was set up dated the 18th Dec. 1897, and in the alternative probate was asked for of certain documents of the 8th Dec. 1897. On the 20th Feb. 1900, Ada Rose Guise delivered a defence supporting the claim of the plaintiff in the second action for a revocation of the grant. Walter George Birch pleaded that the alleged wills of the 8th and the 18th Dec. 1897 were not duly executed, and were not signed by the deceased or by anyone at his direction. The plaintiffs in the second action, in their reply, traversed the allegations of the defence. The actions were, as I have said, consolidated, and the case was tried before the President on the 22nd June 1900. As the witnesses to the will could not be found they could not be called as witnesses in the action, but Henry Guise, the husband of Ada Rose Guise, was called, and he gave evidence to the effect that he had found a certain man who was a witness to the instructions for the will. This man was also called as a witness. It appears that when Mr. Guise was making inquiries, he was acting on behalf of his wife and looking after her interests. He was likewise an executor under the will of his wife's sister. The President pronounced for the will of the 18th Dec. 1897, and ordered the letters of administration of the 14th June 1899 to be revoked. On the 26th June 1901 a writ was issued by Walter George Birch, and in his statement of claim he alleges that the judgment has been obtained by fraud, and that the will of the 18th Dec. 1897 has been forged at the instigation of Henry Guise. He further states that the man who has been a party to the fraud has left this country for America, and has written from there describing the circumstances under which the pretended will was executed, and he therefore claims that the judgment shall be set aside. There was, then, a motion to dismiss the action, but it has been twice adjourned—first to enable the plaintiff to file his statement of claim; and, secondly, because of the direction of the court that the allegations set forth in the statement of claim should be verified by affidavit. The plaintiff has now sworn that the originals of the letter and the confession are, as he is informed and believes, in the hands of the Commissioner of the Police, and investigations have been and still are being made with reference to them by the authorities at Scotland-yard, and it is upon the information and the evidence collected and

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

[PROB.]

In the Goods of WILLIAM KNEE; GATTWARD v. KNEE.

[PROB.]

obtained by them and by his solicitor that he has commenced this action, and that he is informed and believes that the contents of his statement of claim are true. It appears also that Henry Guise is a party to an action in Chancery in connection with the administration of the estate in which the plaintiff, Walter George Birch, is a defendant, and it is submitted that Henry Guise should be made a defendant in this suit as he was materially interested in supporting the will. Now, it has been contended for the defendants that an action will not lie. But I am of opinion that where a judgment has been obtained by fraud it may be impeached. In the case of *Barnesly v. Povel* (sup.), which was before the Lord Chancellor in 1748, there is the following marginal note: "Relief may be against a decree obtained by fraud. Against a probate obtained by fraud relief must be here"—i.e., in Chancery. Again, in the case of *Wyatt v. Palmer* (sup.), Lindley, M.R., in the course of his judgment, uses the following words: "Thereupon the plaintiff brings an action to impeach that judgment on the ground that it was obtained by fraud. It is said that no such action will lie. That proposition is so new to me that, as an equity lawyer, I was startled by it. That an action could not be brought to impeach a decree or judgment on the ground of fraud was a surprise to me. I was familiar with such actions when at the Bar; and I have refreshed my memory by referring to Mitford on Pleadings, where I find this: 'If a decree has been obtained by fraud it may be impeached by original bill without the leave of the court' (5th edit., p. 112). Why should not a judgment by default be so impeached? Suppose a man was induced by fraud not to appear, and by that means judgment was obtained against him; I am not prepared to say that because there is a summary method of impeaching that judgment provided by the rules recourse cannot be had to the old method of impeaching the judgment by action. The old jurisdiction of the court is not touched or taken away by the rule in question." The case of *Priestman v. Thomas* (sup.) has been cited by Mr. Deane, but that is really not an authority for this contention. It must be clearly borne in mind that fraud in obtaining a will is one thing, and fraud in obtaining probate of a will another. It seems, therefore, that such a suit as this can be maintained. But it has been argued that it can only be so when one of the parties to the suit has been guilty of fraud, and that where no fraud is alleged against any of the parties, the matter cannot be reopened. In the statement of claim the only fraud charged is that of Henry Guise. This point, then, has to be considered: Can a suit of this character be maintained when no party to the suit is guilty of improper conduct? This may be so in many cases, but there is a considerable distinction in a case like the present. In probate cases many persons are bound by the decree who are not parties to the suit, as is clear from *Wytcherley v. Andrews* (sup.). It follows that a number of persons may be interested who are not parties to a probate suit, and it seems to me that if someone who is interested is guilty of fraud, the whole litigation is affected. Conceive a case like the following: A will is forged by some person in his own interest, duly attested, and executors named in it. The executors might propound the

will in all innocence although it was fraudulent. If the fraud was afterwards discovered, it would be absurd to allow such a will to stand. In this case it is undoubtedly clear that Mr. Guise had an interest in the suit, and was acting in the interests of his wife, and that she had left the matter entirely in his hands. He clearly has had an interest in all these proceedings, and I understand that he is a party to the Chancery proceedings which are now pending. I do not wish to express any opinion one way or the other as to the merits of the case. But seeing that the allegations in the statement of claim have been sworn to, I have come to the conclusion, after an examination of the authorities, that the case must be allowed to proceed. The motion, therefore, will be refused. The question of costs will be reserved, and Henry Guise must be added as a defendant.

Leave to appeal given.

Solicitor for the plaintiff, *E. W. Reeves*.
Solicitor for the defendant, *McKie Sharp*.
Solicitor for Henry Guise, *J. W. Reid*.

Tuesday, Dec. 10, 1901.

(Before Sir F. JEUNE, President.)

In the Goods of WILLIAM KNEE; GATTWARD v. KNEE. (a)

Probate—Soldier's will—In expeditione—Letter to friend—Mobilisation—Wills Act 1837 (1 Vict. c. 26), s. 11.

A soldier is held to be in actual military service as soon as the order for mobilisation has been given. If, therefore, a letter is written after the order for mobilisation, and such letter can be construed as a testamentary document, the court will hold it to be a valid soldier's will, even though the letter itself contains an intimation of an intention to draw up a more formal document at a later period.

In the Goods of Hiscock (84 L. T. Rep. 61; (1901) P. 78) followed.

THIS was an action in which the plaintiff, William Gattward, claimed that the letters of administration which had been granted to the defendant, dated the 31st July 1901, to the estate of the deceased William Knee should be revoked, and that a letter written by the deceased in Sept. 1899 should be admitted to probate as a soldier's will, and that letters of administration with the will annexed should be granted to him.

The defendant, Mark Thomas Lewellyn Knee, the father of the deceased, alleged that the letter set up by the plaintiff was not a will on the ground that the deceased was not on actual military service at the time when the letter was written, and that it was not properly attested as a testamentary document to satisfy the Wills Act. He claimed to be entitled to the grant of administration as on an intestacy.

The deceased was a private in the 2nd Battalion of the King's Royal Rifles, and was stationed in India in the early part of Sept. 1899, a month before the outbreak of the Boer War. Prior to his departure with his regiment for South Africa he wrote the following letter to the plaintiff:

1479 Pte. W. Knee, D Company, 2nd K.R.R., Natal, South Africa (for Transvaal Company).—

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

PROB.]

In the Goods of MAY; MAY v. MAY.

[PROB.]

Dear Bill,—Just a few lines to you hoping that you are not dead yet, as I have received no answer to the last letter that I sent you. I do not know whether you are waiting for me to come home or not but there is no knowing when I will arrive as we are just off to South Africa again for the Boer War if war is declared at all. It is hard lines seven years and four months' service and got to go there; but it cannot be helped. I am sending a box of things to you which I want you to look after for me till I come home for there are some things which I got out here, I think a lot of them, I will show them to you when I come; they are a lot of curios and there is some things for you there, but if you have a letter to say that I am killed, then the lot is for you; and also I have about 13*l.* in the bank and 18*l.* deferred pay which will come 31*l.* You will receive the lot if I am killed in action for I shall make out my will in your favour so you can keep this letter in case you want it for anything, but let us hope that I arrive home safe again. I am looking forward to a grand time with you and the missus—yes, for we will have one when I come home. Please excuse black lead as I want to catch the mail, everyone is using or waiting for the ink. Hoping you are enjoying good health as I am at present. Please write my address as in this letter.—I remain, from your old chumb, hoping to see you at the end of the war, W. KNEE. Take the note of the top of the box.

The deceased died of enteric fever at Ladysmith on the 9th Feb. 1900. As soon as the death was announced the plaintiff communicated with the War Office, and asked whether any will had been found. He was informed that the deceased had left no papers, and consequently he issued the writ in the present action on the 14th Aug. 1901, claiming that letters of administration should be granted to him, and that the grant which had already been made to the defendant should be revoked.

From information supplied by the War Office it appeared that the 2nd Battalion of the King's Royal Rifles had been warned for service on the 7th Sept. 1899, and had been ordered to mobilise for service in South Africa on the 9th Sept.

At the time of the warning and the order for mobilisation the battalion was stationed at Fort William, Calcutta, and sailed for South Africa on the 18th of the same month.

The sole question for the consideration of the court was whether the will was a valid one, as being that of a soldier in *expeditione*.

Richards, K.C. and *Soper* for the plaintiff.—Although there was no date to the letter, it was clear from internal evidence that it must have been written after mobilisation had been ordered. Directly mobilisation had taken place the deceased was a soldier in *expeditione*, and was "in actual military service" within the operation of sect. 11 of the Wills Act 1837. The case of *In the Goods of Hiscock* (84 L. T. Rep. 61; (1901) P. 78) supported this view.

Barnard for the defendant.—There was no evidence at all that the deceased had ever done any physical act under the mobilisation. Great stress had been laid upon this fact in *Hiscock's* case. Moreover it was not proved that the letter itself had been written after the order for mobilisation. The burden of proof was upon the plaintiff to show when it was written. Moreover, the words contained in the letter, "I shall make out my will in your favour," were entirely opposed to the notion that the deceased intended that the letter should be his last will. It was essential that even a soldier should have the intention of

making a will when he draws up a document which may afterwards be, on other grounds, admitted as a soldier's will.

The *PRESIDENT*.—I am clearly of opinion that the letter of the deceased is a testamentary document, and the fact that he had intimated his intention of drawing up a more formal document later on does not at all affect the letter itself. I also think that it is a soldier's will. I am of opinion that mobilisation may be taken as a fair test as to whether a soldier is or is not what is called in Roman law in *expeditione*. Mere warning for service is not enough. But in this case the order for mobilisation followed the warning for service within two days. I think I am justified in finding that the letter in the present case was written between the 9th and the 18th Sept.—i.e., after the order for mobilisation and before the departure for South Africa. No doubt I am going a step further than I did in *Hiscock's* case; but yet I think, for the reasons that I have stated, that the deceased was in *expeditione* at the time when the letter was written, and that therefore the letter itself is a valid soldier's will.

Solicitor for the plaintiff, *Eugene Goddard*.
Solicitor for the defendant, *Bentley*.

Monday, Dec. 16, 1901.

(Before *BAERNES, J.*)

In the Goods of MAY; MAY v. MAY. (a)

Probate—Soldier's will—Letter—Wills Act 1837
(1 Vict. c. 28), s. 11.

The privilege of making a valid soldier's will is not dependent upon the military position or the education of the testator.

THIS was a probate action on which the plaintiff sought to have a letter of her deceased husband established as a will.

The deceased, James May, was hon. lieutenant and quartermaster of the 3rd Battalion Grenadier Guards. He sailed with his regiment from Gibraltar to South Africa in Jan. 1900, and died whilst on active service on the 4th Feb. 1901.

On the 22nd March 1900 the deceased wrote to his wife, and in the letter occurred the following words:

As regards my will, I am sorry I have not made one, but I will make out a paper and send you. I think you will have no difficulty in getting all I possess while the boy lives. I will write and ask Mr. Harnden to draw me a will up and send it to me for signature. Of course, dear, I leave everything to you, as I know should the boy require anything you would see to it, but I am of opinion that the boy is well provided for, and if he is always truthful and honest he will get on.

No formal will was ever made, and the deceased never communicated with Mr. Harnden. There were no other testamentary documents of any kind.

The plaintiff, the widow of the testator, claimed to have the letter established as a will, and to be declared universal legatee under it.

The defendant, who appeared by his guardian *ad litem*, Alexander Graham, was the only child of the deceased and twelve years of age.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Div.]

BOSWORTHICK v. BOSWORTHICK—BLOOD v. BLOOD.

[Div.]

The sole question for the court, since there was no doubt as to actual military service, was whether or not the letter could be proved as a will, and if so, whether the plaintiff was entitled to the whole of the property of her deceased husband.

Pritchard for the plaintiff.—He referred to the case of *Gattward v. Knes* (*ante*, p. 119), which came before the President on the 10th Dec.

Rayden for the defendant.—He submitted that the court ought to make a distinction between this case and that of *Gattward v. Knes*. In the present instance the deceased was a man of education, whereas in the latter that was not so. Mr. May must be presumed to have known how to make a will. There was also the expression in the letter which shewed that it was his intention to make a formal will.

BARNES, J. did not think there was any reason for displacing a less formal document merely on the ground that the testator had expressed an intention of making a formal will. The letter was perfectly clear and it would be admitted to probate.

Solicitor for the plaintiff, *McKie Sharp*.

Solicitor for the defendant, *J. R. Foz*.

DIVORCE BUSINESS.

Tuesday, Nov. 12, 1901.

(Before BARNES, J.)

BOSWORTHICK v. BOSWORTHICK. (a)

Divorce—Petition of wife—Rape—Indecent assault—Conviction of husband—Breakdown of health of wife—Conduct amounting to cruelty—Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), s. 27.

A wife may obtain a divorce from her husband for rape, though he has been prosecuted and convicted for indecent assault only.

Alternatively, a wife will be entitled to a decree of judicial separation on the ground of cruelty if the conduct of the husband has been such as to cause a breakdown of her health, by reason of the disgrace and shock arising out of his conviction.

Coffey v. Coffey (78 L. T. Rep. 796; (1898) P. 169) and *Thompson v. Thompson* (85 L. T. Rep. 172) followed.

THIS was the petition of Catherine Bosworthick for a dissolution of her marriage with the respondent, Charles Henry Bosworthick, on the ground that he had committed rape, and alternatively the petitioner asked for a judicial separation on the ground of her husband's cruelty.

The parties were married at the parish church of Atherton, Lancashire, on the 12th Oct. 1897, and afterwards lived at Twickenham. The respondent was an officer in the merchant service. There had been no issue of the marriage.

In Sept. 1898, two little girls paid a visit to the petitioner and her husband at Twickenham, and they afterwards complained that the respondent had misbehaved by indecently exposing himself to them. The father of the children, a clergyman, taxed the respondent with his misconduct, and though he at first denied the truth of the accusation he eventually admitted that it was

so. In consequence of this there was a separation between the petitioner and her husband, and a deed was executed on the 28th Sept. 1898, by which it was arranged that the respondent should go abroad for four years. In 1899, however, after a year's separation, the wife forgave her husband, and they lived together again. They took up their residence at Ivy Bridge, in Devonshire, and whilst there the respondent committed a series of indecent assaults upon six female children, all under thirteen years of age. For these offences he was sentenced to twenty months' imprisonment with hard labour at the Exeter Quarter Sessions in Oct. 1900.

In consequence of the misconduct of her husband the petitioner had suffered greatly in health. Both in Sept. 1898, and in Oct. 1900, she was compelled to consult her medical advisers, and they pronounced her an absolute wreck. She suffered mainly from insomnia, loss of appetite, and palpitation of the heart—no doubt caused by mental shock.

The case was undefended.

Inderwick, K.C. and *Harvey Murphy* for the petitioner.—Evidence was given in support of the petition by two little girls, who repeated the evidence they had given before the justices at Plympton, and medical evidence was also given in support of the charge of cruelty.

BARNES, J. said that in his judgment the charge of rape had been established, though there was some difficulty in obtaining the facts from the elder girl. The whole outline of the case was such that he thought the court might act as it had done in *Coffey v. Coffey* (*sup.*). Although it was not necessary to do so, he had come to the conclusion that the charge of cruelty also had been established, and that it was covered by the authority of *Thompson v. Thompson* (*sup.*). There would, therefore, be a decree nisi, with costs.

Solicitors: *Woodcock, Ryland, and Parker*, for *Alfred Grundy, Son, and Co.*, Manchester.

Nov. 11 and 18, 1901.

(Before BARNES, J.)

BLOOD v. BLOOD. (a)

Divorce—Petition of wife—Variation of marriage settlement—Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61), s. 5.

A wife upon her marriage settled property to which she was entitled in her own right upon herself for life, and after her death upon her husband for life, if he survived her, with remainder to the issue of the marriage. There was one child of the marriage, a son. He attained the age of twenty-one years and acquired a vested interest in the property comprised in the settlement. Subsequently the wife petitioned for the dissolution of her marriage with the respondent, and a decree nisi was pronounced in her favour. Before the decree was made absolute the son died, a bachelor and intestate. After the decree was made absolute the wife applied for an order extinguishing all the respondent's interest in the property, as he had become entitled to his son's interest, the latter having died intestate.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Div.]

BLOOD v. BLOOD.

[Div.]

Held, the court had power under the Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61), s. 5, to extinguish all interests of the respondent in the trust funds of the wife.

THIS was a motion to confirm the report of the registrar on a petition to vary settlements after a decree absolute for the dissolution of marriage.

The petitioner was Constance Blood, and the respondent Neptune William Blood. By an ante-nuptial settlement, dated the 25th July 1877, the petitioner settled a considerable sum of money in trust for herself for life, and on her death for her husband for his life, with remainder to the children of the marriage in the usual form. There was, by the settlement, a right reserved to the petitioner of settling a moiety of the property on any second husband and on any children of a second marriage, under certain conditions. There was one child of the marriage, a son, who attained his majority on the 13th July 1899.

Mrs. Blood petitioned, in 1900, for a dissolution of her marriage with the respondent on the ground of his adultery and desertion.

On the 16th July 1900, after the date of the decree *nisi*, and before the date of the decree absolute, the son died, unmarried and intestate.

Priestley and *F. Russell* for the petitioner.—They submitted that the court should extinguish the whole of the respondent's interest in the trust funds under sect. 5 of the Matrimonial Causes Act 1859. The son of the marriage having died intestate after the attainment of his majority, the respondent had become entitled to the son's estate as his son's next of kin.

Inderwick, *K.C.* and *Barnard* for the respondent.—The court had never taken away a child's interest under a settlement by virtue of sect. 5 of the Matrimonial Causes Act 1859. The son had gained a vested interest, and therefore the respondent had acquired a right to the same through his son, who had died intestate. The property was not settled property at all. It was by a mere accident that the respondent had become entitled to the property.

Wright for the trustees.

The following cases were cited in the course of the argument and judgment:

Pocock v. Pocock, 18 L. T. Rep. 338;

Crisp v. Crisp, 27 L. T. Rep. 428; L. Rep. 2 P. & M. 426;

Wigney v. Wigney, 46 L. T. Rep. 441; 7 P. Div. 228;

Pollard v. Pollard, 70 L. T. Rep. 815; (1894) P. 172;

Meredyth v. Meredyth and Leigh, 72 L. T. Rep. 898; (1895) P. 92;

Hartopp v. Hartopp, 80 L. T. Rep. 297; (1899) P. 65.

BARNES, J.—The only question remaining to be decided is whether the settlement can be varied by extinguishing all the interests of the respondent in the capital and income of the petitioner's trust funds. On the 12th June 1900, the petitioner obtained a decree *nisi* for the dissolution of her marriage on the grounds of the respondent's adultery and desertion. This decree was made absolute on the 14th Jan. 1901. On the 25th July 1877 in view of the proposed marriage between the parties, an ante-nuptial settlement was executed, the wife bringing into settlement certain property in trust for herself for life, and, on her death, to the respondent for

life, if he should survive her, with remainder to the children of the marriage, with a proviso that, if the petitioner should survive the respondent and marry again after his death, and there should be only one child of the marriage, she should be at liberty to appoint a moiety of her income arising out of her trust funds to such husband, in the event of survivorship, for his life, and a moiety of the trust funds for the children of such second marriage. There had only been one child of the marriage, who attained his majority in 1899, and died a bachelor and intestate on the 16th July 1900. He therefore attained a vested interest in his mother's fund, and his father, the respondent is entitled to succeed to his son's property. The respondent has married again, and on the 22nd May 1901 he executed a settlement dealing with that portion of the settlement property that has accrued to him as his son's personal representative. I am now asked, under sect. 5 of the Matrimonial Causes Act 1859 (without entering into the question of the powers of the Court under sect. 32 of the Matrimonial Causes Act 1857), to order that the property be reconveyed to the wife, freed from the husband's interests; in other words, to extinguish all the husband's interests in the settled fund, including such interest as he derives from his son's death and intestacy—to follow, in fact, the case of *Meredyth v. Meredyth and Leigh*, and to accelerate the wife's powers under the settlement. To this it is objected that the Court has no power under sect. 5 of the Act of 1859 to do what is asked. That section enacts that "the court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit." The words of that section are extremely wide, and I am very desirous that they should not be narrowed down, for many and various and diverse in their circumstances are the cases that have to be decided under it. In the case of *Hartopp v. Hartopp* it was objected that the court had no power to make the order there asked for, as it would affect the interests of the children under the settlement; but I there held that the court had power under sect. 5, notwithstanding the fact that it was not for the children's benefit. Again, in a case (a) recently decided by the President, it was held that the court had power to vary a marriage settlement so as to deprive infant children of the marriage of part of their interests. I am therefore of opinion that the words of the section are wide enough to give me power to act, although it is clear that the interests of the children may be affected. I think that all the husband's interest in the wife's fund should be extinguished, and that the trustees should reconvey the wife's trust fund, freed from the husband's interest, subject to any prior life interest under the settlement and to any charges made by the child of the marriage. The respon-

(a) *Whitton v. Whitton* (85 L. T. Rep. 646; (1901) P. 348).

DIV.] **BILBY v. BILBY AND HARROP—WAUDBY v. WAUDBY AND BOWLAND.**

[DIV.]

dent must pay the costs both of the petitioner and of the trustees.

Solicitors for the petitioner, *C. Russell and Co.*
Solicitors for the respondent, *Valpy, Peckham,*
and *Chaplin.*

Solicitor for the trustees, *Hugh Wharton.*

Tuesday, Nov. 19, 1901.

(Before Sir F. JEUNE, President.)

BILBY v. BILBY AND HARROP. (a)

Divorce—Adultery of wife—Co-respondent and costs—Practice.

Even when, upon an application to make a co-respondent liable for the costs of a divorce suit, the only evidence against him as to his knowledge of the fact that the respondent was a married woman is an admission that he became aware of it a fortnight after the first act of adultery, the court may infer that he was practically aware of the fact from the first, and, if it so infers, an order for costs will be made in favour of the petitioner against the co-respondent.

THIS was a husband's petition for a dissolution of his marriage on the ground of the adultery of his wife with the co-respondent.

The respondent left her husband ten years ago, and did not see him again until 1899.

From communications received the petitioner subsequently saw the co-respondent, who admitted that he had committed adultery with the respondent, but declared that at the time the intimacy between them first took place he was not aware of the fact that she was a married woman.

Afterwards the co-respondent made a similar confession to the petitioner's solicitor, with the additional information that he knew that she was a married woman a fortnight after he became intimate with her.

There was no defence to the suit, the co-respondent having filed no answer to the petition and citation, although he had put in an appearance.

Barnard for the petitioner.—He applied for an order condemning the co-respondent in costs.

Le Bas for the co-respondent.—He opposed the application on the ground that there was no evidence to show that the co-respondent knew that the respondent was a married woman when he first became intimate with her. The evidence of the petitioner and his solicitor pointed to the contrary. It had been the practice of the court for many years under similar circumstances, not to condemn a co-respondent in the costs.

THE PRESIDENT.—The rule as laid down by my predecessors that a co-respondent, who has taken up with a married woman, without knowing that she was married, and afterwards, having found out the true state of affairs, has refused to desert her, ought not to be condemned in costs is fair and proper enough. But when a co-respondent, as in the present case, says that he was aware that the respondent was a married woman a fortnight after the first act of adultery, I am inclined to construe that not too literally, but to hold that he practically knew it from the first. I therefore order that there be a decree *nisi*, and

that the co-respondent be condemned in the costs of this petition.

Solicitor for the petitioner, *T. B. Apps.*
Solicitor for the co-respondent, *Alfred Pitts.*

Thursday, Dec. 5, 1901.

(Before BARNES, J.)

WAUDBY v. WAUDBY AND BOWLAND. (a)

Divorce—Cross-petitions—Adultery of wife—Adultery of husband—Condonation of wife—Discretion of court as to decree—Costs.

A husband presented a petition for a dissolution of his marriage on the ground of his wife's adultery with the co-respondent, and the wife presented a cross-petition for a divorce by reason of her husband's cruelty and adultery. The consolidated cases were twice heard. On the first trial, before the President, the jury were unable to come to a decision upon all the issues, and on the second, before Barnes, J., they found (1) that the respondent and co-respondent had committed adultery; (2) that the petitioner had been guilty of adultery, and (3) that the respondent had condoned her husband's adultery. On these findings the petitioner applied that the petition of the respondent should be dismissed, and that the co-respondent should be condemned in the costs; the respondent that she should have the costs of both trials, although she had not applied for any security on the first hearing; and the co-respondent that he should not be condemned in any costs.

Held, that under the circumstances of the case the court would not exercise its discretion in favour of the petitioner; that the wife was entitled to her full costs, not only of the second trial, but also of the abortive first trial; and that the co-respondent should pay the costs of those issues on which he had failed.

THIS was a husband's suit for dissolution of marriage on the ground of his wife's adultery with the co-respondent. There was a cross-petition by the wife against her husband.

The case was twice heard, with the result stated in the headnote.

Bargrave Deane, K.C. and *Rayden* for the petitioner.—They did not press the court to exercise its discretion, and grant a decree *nisi* under sect. 31 of the Matrimonial Causes Act 1857. But the petition of the wife should be dismissed, and the co-respondent should be condemned in the costs.

Barnard for the respondent.—He asked for the costs of both trials.

Grazebrook for the co-respondent.—He submitted that as the petitioner had committed adultery, he ought not to have brought the petition at all. The co-respondent should not be condemned in any costs on the findings of the jury.

BARNES, J. (after referring briefly to the history of the case).—The first question for the decision of the court is whether the petitioner is entitled under the circumstances to obtain any decree at all. The matter is one entirely for the discretion of the court. I have carefully con-

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law

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sidered the authorities upon the subject, and I am of opinion that this is not a case in which I ought to exercise a discretion in favour of the petitioner. The question has been considered in *McCord v. McCord* (33 L. T. Rep. 264; L. Rep. 3 P. & D. 237), *Story v. Story* (57 L. T. Rep. 536; 12 P. Div. 196), and *Grosvenor v. Grosvenor* (34 W. R. 140). The second of these cases is more favourable to the petitioner than the first, and the third is still more favourable than the second. But I do not think that I need go through the judgments since Mr. Deane has not pressed me to exercise my discretion in favour of the petitioner. It has, however, been urged that there had been but one act of adultery on the part of the petitioner, that it had occurred a long time ago, and that it had been condoned. Yet the case was a serious one, and the court cannot overlook the fact that the act was the seduction of a maid-servant in the house during the absence of the wife, and that a child was subsequently born. Under the circumstances, therefore, I shall make no decree in favour of the petitioner. The remaining question, and the substantial one, is that of costs, and this requires greater consideration. The case has been twice tried. On the first occasion the findings of the jury were not recorded, as they were unable to agree on all the issues. They did, however, intimate that they were agreed as to the adultery and cruelty of the petitioner, though they were divided as to whether the conduct of the husband had been condoned, and as to whether the respondent and co-respondent had been guilty of adultery. On the first trial no application was made for security for costs, but the wife applied, after the first trial, for her costs of the same and these were refused. Before the second trial, however, the wife applied for security and the sum of 200*l.* was ordered to be secured. As to the costs of the second trial there is no substantial question, for the wife has not only got her security, but an extension of it, and according to the usual practice of the court she is entitled to her full costs. As to the first trial, the wife applied, as I have said, to the President after the trial that she should have her costs as no finding had been recorded against her; but the President declined to make any order on the ground that it was premature and that the respondent had taken no steps, as she might have done, to obtain an order for security. Now, I have to consider how I am to deal with the costs of both trials. After much consideration I have come to this conclusion, that the wife was, in a sense, successful on the first trial, and she has now succeeded on the second trial in getting the petition against herself dismissed. She is, therefore, entitled to her full costs of both trials. In this conclusion I have been guided by the principles laid down in *Barnes v. Barnes* (19 L. T. Rep. 526; L. Rep. 1 P. & D. 572). As to the costs of the co-respondent the court has been asked to make no order against him, and it has even been suggested that I should go further and allow him his costs. I have found in several cases outlines of the legal position corresponding with the present case, and the co-respondent has been condemned in the costs of those issues upon which he has failed. In *Bremner v. Bremner and Brett* (10 L. T. Rep. 99; 3 Sw. & Tr. 378) the headnote says: "Where the co-respondent is found to have been guilty of adultery, he is not,

as a matter of course, relieved from payment of the costs of that issue, merely by reason of the husband having been guilty of such adultery as to induce the court to dismiss the petition." And in the case of *Story v. Story*, to which I have already referred, the petition of the husband was dismissed, but costs were given against the co-respondent on those issues which had been found against him. There is also the case of *Morgan v. Morgan and Porter* (20 L. T. Rep. 588; L. Rep. 1 P. & D. 644). I have had the original records of that case, and I find that the report in the Law Reports is incomplete, since it has only been reported there on the question of the discretion of the court under sect. 31 of the Matrimonial Causes Act 1857. From the records it appears that the jury there found that the petitioner had committed adultery with a certain woman, although all the other points were found in his favour. The court was then asked to exercise its discretion and grant a decree *nisi*. The court refused to do so and gave the wife her full costs except as to the issue on which she had failed. On that point the case is reported. Shortly afterwards application was made to re-open the case, and a new trial was ordered. The new trial took place; but the respondent and co-respondent did not appear to defend, and the second jury found that the petitioner did not commit the adultery of which the first jury had convicted him. Accordingly a decree *nisi* was pronounced, which was ultimately made absolute, and the co-respondent was ordered to pay the amount of the petitioner's costs. None of these facts, however, appear in the reports of the case. Again, in *Grosvenor v. Grosvenor* (*sup.*) the report is silent as to what was done as to costs, but on an examination of those records also I have found that the petition was dismissed, and that the co-respondent, who did not appear to defend the case, was condemned in the costs. Having regard to all the circumstances, and following the authorities, the court will order the co-respondent to pay the costs of the issues on which he has failed.

Solicitors for the petitioner, *Iliffe, Henley, and Sweet, for Wilkinson*, York.

Solicitors for the respondent, *Long and Gardiner, for Anderson*, York.

Solicitors for the co-respondent, *Ridsdale and Son, for Crombie and Sons*, York.

Monday, Jan. 20.

(Before Sir F. JEUNE, President.)

STEDALL v. STEDALL. (a)

Divorce—Husband's petition—Adultery of wife—Policy of insurance in favour of wife—Report of registrar—Variation—"Property in reversion"—Order—Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), s. 45.

The money secured to a wife under a policy of insurance, and to be paid to her under the terms thereof if she is living at the time of her husband's death, may be "property in reversion," although the policy itself may not be a marriage settlement, and the court has power to compel

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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her, if she is the guilty party in divorce proceedings, to settle her interest under the policy in favour of her husband and children.

THIS was a motion on behalf of the petitioner, Alfred Stedall, to vary the report of the registrar.

The petitioner was married to his wife on the 30th Nov. 1889.

On the 2nd Jan. 1891 he insured his life for the sum of 2500*l.* with the Equitable Life Assurance Society of the United States under what is called a Semi-Tontine Return Premium Policy. Under the policy the society undertook

To pay either to Alfred Stedall, junior, his executors, administrators, or assigns, on the 12th day of December, in the year 1910, or should he die before then, to his wife, Fanny Edith Stedall, if living; if not, then to the said Alfred Stedall, junior, his executors, administrators, or assigns, the sum of 2500*l.* . . . And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue in lieu of such policy a new paid-up policy without participation in profits, in favour of said beneficiaries, as aforesaid, his executors, administrators, or assigns, for as many twentieth parts of the original amount hereby assured as there shall have been complete annual premiums received in cash by said society upon this policy at the date when such default shall first be made.

By the 11th section of the provisions and requirements of the policy it was provided:

The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by one of the following officers, viz., the president, first, second, or third vice-president, actuary, assistant actuary, secretary, assistant secretary, comptroller, cashier, or registrar of the society whose authority for this purpose will not be delegated; no other person has or will be given authority.

The policy was not taken out by the assured under any pre-nuptial or post-nuptial agreement, though he informed his wife of the fact that he had taken out the policy, and that it would be payable to her if he died before the 12th Dec. 1910, and she survived him.

The petitioner obtained a decree dissolving his marriage in 1900, on the ground of the adultery of his wife, and was granted the custody of the two children of the marriage, born in 1893 and 1896 respectively. Being advised that the policy was in effect a settlement upon his wife, a petition was presented to the court by Mr. Stedall for its variation.

The report of the registrar, dated the 18th July 1901, after stating the facts of the case proceeded:

It is submitted to the court that the policy is not a settlement between the parties as to which any order for variation of its terms can be made, but that it is for the consideration of the court whether the contingent interest of the respondent in the sum secured is not property in reversion within the meaning of the 45th section of 20 & 21 Vict. c. 85, the settlement of which can be ordered by the court for the benefit of the two children of the marriage.

On the 11th Nov. 1901 the motion to vary the report of the registrar, by ordering the respondent to assign her interest in the policy to the petitioner

or by ordering that she should settle her interest in the policy for the benefit of the children of the marriage, came before Barnes, J. The learned judge was of opinion that the policy was a contract purely between the assured and the society, which might be varied by agreement between themselves, that there was no obligation on the part of the assured either to the society or to Mrs. Stedall to keep up the policy, and that even if the assured were to die before the 12th Dec. 1910, Mrs. Stedall could not compel payment by the society to her of the sum assured; but he ultimately adjourned the hearing in order that the petitioner might obtain the opinion of counsel as to whether the policy was a settlement, and as to the rights of Mrs. Stedall before 1910 should she survive her husband.

Barnard for the petitioner.—It would be a case of great hardship if the wife, who was the guilty party in the divorce proceedings, obtained the proceeds of the insurance. Since the motion was before Barnes, J. the society had been communicated with, and the opinion of a chancery barrister had been taken. The society said that if the policy were surrendered to-day the only person to whom they could pay the money would be the wife, unless she assigned the policy. It was obviously impossible to get the wife to do this. Counsel to whom the matter had been referred was of opinion that the policy was a settlement, though not a marriage settlement over which the court had jurisdiction under sect. 5 of the Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61). and that Mrs. Stedall had certain rights under it. Her interest was a contingent interest, and was property in reversion. The court ought, therefore, under sect. 45 of the Matrimonial Causes Act 1857, to order the wife to settle her interest under the policy for the benefit of the petitioner or the two children. The petitioner himself did not mind which order was made.

The PRESIDENT.—I should have thought that the matter fell within sect. 5 of the Matrimonial Causes Act of 1859, and that the settlement would have been treated as a post-nuptial one. However, I think that the wife ought to be compelled to settle her interest in the policy in favour of the husband and children. The matter had better be referred to conveyancing counsel to settle the deed.

Solicitor: J. T. Chapple.

Tuesday, Feb. 4.

(Before Sir F. JEUNE, President, and BARNES, J.)

ROWLANDS v. ROWLANDS. (a)

Husband and wife—Appeal from justices—Separation—Agreement—Bankruptcy of husband—Neglect causing wife to live separate—Time for proceedings—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), ss. 4, 8.

When a husband and wife have lived apart for several years, and the husband has agreed to pay to his wife a certain weekly allowance, his failure to pay such allowance and his subse-

(a) Reported by J. A. SLATER, Esq., Barrister at-Law.

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quent filing of his petition in bankruptcy, with the object of evading the payment of arrears, do not replace the parties in the same position towards each other which they occupied before the separation actually took place. Under such circumstances a wife is not entitled to a separation order under the Summary Jurisdiction (Married Women) Act 1895, on the ground that she has been compelled to live separately and apart from her husband because he has neglected to maintain her, although she commences proceedings within six months of the making of the receiving order, as she is out of time under sect 11 of the Summary Jurisdiction Act 1848.

THIS was an appeal by the husband from an order of the justices of Oswestry, in the county of Shropshire, under the Summary Jurisdiction (Married Women) Act 1895, made on the 29th Nov. 1901.

The parties were married in 1873. They lived together until 1894, when the wife took out a summons against her husband for desertion. As she did not wish to proceed to extremities, the case was withdrawn. Later in the year a second summons was taken out, but again a settlement was arrived at.

On the 23rd Jan. 1895, a deed was executed under which the husband agreed to pay to the wife a weekly allowance of 10s. The allowance was not paid with regularity, and in 1901 the arrears amounted to about 100l.

On the 1st. Aug. 1901 a receiving order was made against the husband on his own petition.

On the 25th Oct. 1901 an application was made to the justices sitting at Oswestry for a separation order on the ground of desertion, but this was amended to a charge under sect. 4 of the Summary Jurisdiction (Married Women) Act 1895, against the husband for having wilfully neglected to provide reasonable maintenance for his wife, whereby he had caused her to leave and live separately and apart from him.

After hearing the evidence the magistrates made an order against the husband of 7s. 6d. a week for her maintenance, and four guineas costs.

It was against this order that the husband now appealed.

The justices gave the following reasons for their decision: "The magistrates think that while on the one hand the applicant has compelled defendant to file his petition in bankruptcy, still it is a case in which on the evidence before them the husband is able and ought to contribute a reasonable amount towards the support of his wife, and that this is shown by the amounts which he has paid upon judgment summonses and the offer he made in June last to pay 5s. a week. There is also the fact that he was summoned in Dec. 1894 before this court for deserting the applicant when the case was struck out, and again, for the same cause, on the 25th Jan. 1895 when the case was settled, the agreement referred to as shown in the statement of defendant's affairs being dated the 23rd Jan. 1895. They further consider that the payment and offer combined with the bankruptcy proceedings bring the neglect complained of within six months from the date of the information. They further consider that the agreement which was dated prior to this act not having been proved is not before the court."

Chester Jones for the appellant.—The justices had no power to make the order. First, under sect. 11 of the Summary Jurisdiction Act 1848, it was necessary that any complaint should be made or information laid within six calendar months from the time when the matter of such complaint or information arose. The complaint against the husband in the present case was that he had neglected to maintain her. The cause of complaint arose more than six years ago. Wilful neglect was not a continuing offence:

Ellis v. Ellis, 75 L. T. Rep. 390; (1896) P. 251.

The respondent was, therefore, out of time for taking proceedings. Secondly, there was the agreement between the parties made in 1895, when the separation took place. This took away the remedy of the wife. The agreement was, in fact, before the justices as shown by the affidavit of the appellant's solicitor. Upon that agreement the justices must decide:

Medway v. Medway, 82 L. T. Rep. 627; (1900) P. 141.

In that case the wife had offered to go back to her husband, which the present respondent had not done. Thirdly, the wife admitted in cross-examination that she left her husband because he was unfaithful and neglected her. This was not neglecting to maintain her. Having allowed the summons in 1895 to be withdrawn she had put an end to the whole cause of her complaint:

Pickavance v. Pickavance, 84 L. T. Rep. 62; (1901) P. 60.

There was no evidence upon which the justices could find against the appellant.

E. V. Bankes for the respondent.—Reliance could not be placed on facts prior to 1895. The material date was the 1st Aug. 1901, when the receiving order was made. The bankruptcy proceedings were taken to avoid payment of the money ordered. A breach of the undertaking to pay under the agreement caused the parties to return to their original position. The agreement of 1895 was to pay a sum of money and not to separate. The case of *Medway v. Medway* (*sup.*) was not distinguishable, because in that case the wife wished to return to her husband. It was clear in the present case that the husband would not have anything more to do with her. The proceedings had been taken within six months of the bankruptcy.

THE PRESIDENT.—I think this case is a very clear one, and it is the more so because the magistrates have stated very fully the reasons which led them to arrive at their decision. With those reasons I cannot agree. In fact I am of opinion that no specific charge was made out against the husband. The charge against him is that he wilfully neglected to provide reasonable maintenance for his wife, and that by such neglect he caused her to leave and live separately and apart from him. There are, therefore, two things which must be established—first, that the husband did neglect his wife, and secondly, that it was this neglect which caused her to leave him and live apart. Now, how is the case made out? There is no evidence at all of his neglect to maintain her. In cross-examination before the magistrates the wife distinctly stated that she left her husband because he was unfaithful and neglected her. Then there is the fact of the

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separation which took place in 1895 under the agreement. And the parties have lived separately ever since. It is clear, therefore, that the complaint is out of time as not having been made within the six months required by the Summary Jurisdiction Act of 1848, and on the authority of *Ellis v. Ellis* (sup.) the decision of the magistrates cannot be upheld. In the reasons given by the magistrates they have further stated that they consider that the payment and offer combined with the bankruptcy proceedings bring the neglect complained of within six months from the date of the information. This is not failure to maintain, for the parties were living separate at the time. It is not sufficient for the magistrates to make the order because they thought that the husband was able and ought to maintain his wife. I am of opinion that the case is not made out, and the appeal will, therefore, be allowed.

BARNES, J. agreed.

Solicitors for the appellant, *Kennedy, Hughes, and Ponsonby*, for *Lloyd, Ellesmere*.

Solicitor for the respondent, *W. P. Owen*, for *Llewellyn Kenrick*, Ruabon.

Judicial Committee of the Privy Council.

Dec. 11, 12, and 18, 1901.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, and LINDLEY, and Sir F. NORTH.)

CANADIAN PACIFIC RAILWAY COMPANY v.
ROY. (a)

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Quebec—Railway company—Statutory powers—Liability for damage—Canadian Railway Act 1888, s. 92—Fire caused by sparks from engine.

Where a company or corporation is empowered by statute to do a certain thing, they are not liable for damage caused in carrying out their statutory powers in the absence of negligence; and in this respect there is no difference between the law of the Province of Quebec and that of England; and therefore

Held (reversing the judgment of the court below), that a railway company was not liable for damage resulting from a fire caused by sparks from an engine running on their line in the absence of evidence of negligence in the construction or use of such engine.

Their liability is not affected by sect. 92 of the Canadian Railway Act 1888, which refers only to compensation for damage under that Act, or the special Act of the company.

THIS was an appeal by special leave from a judgment of the Court of King's Bench for Lower Canada (Lacoste, C.J., Bossé, Blanchet, and Hall, J.J.), who had affirmed a judgment of the Superior Court (Langelier, J.) in favour of the respondent, the plaintiff below.

The respondent brought an action against the Canadian Pacific Railway Company, claiming damages for injuries to his property through fire

caused by sparks from a passing engine on their line. The company resisted the claim on the ground that their locomotive was of the best type known and provided with the best appliances for preventing the escape of fire, and their *employés* were not guilty of negligence.

The question for decision was whether, in these circumstances, the company were liable.

The respondent contended that under the civil law of the Province of Quebec the company were responsible for the damage. The company, on the other hand, asserted that the law regulating the matter was that of the Dominion Parliament, under the true construction of which they were not liable.

Blake, K.C. (of the Canadian Bar) appeared for the appellants, and argued that under the true construction of the law of the Parliament of Canada they were not liable. Under the French law, which formerly prevailed in the Province of Quebec, a railway company is always held liable though they may have taken all possible precautions, but that rule of law has been abrogated by the legislation of the Dominion Parliament, which must receive the same construction in every province irrespective of the pre-existing law. The Canadian law on this matter is now assimilated to the law of England. He cited

Bourgoin v. La Compagnie du Chemin de Fer de Montreal, 42 L. T. Rep. 414; 5 App. Cas. 381;

Canadian Pacific Railway Company v. Notre Dame de Bonsecours, 80 L. T. Rep. 434; (1899) A. C. 387;

Port Glasgow Sailcloth Company v. Caledonian Railway Company, 20 B. 35 H. L.; 30 Sc. L. Rep. 587.

Gouin, K.C. (of the Canadian Bar), for the respondent, contended that under the law of Quebec the appellants were liable apart from negligence (see arts. 356, 1053, and 1054 of the Civil Code), and the fact that they were authorised by statute to use the locomotive makes no difference. The provincial law is not affected by the Railway Act: (see sect. 92 of the Act of 1888). He cited

St. Charles v. Doutré, 18 Low. Can. Jurist. 253;

Crawford v. Protestant Hospital for Insane, Montreal L. Rep. 7 Q. B. 57;

Fordyce v. Kearns, 15 Low. Can. Jurist. 80;

Chandler Electric Company v. Fuller, 21 Sup. Ct. Rep. 337;

Metropolitan Asylums Board v. Hill, 44 L. T. Rep. 653; 6 App. Cas. 193;

Canadian Pacific Railway Company v. Parke, 81 L. T. Rep. 127; (1899) A. C. 535;

Hammersmith Railway Company v. Brand, 21 L. T. Rep. 238; L. Rep. 4 H. L. 171;

Grand Trunk Railway Company v. Megan, Montreal L. Rep. 1 Q. B. 364;

Jodoin v. South-Eastern Railway Company, Montreal L. Rep. 1 Q. B. 816;

North Shore Railway Company v. McWllie, Montreal L. Rep. 5 Q. B. 122; affirmed on appeal, 17 Sup. Ct. Rep. 511;

Leonard v. Canadian Pacific Railway Company, 15 Quebec L. Rep. 93;

Lemieux v. Quebec and St. John Railway Company, 3 Quebec Sup. Ct. Rep. 192;

Citizens Insurance Company v. Parsons, 45 L. T. Rep. 721; 7 App. Cas. 96;

Colonial Building Association v. Attorney-General, 49 L. T. Rep. 789; 9 App. Cas. 157.

Blake, K.C. was heard in reply.

(a) Reported by G. E. MALDEN, Esq., Barrister-at-Law.

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At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 18. — Their Lordships' judgment was delivered by

THE LORD CHANCELLOR (Halsbury).—This is an appeal by the Canadian Pacific Railway Company against a judgment of the Court of King's Bench for Lower Canada, affirming a judgment of the Superior Court of Quebec whereby that company were held to be liable to damages to the extent of 300 dollars for injuries to the plaintiff's property alleged to be caused, and now admitted to have been caused, by sparks escaping from one of their locomotive engines while employed in the ordinary use of its railway. Some questions were raised in the courts below, and to some extent referred to here, whether the judgment could be supported upon the ground of the appellants having been guilty of negligence in their management of the engine or its appliances being defective. No such question is now before their Lordships. By arrangement that question has been withdrawn, and their Lordships are not to be taken as giving any opinion whether there was any evidence of negligence, or, if there was, how that issue ought to be determined. The serious and important question sought to be raised in this appeal is whether the railway company, authorised by statute to carry on their railway undertaking in the place and by the means that they do carry it on, are responsible in damages for injury not caused by negligence, but by the ordinary and normal use of their railway. Both courts below have held that in the Province of Quebec the railway company is so responsible, and the question is whether that is the law. The argument appears to be founded on the suggestion that Quebec has a civil law of its own, and that in that province all corporations, like all other persons, are responsible for causing damage to their neighbours by a fault—that is to say, any actionable wrong, whether imprudence or want of skill—and another article of the code provides that civil corporations, constituting by the fact of their incorporation ideal or artificial persons, are as such governed by the laws affecting individuals, saving the privileges which they enjoy and the disabilities to which they are subjected. If the immunity claimed for the appellants were simply claimed upon the ground that they were a corporation, without reference to what they are authorised to do in that capacity, the argument would be well founded, but the fallacy of the suggestion lies in supposing that that immunity is claimed because they are a corporation. If it were so, there would be no difference between the law of England and the law as so expounded in the Province of Quebec, but the ground upon which the immunity of a railway company for injury caused by the normal use of their line is based is that the Legislature, which is supreme, has authorised the particular thing so done in the place and by the means contemplated by the Legislature, and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code. The principle has been lucidly expounded by Lord Hatherley in the case of *Geddis v. Proprietors of Bann Reservoir* (3 App. Cas. 430) thus: "If a company, in the position of the defendants there [*Cracknell v. Corporation of Thetford*, L. Rep.

4 C. P. 629], has done nothing but that which the Act authorised—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers. My Lords, I say the proper mode of executing those powers, because it appears to me that it is very neatly and appositely put by FitzGerald, B. in giving his judgment in the Court of Exchequer Chamber, in this form. FitzGerald, B. says: 'The substantial question raised on the pleadings in the first and second counts of the declaration appears to me to be whether these acts of the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence.' " And Lord Cairns in the case of *Hammersmith Railway Company v. Brand* (21 L. T. Rep. 238; L. Rep. 4 H. L. 171) points out that it would be a repugnant and absurd piece of legislation to authorise by statute a company to do a thing and at the same time leave it to be restrained by injunction from doing the very thing which the Legislature has expressly permitted to be done. Lord Cairns said: "It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequences would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked—which, of course, is a *reductio ad absurdum*, and would defeat the intention of the Legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company." This permission of course does not authorise the thing to be done negligently or even unnecessarily to cause damage to others. Much was argued by the learned counsel for the respondent as to the peculiar jurisprudence of Quebec, but in truth there is no such difference between the law of England and the law of Quebec in this respect as he seemed to suppose. The law of England equally with the law of the province in question affirms the maxim *Sic utere tuo ut alienum non laedas*, but the previous state of the law, whether in Quebec or France or England, cannot render inoperative the positive enactment of a statute, and the whole case turns not upon

what was the common law of either country, but what is the true construction of plain words authorising the doing of the very thing complained of. The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty, and it seems to their Lordships to come within the express language of the code (art. 356). But it is said that the Dominion Railway Act itself expressly maintains the liability of railway companies under provincial law for damages caused by their operation, and sect. 92 is referred to. This may be disposed of in a sentence. That section refers to compensation under the Act and not to damages in an action at all, which is what the question is here. Sect. 288 is more plausibly argued to have maintained the liability of the company notwithstanding the statutory permission to use the railway; but, if one looks at the heading under which that section is placed and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant and authorise in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed. Mr. Blake for the appellants having waived their right to recover damages or costs awarded in Canada to the respondent, their Lordships will humbly advise His Majesty that the judgment of the King's Bench affirming the judgment of the Superior Court ought to be reversed except as to costs. In the exercise of the discretion expressly reserved to their Lordships by the Order in Council granting leave to appeal, their Lordships direct the appellants to pay the respondent's costs of this appeal.

Solicitor for the appellants, *S. V. Blake*.

Solicitors for the respondent, *Fox and Precoe*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 15, 16, and 28.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

CAPES v. DALTON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Gift to A. and B. and the children of C.—Gift divisible into thirds—No class gift.

By his will, dated the 7th June 1870, a testator bequeathed his residuary personal estate to trustees upon trust for sale and conversion and upon certain trusts for the benefit of his daughter for life, and for her issue (all of which trusts failed), and the will then continued as follows: "And in case there shall be no child of my said daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, then I direct and declare that

my said trustees or trustee shall stand possessed of the said residuary trust fund in trust for the said George Barker, his sister, Mary Barker, and the children now living of the said Richard Hollings who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one in equal shares, the share or shares of any of them being female to be for her or their sole and separate use."

The testator died on the 26th June 1870.

There were four children of Richard Hollings living at the date of the death of the testator, all of whom attained the age of twenty-one years.

Farwell, J. was of opinion that the gift was a class gift within the meaning of *Romer, L.J.* in the judgment of the Court of Appeal in *Re Moss; Kingsbury v. Walter* (81 L. T. Rep. 139; (1899) 2 Ch. 314), and accordingly his Lordship decided that the words "who being male . . . separate use" referred as much to George and Mary Barker as to the children of Richard Hollings. The learned judge therefore made a declaration that the investments representing the residuary trust fund were divisible into equal sixths between George and Mary Barker and the children of Richard Hollings.

On appeal:

Held (dissentiente Stirling, L.J.), that the intention of the testator was that the investments representing the residuary trust fund should be divided into equal thirds (one of such thirds being again divisible into fourths) between George Barker, Mary Barker, and the children of Richard Hollings; that those persons did not constitute a class, they not being united or connected by any common tie; and that the gift was therefore not a class gift.

The reasoning of Lord Westbury in *Davis v. Bennett* (4 De G. F. & J. 327) applied.

Blackler v. Webb (2 P. Wms. 333) considered.

Decision of Farwell, J. reversed.

GEORGE CAPES by his will, dated the 7th June 1870, after appointing trustees and executors thereof, and after bequeathing certain specific and pecuniary legacies and devising his real estate as therein mentioned, gave and bequeathed all his personal estate and effects not therein-before specifically bequeathed unto the trustees, upon trust for sale and conversion, and to pay his funeral and testamentary expenses, debts, and legacies, and to invest the residue, and to stand possessed of the residuary trust moneys, and of the stocks, funds, shares, or securities, wherein the same should for the time being be invested (thereinafter referred to as "the said residuary trust fund") upon trust to pay the income thereof to his daughter Georgina Capes during her life for her sole and separate use, without power of anticipation as therein mentioned, and after the decease of his daughter, upon certain trusts in favour of the children and issue of his daughter; and the will then continued as follows:

And in case there shall be no child of my said daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, then I direct and declare that my said trustees or trustee shall stand possessed of the said residuary trust fund in trust for the said George Barker, his sister Mary Barker, and the children now living of the said Richard Hollings who being male shall live to attain the age of twenty-one years, or being female shall

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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live to attain that age or marry, and if more than one in equal shares, the share or shares of any of them being female to be for her or their sole and separate use.

The testator died on the 26th June 1870.

Difficulties having arisen in the administration of the estate of the testator, this cause was commenced in March 1873 by Georgina Capes against the trustees of the will, asking that the estate might be administered and the trusts of the will carried into execution under the direction of the court.

By the decree dated the 23rd June 1873 the usual accounts and inquiries were directed to be taken and made; and by an order dated the 20th March 1877 a further inquiry was directed as to who were the children of Richard Hollings named in the will living at the date of the testator's death.

By the chief clerk's certificate, dated the 23rd June 1879, it was certified in answer to the further inquiry that the children of Richard Hollings living on the 26th June 1870 were Mary Elizabeth, the wife of Edward Henry Foster; Grace Otway Hollings; Amy, the wife of Francis William Byrne; and Walter Worsley Hollings.

On the 23rd Oct. 1900 Georgina Capes died without ever having been married.

On the 5th Feb. 1901 an order was made that the proceedings in this cause should be carried on by Mary Barker.

Doubts having occurred as to the true construction of the clause in the will relating to the residuary trust fund, a petition was presented by Mary Barker asking for a declaration that upon the true construction of the will the investments representing the residuary trust fund ought to be distributed in the following shares and to the following persons: Four equal twelfth parts to George Barker, another four equal twelfth parts to Mary Barker, and the remaining four equal twelfth parts to the four children of Richard Hollings or their representatives.

On the 23rd Feb. 1901 the petition came on to be heard before Farwell, J., when the following judgment was delivered:—

FARWELL, J.—Notwithstanding Mr. Carson's very ingenious argument I am unable to accede to it. In my opinion this is a class gift within the meaning of *Romer, L.J.* in the judgment of the Court of Appeal in *Re Moss; Kingsbury v. Walter* (81 L. T. Rep. 139; (1899) 2 Ch. 314), and the conclusion I come to is, that the words "who being male" and so on, down to the end of the sentence, refer as much to George and Mary Barker as to the children of Richard Hollings. There is no evidence to show whether George Barker was or was not an infant at the time of the testator's will, and still less to show whether the testator knew what his age was or as to what the age of Mary Barker was. The latter words, "the share or shares of any of them being female to be for her or their sole and separate use," must in my opinion extend to Mary Barker. It would be a most extraordinary construction to split up the words "who being male" and so on, and "being female" into two different divisions so as to make "who being male" and so on, apply only to the children of Richard Hollings. In my opinion it is all one gift and all one class gift, the class being such of George and Mary

Barker and the children of Richard Hollings "as being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one in equal shares, the share or shares of any of them being female to be for her or their sole and separate use." That makes it consistent and sensible, and seems to me to be the fair construction of the will. There will be a declaration therefore that the fund is divisible into sixths.

From that decision the petitioner now appealed.

Carson, K.C. and Greenland for the appellant.

P. Ogden Lawrence, K.C. and Brinton for the respondents the mortgagees of one of the children of Richard Hollings.—Assuming that George and Mary Barker and the children of Richard Hollings do not all form a class (as we submit they do) then the ordinary rule applies. A gift to A. and children of B. is to all *per capita*:

Blackler v. Webb, 2 P. Wms. 383;

Re Allen; Wilson v. Atter, 44 L. T. Rep. 240.

They referred also to

Re Moss; Kingsbury v. Walter, 81 L. T. Rep. 139; (1899) 2 Ch. 314.

Butcher, K.C. and J. G. Wood, for the respondents the children of Richard Hollings or their representatives, referred to

Dowding v. Smith, 3 Beav. 541;

Brett v. Horton, 4 Beav. 239.

[STIRLING, L.J. referred to *Davis v. Bennett*, 4 De G. F. & J. 327.]

Johnston Edwards for the trustees of the will, viz., George Barker and another.

Carson, K.C. in reply.—[WILLIAMS, L.J.—There is, we think, no class gift, so do not trouble about that point.] Then the *prima facie* rule as to a gift *per capita* comes in to be dealt with. The same rule applies whether there has to be one subdivision or two subdivisions.

Cur. adv. vult.

Jan. 28.—The following written judgments were delivered:—

WILLIAMS, L.J.—In my opinion this appeal should succeed. I think that the intention of the testator is that the residuary trust fund be divided into thirds between George Barker, his sister Mary Barker, and the children of Richard Hollings. The words of the trust run thus: [His Lordship read the material clause of the will, and continued:] It is said that George Barker, Mary Barker, and the children of Richard Hollings constitute a class and that the gift is a class gift. I cannot agree. I apply the principle as defined by Lord Macnaghten. I cannot find that these persons are united or connected by any common tie, or that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, or that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them. Now, taking it that there is here no gift to a class of which George Barker, Mary Barker, and the children of Hollings are members, let us see whether the testator intended that the trust fund should be divided into "sixths" or that it should be divided into "thirds," and that the children's third should be subdivided amongst them *inter se*. No doubt where there is a gift to A. and the children of B., A. takes only a share equal to that

of one of the children of B., just as if the children of B. had been named by their respective names (*Blackler v. Webb*, 2 P. Wms. 383), and if there is nothing more in the will this *primâ facie* construction will prevail. But the authorities show conclusively that this *primâ facie* construction may be overridden by matters in the context. Now, before dealing with the question whether the *primâ facie* construction is in this will overridden by the context, it is desirable to decide whether or not the clause beginning with the word "who" applies to George Barker, Mary Barker, and the children, or only to the children. I am of opinion that it applies only to the children; that is, to my mind, the plain grammatical construction. The grammatical construction may be disregarded in cases where the manifest intention of the will requires it—but I find no such manifest intention in this clause. On the contrary I find expressions wholly inapplicable to the Barkers, such as "now living," "if more than one." And the provision for taking in equal shares is wholly unnecessary if every one taking the gift is by the form of the clause to take an equal share, or if the words create a joint tenancy, whereas if one treats the words as directing a subdivision amongst the children of Hollings the words as to equal shares serve a useful purpose, and, indeed, were absolutely necessary if it was desired to make it clear that the children of Hollings were to take equally *inter se*. But there was no such necessity if George Barker, Mary Barker, and the individual children of Hollings were all to take equally. I think that the provision for equal shares in this clause brings the case within the reasoning of Lord Westbury in *Davis v. Bennett* (4 De G. F. & J. 327), and as plainly constitutes a direction for a subdivision as the words "of such respective issue" did in that case. And I think that the word "them" just as the words "more than one," and the relative "who" all relate to the children only. I have only to add that the case of *Brett v. Horton* (4 Beav. 239) seems to me to be a case in which Lord Langdale rejected the *per capita* construction and inferred an intention to divide and subdivide on grounds no stronger than those disclosed by the context and facts in the present case. The costs of all parties to the appeal will come out of the entire residue.

STIELING, L.J.—In this case I find myself unable to disagree with the conclusion arrived at by Farwell, J. I find myself differing, therefore, from my brethren. But it is satisfactory that this difference does not turn on any question of principle, but simply on the effect to be given to the very peculiar language which is found in the will which we have to construe. I think, in the first place, that George Barker, Mary Barker, and the children of Richard Hollings, do not form a class. Secondly, I think that it is the better view that the clause beginning with the words "who being male" and ending with the words "separate use" refers only to the children of Richard Hollings. This is, in my opinion, the strict grammatical construction of the clause; and though there may be a good deal to be said in support of a different view I do not think that there is any such inconsistency or repugnancy to the intentions of the testator, as gathered from the rest of the instrument as would justify a

departure from the primary meaning of the words. Thirdly, according to the rule established by *Blackler v. Webb* (2 P. Wms. 383) and constantly followed ever since (see *Lady Lincoln v. Pelham* 10 Ves. 175; and *Heron v. Stokes*, 2 Dr. & War., 112) under a gift to George Barker, Mary Barker, and the children of Richard Hollings, George, Mary, and the children would, in the absence of a sufficient indication of contrary intention, take *per capita*. It is said, however, that the words "if more than one in equal shares," do give such an indication. It is contended that they show the intention of the testator to be that his residuary estate should first be divided between George, Mary, and the children, and then that the share of the children should be subdivided between them in equal shares. If the testator has directed such a double division, then I think that the operation of the rule is excluded; but I fail to see that the testator has given such a direction. All that he appears to me to have said is this, that in dealing with the residuary estate the trustees are to give to the children of Richard Hollings equal shares *inter se*; he has not said expressly whether more children are also to receive equal shares as between themselves and George and Mary Barker, but he has said nothing inconsistent with that being his meaning. In that state of things it would seem to me that the rule in *Blackler v. Webb* (*ubi sup.*) ought to be applied, and as I read the judgment of Lord Westbury in *Davis v. Bennett* (4 De G. F. & J. 327) he formed a similar opinion. There the fund was directed to "be equally divided between my sisters Jane and Mary, and the lawful issue of my deceased sisters Elizabeth and Anne in equal shares if more than one of such respective lawful issue." Lord Romilly, then Master of the Rolls, held that the fund ought to be divided *per capita*, and Lord Westbury said "that construction would have been correct if the bequest had ended with the words 'if more than one'"; and although he came to a different conclusion he did so by reason of the weight which he considered ought to be attached to the word "respective." I am unable to find any expression in the present will which affords ground for coming to such a conclusion.

COZENS-HARDY, L.J.—In my opinion this appeal must succeed. The question arises upon the will, dated the 7th June 1870, of Mr. George Capes. He gave his residuary personal estate to trustees upon trust for sale and conversion and upon certain trusts for the benefit of his daughter for life and for her issue, all of which have now failed, and the will then proceeded as follows: "And in case there shall be no child of my said daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, then I direct and declare that my said trustees or trustee shall stand possessed of the said residuary trust fund in trust for the said George Barker, his sister Mary Barker, and the children now living of the said Richard Hollings who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one, in equal shares, the share or shares of any of them being female to be for her or their sole and separate use." There were four children of Richard Hollings living at the date of the will, all of whom attained twenty-one, and Farwell, J.

held that the residue was divisible in equal sixths. Now, in my view, according to the grammatical construction of the clause, the words "who being male" down to "separate use" apply solely to the immediate antecedent—that is to say, the children now living of the said Richard Hollings, and do not apply to George Barker or Mary Barker. In this respect I differ from Farwell, J. This being so, it seems to me to follow that the gift is not to these six persons *per capita*, but is to George and Mary and the children of Richard as a class. The gift is not preceded by the word *equally*. There is no direction, express or implied, that George and Mary and each of the children of Richard are to take in equal shares. But there is a direction that the children of Richard, if more than one, are to take *inter se* in equal shares. I recognise fully that a gift to A. and B. and the children of C. is *prima facie* a gift to A. and B. and all the children of C., either as joint tenants or as tenants in common. But very slight circumstances suffice to lead us to an opposite conclusion. And, in my judgment, the part of the clause which I have read is a sufficient indication that the children as a whole were put on the same footing as George and Mary, though what they took as a whole was, if necessary, to be subdivided. In dealing with a will of this nature authorities are of little value, but the reasoning of Lord Westbury in *Davis v. Bennett* (4 De G. F. & J. 327) tends to support the view which I take. The result is that I think the residuary estate is divisible into thirds, and that one of these thirds is again divisible into fourths.

Appeal allowed.

Solicitors for the appellant and for the respondents the trustees, *Harrison and Powell*, agents for *E. and K. J. Hough*, Carlisle.

Solicitors for the other respondents, *Lawrence, Graham, and Co.*; *A. F. and R. W. Tweedie*.

Monday, Jan. 20.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

COUNTY THEATRES AND HOTELS LIMITED v. KNOWLES. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—*Staying proceedings in action*—*Arbitration*—*Summons for directions taken out by plaintiff*—*Leave to defendant to administer interrogatories*—"Step in the proceedings"—*Arbitration Act 1889* (52 & 53 Vict. c. 49), s. 4.

Under the summons for directions taken out by the plaintiffs in an action for breach of contract, an order was made against them for discovery, and leave was given to the defendant to administer interrogatories.

Afterwards the defendant took out a summons under sect. 4 of the Arbitration Act 1889 asking for a stay of proceedings on the ground of an arbitration clause in the contract.

Held, that, by the order he had obtained under the summons for directions, the defendant had taken a "step in the proceedings" which precluded him from obtaining a stay under sect. 4.

This was an appeal by the defendant from a refusal by Lawrance, J. at chambers to stay the

action, upon an application by the defendant under sect. 4 of the Arbitration Act 1889.

The action was brought to recover damages for an alleged breach of contract by the defendant to perform at a music-hall at Plymouth.

The plaintiffs took out a summons for directions as ordered by Order XXX., r. 1, and upon the hearing of the summons the defendant was represented and obtained an order for discovery against the plaintiffs and leave to administer interrogatories.

An order was also made upon this summons for the delivery of pleadings, and upon the statement of claim being delivered the defendant took out a summons asking that, pursuant to sect. 4 of the Arbitration Act 1889, all further proceedings in the action might be stayed on the ground that by a clause in the contract, for breach of which the action was brought, the matters in difference had been agreed to be referred to arbitration.

The Arbitration Act 1889 (52 & 53 Vict. c. 49) provides.

Sect. 4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission . . . may make an order staying the proceedings.

The master refused the defendant's application upon the ground that the defendant had taken a "step in the proceedings" within sect. 4, and was therefore precluded from succeeding in his application.

Lawrance, J. at chambers affirmed the decision of the master.

The defendant appealed.

Newton Crane for the defendant.—The defendant has not taken any step in the proceedings. He has merely appeared and opposed the summons for directions taken out by the plaintiffs. The learned judge at chambers thought that he was bound to decide as he did by a judgment of a divisional court, consisting of Denman and Wills, JJ., in

Chappell v. North, 65 L. T. Rep. 23; (1891) 2 Q. B. 252.

There upon the hearing of the defendant's summons for directions, the plaintiff applied for and obtained leave to administer interrogatories to the defendant, and it was held that this amounted to a step by the plaintiff in the proceedings. By the present rules, made since that decision, it has been made compulsory on the plaintiff to take out a summons for directions after appearance, and before he has taken any fresh step in the action. [COLLINS, M.R.—Why did not the defendant apply for a stay on the hearing of the summons for directions?] When the summons was served on the defendant, he was unaware that any such entity existed as the plaintiff company. It was only when a statement of claim was served upon him, pursuant to an order for pleadings made upon the summons for directions, that he found out that the plaintiffs claimed to be the principals of a

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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certain person with whom the defendant had made a contract; and then, when he discovered this, he wished to set up the arbitration clause in that contract in order to get the action stayed. He had not the materials before him to enable him to exercise his judgment in the matter until he received the statement of claim. See the judgment of Lindley, L.J. in

Ires and Barker v. Willans, 70 L. T. Rep. 674: (1894) 2 Ch. 478.

Montague Lush and Randolph, for the plaintiffs, were not called upon.

COLLINS, M.R.—I think that the decision of the learned judge at chambers was right. That is clear from the judgment of the Divisional Court in *Chappell v. North* (*ubi sup.*), and, moreover, the matter seems to me to be clear on principle. The summons for directions which Order XXX. directs shall be taken out in every action enables both parties to the action to obtain upon one summons the relief which, under the former practice, they could only have obtained by each taking out a summons for what he wanted. Under the present practice, when a summons for directions has been taken out, the parties have the same rights as if they had taken out summonses for the various matters for which an order can be made upon the summons for directions, though the necessity for taking out those summonses has been dispensed with. The defendant obtained benefits under the summons for directions which he would not have got otherwise. I therefore think that he has here taken a step in the proceedings within the meaning of sect. 4 of the Arbitration Act 1889, and that the appeal must be dismissed.

ROMER, and MATHEW, L.JJ. concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Stanley, Woodhouse, and Hedderwick*.

Solicitors for the defendant, *Thomas Beard and Sons*.

Wednesday, Jan. 22.

(Before **COLLINS, M.R., ROMER and MATHEW, L.JJ.**)

YATES v. TERRY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—County Court—Garnishee summons—Assignment of debt—Payment by garnishee—Balance in hand—Payment of balance under subsequent garnishee summons.

A debtor, after having been served by the judgment creditor in a County Court action with a garnishee summons, received notice of an assignment of the debt which he owed to the judgment debtor. He afterwards was served with another garnishee summons by another judgment creditor of the same judgment debtor. He then paid into court the amount of the judgment debt owing to the first judgment creditor, and the balance of his debt which then remained in his hands he paid into court in respect of the claim of the second judgment creditor.

In an action subsequently brought against him by the assignee of the debt to recover the amount of the balance remaining after the first judgment creditor had been paid:

Held (reversing the judgment of the King's Bench Division), that the debtor, after having received notice of the assignment of the debt, was not justified in appropriating to the second judgment creditor the balance remaining in his hands after paying the first judgment creditor; and, as he had thereby deprived the assignee of the benefit of his assignment, he was liable in the assignee's action.

THIS was an appeal by the plaintiff from a judgment of the King's Bench Division (Lawrance and Kennedy, JJ.) reversing a decision of the judge of the Liverpool County Court.

The action had been commenced in the County Court to recover the sum of 13*l.* under the following circumstances.

The defendant was the receiver and manager of a company in liquidation, and was ordered by the court to pay the sum of 50*l.* to one William Henderson for salary and services rendered to the company.

Afterwards, on the 21st Feb. 1900, a garnishee summons was served upon the defendant in a County Court action of *Jones v. Henderson*, in which Jones had recovered judgment against Henderson for the sum of 37*l.*

On the 27th Feb. 1900 Henderson assigned to the plaintiff in the present action the sum of 16*l.* out of the 50*l.* due to him from the defendant.

On the 28th Feb. the plaintiff gave the defendant a due and proper notice of the assignment.

On the 15th March another garnishee summons was served upon the defendant in another County Court action of *Bielby v. Henderson*, in which Bielby had recovered judgment against Henderson for the sum of 21*l.*

The defendant then paid into court 37*l.* in the action of *Jones v. Henderson*, and on the same day he paid 13*l.* (the balance remaining in his hands out of the debt of 50*l.*) in the action of *Bielby v. Henderson*.

These two sums were taken out of court by Jones and Bielby respectively.

Thereupon the plaintiff commenced the present action for 13*l.*, the balance remaining in the defendant's hands after paying the judgment debt due to Jones.

The County Court judge gave judgment for the plaintiff.

The King's Bench Division (Lawrance and Kennedy, JJ.) held that though the form of garnishee summons in use in County Courts differs slightly in its wording from that of a garnishee order in the High Court, yet the effect was the same; and that, under the decision of the House of Lords in *Bogers v. Whiteley* (66 L. T. Rep. 303; (1892) A. C. 118), the garnishee summons attached the whole of the debt due from the garnishee to the judgment debtor, although the amount of that debt exceeded the amount of the judgment debt. The defendant in the present action was therefore protected by the first garnishee summons served on him from any action by the plaintiff as assignee from Henderson; and the court reversed the decision of the County Court judge, and gave judgment for the defendant. Leave to appeal was given.

The case is reported 83 L. T. Rep. 415; (1901) 1 K. B. 102.

Whitty for the plaintiff.

Cuthbert Smith for the defendant.

(a) Reported by E. MAXLEY SMITH, Esq., Barrister-at-Law.

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WEST HAM UNION v. LONDON COUNTY COUNCIL.

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COLLINS, M.R.—This is an appeal by leave from a judgment of the King's Bench Division reversing a decision of the judge of the Liverpool County Court. The action was brought by the assignee of a debt due from the defendant to a person named Henderson. Due notice of the assignment was given to the defendant by the plaintiff. Before the assignment a garnishee summons had been served on the defendant by which all the debts due and accruing from him to Henderson had been attached to answer a judgment which had been obtained in the County Court against Henderson by a person named Jones. After the assignment to the plaintiff had been made, and after he had given due notice of it to the defendant, another garnishee summons was served on the defendant in respect of another judgment in the County Court, which had been obtained against Henderson by a person named Bielby. That being the state of affairs, the defendant appropriated towards the satisfaction of Jones' garnishee summons part of the funds in his hands which he owed to Henderson, and the balance he appropriated, so far as it would suffice, towards the satisfaction of Bielby's garnishee summons; and these two sums, so appropriated, he paid into court. That appropriation by the defendant altogether ignored the intervening rights of the plaintiff, of whose assignment from Henderson he had received notice before he was served with Bielby's garnishee summons. Under these circumstances the County Court judge was of opinion that the plaintiff was entitled to recover in this action, and I think that the learned judge was right. It was contended on behalf of the defendant that the effect of the first garnishee summons was to attach the whole of the money in the defendant's hands owing to Henderson, not merely enough of the money to satisfy the judgment debt, and that consequently the defendant was protected by it from any claim by the plaintiff, whose assignment was made subsequently to the service of the garnishee summons. That contention might have been right if the facts were different from what they are. The fact is that the defendant dealt with the whole of the funds in his hands and appropriated them in the way I have mentioned, paying part to the creditor under the first garnishee summons, and the balance to the creditor under the second. The defendant had had notice of the assignment to the plaintiff, and I think he should have held for the plaintiff the balance remaining in his hands after paying Jones. It is no answer to the plaintiff's claim for satisfying the first garnishee summons he paid away the balance to someone else than the plaintiff. I think he could not appropriate the money in that way, and that the plaintiff is therefore entitled to judgment. The appeal from the Divisional Court must be allowed, and the judgment of the County Court judge restored.

ROMER, L.J.—I agree. When a debtor has the debt owing by him attached by a garnishee order, he may no doubt be justified in saying that he cannot be compelled to pay away the money he owes except in pursuance of the garnishee order. But, at the same time, the object of garnishee proceedings is merely to enable a judgment creditor to obtain payment of his judgment. The judgment debtor still has an interest in the

debt notwithstanding the garnishee order, and his rights are capable of assignment subject to the garnishee order. In the present case the judgment debtor assigned his debt, and that assignment was perfected by notice to the debtor. Everything was done to complete the assignment subject to the rights of Jones, the judgment creditor, under his garnishee summons. Now, Jones' claim under that garnishee summons was satisfied by the defendant, and a balance of the debt which he owed to the judgment debtor still remained in his hands. That balance was bound by the assignment to the plaintiff. It was the defendant's duty not to pay away that balance under any subsequent garnishee summons without giving notice of the fact that he held it subject to the assignment. By the defendant's neglect of duty in that respect, the plaintiff lost the benefit of the assignment to him. I think the defendant is therefore liable in this action for the loss he has caused to the plaintiff by the breach of the obligation which he was under.

MATHEW, L.J.—It is quite clear that under the first garnishee summons the defendant was obliged to pay to the judgment creditor 37*l.* out of the 50*l.* which he owed to the judgment debtor. Having done that, a balance of 13*l.* was left in the defendant's hands. What was he to do with it? Obviously his duty was to protect the interests of the plaintiff, of whose assignment he had had due notice. However, he paid no regard to the rights of the assignee, and deliberately appropriated the money to pay someone else under a garnishee summons which had been served on him after he had received notice of the plaintiff's assignment. I think that the County Court judge was right in giving judgment for the plaintiff, and that the appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Field, Roscoe, and Co., for Yates and Co., Liverpool.*

Solicitor for the defendant, *Edward Lloyd, Liverpool.*

Thursday, Jan. 30.

(Before **COLLINS, M.R.**, **ROMER** and **MATHEW, L.J.J.**)

WEST HAM UNION v. LONDON COUNTY COUNCIL (a).

APPEAL FROM THE KING'S BENCH DIVISION.

Poor law—Pauper—Settlement—Addition to parish of part of adjoining parish—Identity of parish not destroyed—Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61)—Poor Law Act 1879 (42 & 43 Vict. c. 54).

By an order of the Local Government Board made under the Divided Parishes and Poor Law Amendment Act 1876 and the Poor Law Act 1879 a part of a parish was taken away from it and added to another parish.

Held (affirming the decision of the King's Bench Division), that the identity of the parish to which the addition was thus made was not destroyed by the addition; and that therefore a settlement which had been acquired by a pauper in the parish before the addition to its boundaries continued to exist.

(a) Reported by **E. MANLEY SMITH, Esq., Barrister-at-Law.**

THIS was an appeal by the West Ham Union from a decision of the King's Bench Division (Darling and Channell, JJ.) upon a special case stated by the Court of Quarter Sessions for the County of London.

Elizabeth Heritage (hereinafter referred to as the pauper lunatic) was born in Stephenson-street, Canning Town, in the parish of West Ham in the West Ham Union, on or about the 11th Feb. 1852, and resided at Nos. 3 and 5, Widdicombe-terrace (afterwards and now known as Nos. 40 and 42, Barking-road), in the said parish, for about seventeen years until the month of Aug. 1888.

The pauper lunatic resided at the address aforesaid in such manner and under such circumstances during the whole of the period of seventeen years and in each of such years as to render her irremovable from the parish in which such residence took place.

By an order of the Local Government Board, dated the 24th Aug. 1886 and made under the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) as amended and extended by the Poor Law Act 1879 (42 & 43 Vict. c. 54), it was ordered that a certain part of the parish of Wanstead should cease to be part of that parish and should be amalgamated with the parish of West Ham. A copy of the order, which took effect on the 24th March 1887, was annexed to and was to be taken as part of the special case.

The address at which the pauper lunatic so resided as aforesaid was situate in the parish of West Ham as constituted previously to the date of the order, and not in any part of the parish of Wanstead.

The pauper lunatic left the parish of West Ham in Aug. 1888, and did not thereafter acquire a settlement in any parish.

The pauper lunatic was afterwards found in the hamlet of Ratcliffe, in the Stepney Union in the county of London, and was sent therefrom to the Claybury Lunatic Asylum, which belonged to the London County Council.

By an order of two of Her Majesty's justices of the peace acting in and for the county of London, dated the 14th Feb. 1900, the pauper lunatic was, under sect. 290 of the Lunacy Act 1890 (53 & 54 Vict. c. 5), adjudged to be chargeable to the county of London.

On the 15th May 1900 the London County Council procured from two of Her Majesty's justices of the peace acting in and for the county of London an order of that date whereby (amongst other things) the pauper lunatic was adjudged to be settled in the West Ham Union. A copy of the order was annexed to and was to be taken as a part of the special case.

The West Ham Union appealed from the order of the 15th May 1900.

The London Quarter Sessions allowed the appeal on the ground that the old parish of West Ham had been destroyed by reason of the amalgamation with it of part of the old parish of Wanstead; but they stated a case for the opinion of the King's Bench Division.

The King's Bench Division (Darling and Channell, JJ.) were of opinion that the order of the Local Government Board had not the effect of destroying the parish of West Ham, and that the settlement of the pauper therefore remained

unaffected. They therefore reversed the order of the Quarter Sessions.

The case is reported 84 L. T. Rep. 471; (1901) 1 K. B. 720.

The West Ham Union appealed.

Avory, K.C. (J. C. Earle with him) for the West Ham Union.—The result of the alteration of the old parish of West Ham by the addition of part of the parish of Wanstead is that the old parish in which the pauper had a settlement has ceased to exist, and the pauper's settlement has therefore also ceased to exist. There is a long series of decisions showing that the effect of altering a parish by division is to destroy the identity of the parish existing previously to the division, with the result of destroying also any settlements that had existed in that parish before it was divided:

R. v. Tipton, 3 Q. B. 215;

R. v. Hunnington, 5 Q. B. 273;

Stourbridge Union v. Droitwich Union, 25 L. T.

Rep. 411; L. Rep. 6 Q. B. 769.

Those cases have all been considered and followed by the Court of Appeal:

St. Saviour's Union v. Dorking Union, 78 L. T.

Rep. 29; (1898) 1 Q. B. 594.

It is true that here the parish has not been divided, but has been increased by the addition of a piece taken from another parish. But the principle of those decisions is applicable to the present case. It is unfair to make the ratepayers of the piece which used to form part of the parish of Wanstead responsible for the support of paupers who had a settlement in the old parish of West Ham. The present parish of West Ham ought not to be held to be identical with the old parish merely because it goes under the same name. The addition to the old parish was made under statutory authority, and the result is distinguishable from a case in which by natural causes there has come about an accretion or a diminution as regards the boundaries of a parish, such as may often happen in the case of a parish bounded on one side by the sea.

Macmorran, K.C. and Daldy for the London County Council.—The decisions referred to only apply to cases where a parish has been destroyed. It cannot be fairly said that the old parish of West Ham has been destroyed, merely because its boundaries have been slightly enlarged. By sect. 27 of 31 & 32 Vict. c. 122, in the case of all seaside parishes the foreshore was declared to be annexed to and included within the boundaries of the parishes; but it could hardly be contended that all those seaside parishes were destroyed by that Act. That every alteration of the boundaries of a parish does not destroy a settlement in the parish is clear:

R. v. St. Martin's, New Sarum, 9 Q. B. 241.

There two parishes were united, and it was held that the settlement of a pauper in one of them continued to exist as a settlement in the united parish.

Avory, K.C. in reply.—The union of the two parishes in the case last cited took place under a local Act. The judgment proceeded on the ground that the intention of the Legislature was that the liability of the two parishes to maintain their paupers should not be destroyed. Moreover, it was an equitable thing that each of the parishes should share the expenses of maintaining the

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other's paupers. Here it would be manifestly inequitable that the few inhabitants of the small bit of Wanstead should be responsible for maintaining the paupers of the large parish of West Ham. Under sect. 8 of the Divided Parishes and Poor Law Amendment Act 1876, the Local Government Board could have made an adjustment between the parishes of their debts and liabilities. Since none was made, it would be only fair that the liability to support the pauper should be treated as gone.

COLLINS, M.R.—The question raised in this case is whether a pauper who had acquired by birth a settlement in the parish of West Ham has lost her settlement in consequence of the addition to that parish of a small portion of the parish of Wanstead. The Divisional Court, reversing the decision of the Quarter Sessions and restoring the decision of the justices, held that the pauper did not lose her settlement by that addition to the parish. On behalf of the West Ham Union it is contended that the decision of the Divisional Court is wrong because it is said to be inconsistent with a long line of cases, the last of which was *St. Saviour's Union v. Dorking Union (ubi sup.)*. In those cases it has been held that where a parish in which a pauper had a settlement has been divided into separate parishes, so that the old undivided parish has ceased to exist as a parish, then, as the entity in which the pauper had a settlement has ceased to exist, the settlement of the pauper also ceases to exist. There have been several decisions of that kind, and the principle on which the earlier ones were decided was not altogether approved of by the judges in the later ones. But the law had been laid down in that way so often that the authority of the earlier cases was followed in *St. Saviour's Union v. Dorking Union (ubi sup.)*. Now, it was contended that that principle applies to the present case; but, in my opinion, the Divisional Court was right in holding that long line of cases to which I have referred to be distinguishable from the present case. It is to be observed that here there has not been any destruction of the identity of the old parish of West Ham by reason of its having been divided and having had substituted for it a number of constituent parts which have themselves been erected into parishes. All that has happened to the parish is that there has been an accretion to it from the parish of Wanstead. The legislation under which that accretion was acquired does not seem to me to point to anything at all analogous to the subdivision of one parish into a number of minor and separate parishes. What was done here was done under sect. 1 of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61). That section provides that where any parish shall be divided so as to have its parts or any of them isolated in some other parish or parishes or otherwise detached, the Local Government Board may, after inquiry, &c., make an order "either for constituting separate parishes out of the divided parish or for amalgamating some of the parts thereof with the parish or parishes in which the same may be locally included or to which they may be annexed as shall appear to such board to be most convenient, and providing where requisite for a change of the county of the parish or part of a parish." This necessitated no division of the parish in the sense in which

a parish was divided in the line of cases that has been referred to. All that was done was simply to cut a bit off one parish and put it on to another. The identity of the old parish of West Ham still remained, notwithstanding the addition to it. And the parish of Wanstead still remained the parish of Wanstead, notwithstanding that a certain bit of it was cut off. The present case is therefore outside that line of cases in which it was held that if the identity of a parish was destroyed, a settlement in that parish was also destroyed. But, further than that, there seems to me to be authority for so holding. One of the cases cited was *R. v. St. Martin's, New Sarum (ubi sup.)*. In that case two entire parishes were amalgamated together, and it was held that a settlement which had previously been acquired in one of the parishes still remained in existence as a settlement in the united parish. That decision seems, at all events, to displace the second argument that was addressed to us on behalf of the West Ham Union. It was said that to hold in the present case that the pauper's settlement still remained would have the unfair result of making the inhabitants of the piece which formerly was part of the parish of Wanstead liable to support paupers who had a settlement in West Ham. Precisely the same result was brought about by what took place in *R. v. St. Martin's, New Sarum (ubi sup.)*. There each of the parishes, as part of the new entire amalgamated parish, became responsible for the paupers of the other parish. Mr. Avory, in answer to that, said that the result may have been brought about by the consent of the parishes. I do not know whether we are to assume that what has happened in the present case was done without the consent of the parishes, but it certainly was done by virtue of an Act of Parliament. The fact that certain paupers in the one area would be partly maintained by the other area was not a bar to holding that the amalgamation could not be treated as destroying a settlement in either of the two parishes. The present case seems to me to be outside the line of authorities which established the rule that on the division of a parish a settlement which had existed in the undivided parish is destroyed. There is therefore nothing to prevent us from saying, what seems to me to be in accordance with common sense, that the mere accretion, whether it was caused by Act of Parliament or by some natural cause, of a small portion on to the larger parish whose identity is not permitted to be destroyed by the Legislature did not destroy the original parish of West Ham, and the pauper's settlement therefore remains as it was. For these reasons I think that the appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. The case of *R. v. Tipton (ubi sup.)* and the cases in which it has been followed cannot be disregarded by the court, but I think I may say that those cases are not in themselves wholly satisfactory, and that the ground upon which they were decided ought not to be extended so as to be applied to another case when the facts are substantially different. It was contended that logically the present case ought to be decided in the same way as *R. v. Tipton (ubi sup.)*. But even if a *prima facie* logical deduction from *R. v. Tipton* were to lead to such a decision, yet, as was pointed out by the Lord Chancellor in the case in

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the House of Lords (a), it is often misleading, in dealing with questions of English law, to be guided solely by what may *prima facie* seem to be considerations of logic, and it would not follow that the present case ought to be decided as *R. v. Tipton* was decided. But on looking at the real ground of the decision in that case, it seems to me to be this, that owing to the original parish having been divided into several distinct parishes and so destroyed, the settlement in that parish had also been destroyed. That ground of decision is inapplicable to the present case. Upon the facts stated, I have come to the conclusion that the parish of West Ham has not been destroyed, but that it continues to exist as a parish notwithstanding that what was formerly a portion of another parish has been added to it. That being so, I see no sufficient reason for saying that the present parish of West Ham is not the settlement parish of the pauper lunatic, Elizabeth Heritage. I think, therefore, that the appeal should be dismissed.

MATHEW, L.J.—I agree with what Lord Lindley said in the case of *St. Saviour's Union v. Dorking Union* (*ubi sup.*), that a very narrow construction had been put on the statute of 13 & 14 Car. 2, c. 12, by the judges who decided *R. v. Tipton* (*ubi sup.*) and the cases which followed that decision. They appear to have decided in that case that the parish in question had ceased to exist, and with the parish the settlements in the parish disappeared also. That very narrow construction of the statute was adopted and followed with faltering steps by court after court. As the law now stands under the cases that have been referred to, if a parish be divided into two parishes, each different from the original parish and described by a different name, a settlement in the original parish disappears with the parish. It must be borne in mind that the order which has been made by the Local Government Board in this and many other cases was made apparently with the intention of preventing the application of the decision in those cases. The order is made for the maintaining of the old parish with the addition to it of the small slip taken from the other parish. The effect of the argument which has been addressed to us by Mr. Ivory would be that both the parish of West Ham and the parish of Wanstead disappeared by reason of the order. To my mind it is clear that the order was framed in such a way as to prevent the possibility of any such result. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the union, *Hillearys*.

Solicitor for the London County Council,
W. A. Blasland.

(a) In *Quinn v. Leatham* (85 L. T. Rep. 289; (1901) A. C. 495), Lord Halsbury, L.C. said he wished to make two observations of a general character. One was as follows: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Jan. 14 and 15.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

CLERKENWELL VESTRY v. EDMONDSON AND
SON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Metropolis—Management Acts—"New street"—
Sewer—Expenses of sewerage—Liability of
frontagers—Metropolis Management Amendment
Act 1862 (25 & 26 Vict. c. 102), ss. 52, 53.*

The boundary line between the parish of C., in the county of London, and the parish of H., in the county of Middlesex, ran along the centre of an old highway. Before the Metropolis Management Act 1855 came into operation in 1856, buildings had been erected along nearly the whole of the H. side of the road, but on the C. side of the road there were only seven or eight scattered buildings. Afterwards buildings were erected along the whole of the C. side of the road, and the vestry of C. constructed a sewer on that side of the road for the drainage of those buildings. The vestry apportioned the expenses of making the sewer among the frontagers on the C. side of the road, contending that this side of the road was a "new street" within the meaning of the Metropolis Management Amendment Act 1862.

Upon a summons against a frontager to enforce payment, the justices found as a fact that, taken as a whole, the road was sufficiently built upon before 1856 to be a "street," and that, therefore, the C. side of the road was not a "new street."

Held (affirming the decision of the Queen's Bench Division), that the justices could properly consider the road as a whole, and find that the whole was a "street" in 1856, and were therefore right in holding that the C. side of the road was not a "new street."

THIS was an appeal by the Clerkenwell Vestry from the judgment of the Divisional Court (Lord Alverstone, C.J. and Kennedy, J.) upon a case stated by justices.

A complaint was preferred by the Clerkenwell Vestry against Edmondson and Son, that the vestry, during the years 1897 and 1898, in accordance with the provisions in that behalf of the Metropolis Management Acts, executed or caused to be executed certain works, namely, the construction of a sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, with the necessary man-holes and inspection chambers, and other incidental charges and expenses under the Acts, in or in part of a new street known as Colney Hatch-lane, for or in respect of certain premises in the street of which the respondents were the owners; and that the appellants had thereby incurred expenses of which the amounts apportioned in respect of the respondents' premises were 180*l.* 6*s.* 8*d.* and 7*l.* 2*s.* 1*d.* respectively, and that the respondents had not paid these sums.

Colney Hatch-lane is an old highway forming the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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district of Hornsey, in the county of Middlesex.

The actual boundary is nearly in the centre of the lane, but the greater part of the surface is within the parish of Clerkenwell.

Before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected along the Hornsey, or Middlesex, side of the lane along nearly the whole of its length, but on the Clerkenwell, or London, side of the lane there were at that time only seven or eight buildings at various points.

Since the year 1856, and more particularly within the last few years, the remainder of the Clerkenwell, or London, side of the lane has been laid out for building, and the greater part of the frontage to the lane is now covered with buildings.

In or about the year 1887 the Hornsey Local Board laid a sewer on their side of the lane for the drainage of the houses in their district. By agreement between that board and the appellants two of the houses on the Clerkenwell side were drained into that sewer until the sewer mentioned in the complaint was constructed; and, by agreement between the board and the owners of two other houses on the Clerkenwell side, those owners connected their drains with the Hornsey sewer. The sums paid by those owners to the Hornsey Local Board under the agreements were repaid to them by the appellants when their drains were connected with the sewer mentioned in the complaint. On the Clerkenwell side of the lane there was no sewer of any kind save a surface water sewer which had been laid for the drainage of the road itself, partly by the owners of adjoining land and partly by the appellants, and for a short distance an old brick sewer running obliquely across the lane and taking the drainage of three or four houses on that side. The old houses at the south end of the lane on the Clerkenwell side were drained into a sewer behind these houses running into another parish.

The part of the parish of Clerkenwell which comprises the eastern side of the Colney Hatch-lane is wholly detached from the rest of the parish, and is entirely surrounded by the county of Middlesex. For this reason it was found to be impracticable to provide an outlet into the metropolitan main drainage system from this part of the parish.

By the Metropolitan Board of Works (Various Powers) Act 1887 (50 & 51 Vict. c. cvi.), s. 44, the Metropolitan Board of Works (now the London County Council) were enabled, by agreement with the local authorities of certain adjoining districts, or any part of them, to cause any sewer or sewers constructed or to be constructed by that board in the detached portion of Clerkenwell to communicate with the sewers of one or more of such authorities, and an agreement for this purpose was made in the year 1896 by the London County Council with the Friern Barnet Urban District Council, and an outlet for the sewage of this detached part of Clerkenwell into a sewer of the county council and then into the Friern Barnet sewers was provided in pursuance of the agreement, in the year 1897. As soon as such outlet was provided, the appellants laid the sewer mentioned in the complaint for the drainage of

the houses and buildings which then were or might thereafter be erected on the Clerkenwell, or London, side of the lane, and that sewer was completed in the year 1898.

The total cost of the sewer and the works appertaining thereto was 1106*l.*, of which the appellants charged to sewer rates the sum of 103*l.* and apportioned the balance among the owners of the premises on the Clerkenwell side of the lane according to their respective frontages.

The amounts apportioned in respect of the respondents' premises were 130*l.* and 7*l.*

The respondents having refused to pay these sums, a complaint was preferred under sects. 52 and 53 of the Metropolis Management Amendment Act 1862.

It was contended before the justices on behalf of the appellants that so much of Colney Hatch-lane as is within the parish of Clerkenwell was a "new street," within the meaning of the Metropolis Management Acts; that it became a new street by reason of the erection of buildings fronting it as above mentioned; that, in order to determine whether it had become a new street, no regard could be had to the portion of the lane in the parish of Hornsey or to the buildings on the Hornsey side, these being in a different parish, district, and county, and subject to entirely different statutes.

It was contended on behalf of the respondents that Colney Hatch-lane, taken as a whole, had become a street, in the ordinary sense of the term, by reason of the buildings erected along it before the year 1856, and was an old street when the Metropolis Management Act 1855 came into operation; that no part of that street could become a new street subsequently by reason of the erection of additional buildings along it, and that the portion of the lane which is in Clerkenwell could not be dealt with by itself without regard to the portion which is in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it was a "new street" within the meaning of the Metropolis Management Acts.

The justices found that Colney Hatch-lane taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act 1855 came into operation, and they were of opinion that that portion of the lane which is in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a "new street," and for these reasons they dismissed the summonses.

The question for the opinion of the court was whether that portion of Colney Hatch-lane which is in Clerkenwell could be dealt with by itself without regard to the portion which is in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it is a "new street."

The Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) provides:

Sect. 52. Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in and for the drainage of any new street, or of any house or houses erected since the first day of January one thousand eight hundred and fifty-six, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne

and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street, respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just, and the amount charged upon or payable in respect of each house or premises shall be payable before the works shall be commenced, during their progress, or after their completion, as the vestry or district board shall in each case determine, either in one sum or by instalments, within such period, not exceeding twenty years, as the vestry or district board shall direct; and any such sum or instalments shall be recoverable from the present or any future owner of the said house or premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board.

Sect. 53. Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in their parish or district; and the amount so charged by the vestry or district board upon or in respect of each house or premises shall be payable, either before the works shall be commenced, during their progress, or after their completion, as the vestry or board shall in each case determine, either in one sum or by instalments within such period, not exceeding twenty years, as the vestry or board shall direct; and any such sum or instalment shall be recoverable from the present or any future owner of such house or premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board; provided that no street or property in respect of which sewers rates have been levied for five years prior to the first day of January, one thousand eight hundred and fifty-six, shall be subject to be charged under the provision contained in this section.

Sect. 112. In the construction of the recited Acts and this Act . . . the expression "new street" shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having the control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out.

The Divisional Court (Lord Alverstone, C.J. and Kennedy, J.) held that the justices were right and dismissed the appeal (83 L. T. Rep. 501).

The Clerkenwell Vestry appealed.

Macmorran, K.C. and *C. F. Pritchard* for the appellants.—The decision of the Divisional Court was wrong. The justices ought to have held that the portion of the lane in question, within the district of the appellants, was a "new street" within the meaning of the Metropolis Management Act 1862. They were wrong in holding that the part of the lane in Clerkenwell could not be considered by itself without reference to that part which was in Hornsey. The whole of a highway is not necessarily to be treated as being one

street for the purposes of the Metropolis Management Acts. The definition of a "street" in the Metropolis Management Act 1855 includes "a part of any such highway"; and the definition of a "new street" in sect. 112 of the Metropolis Management Act 1862 includes "a part of any such street." Therefore a part of any highway or street may be separately treated as a "new street" without any reference to the rest of the highway or street. The part of this highway which is in Clerkenwell ought to be separately treated; it is situate in a different county and is governed by entirely different statutes. If it is treated as a separate street, it is clear upon the facts that the Clerkenwell part of the road became a "street" by the erection of buildings along it, after the Metropolis Management Act 1855 came into operation, and is therefore a "new street." There are many cases which show that the part of a road which becomes a street in the ordinary meaning of the term by the erection of buildings along it may be separately treated as a "new street":

Property Exchange (No. 1) Limited v. Wandsworth Board of Works, 84 L. T. Rep. 689;

White v. Fulham Vestry, 74 L. T. Rep. 425;

Richards v. Kessick, 59 L. T. Rep. 318.

This sewer was constructed solely for the benefit of the houses built on the Clerkenwell side, which was the only part of the road over which the Clerkenwell Vestry had jurisdiction, and therefore the cost would properly be made to fall upon the owners of those houses.

Alexander Glen, for the respondents, was not called upon to argue.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The question in this case arises with regard to an old highway which formed the boundary between the parishes of Clerkenwell and Hornsey. This highway was the boundary between the two parishes, and the actual boundary line ran along nearly the centre of the road, but the greater part of the surface of the road was in the parish of Clerkenwell. The local authority under the Metropolis Management Acts desired to treat this old highway as a "new street," which would enable them to claim payment from the frontagers of the expenses of making a sewer. If the highway was not a "new street," the local authority could not claim payment of those expenses from the frontagers, but they would have to be paid out of the rates. The local authority say that in the circumstances that part of this highway which is within the parish of Clerkenwell may be deemed to be a "new street" within the meaning of the Metropolis Management Acts. The justices have found as a fact that, before the Metropolis Management Act 1855 came into operation, the old highway had become a street by reason of the number of houses which had been erected on the Hornsey side of the road, and they found that, therefore, at the time when it was sought to charge the frontagers the street was not a "new street," but an old street. That appears to me to be a question of fact. It has been laid down in many cases that the question whether a road is a street or not is a question of fact, and not a question of law, and that it has to be decided by the tribunal which has to deal with the question. Now, in the present case no difficulty arises as to the area of the old highway, because no addition has been made to

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it and it remains the same as it was before. Houses, however, were built upon the Hornsey side of the road in such numbers as to make the whole of the old highway a street long before the sewer in question was made. That being a question of fact, it seems to me that the whole matter is concluded. The whole argument on behalf of the appellants rested upon a confusion between the facts as to what was the area of the highway and the rights of the parties because it was a highway. It was argued that, because the legal rights of the different parties were different, we ought therefore to consider that fact in determining whether this was a "new street" or not, and that, because the Metropolis Management Acts applied to one side of the highway and the Public Health Act to the other side, and the rights of the parties were different, therefore the two sides of the road ought to be treated differently. It seems to me that the legal rights of the parties on either side of the road have nothing whatever to do with the question whether the highway is all a street or not. The justices have found against the appellants upon a question of fact. They have found that the old highway was all a street wherever it was situated. For these reasons I think that the decision of the Divisional Court was right. The learned judges treated the case as one which had been decided as a question of fact, and I think that they were right. This appeal therefore fails, and must be dismissed.

ROMER, L.J.—I am of the same opinion. I think that there is great force in the observation of Kennedy, J. that it is not desirable to create any unnecessary artificiality in the understanding of a "street" and "new street." In this case it seems to me that Colney Hatch-lane was and is one street, and that it was and is an old street, and that it ought not, for the purposes of the appellants, to be treated as two streets, one old and the other new. I agree, therefore, that the appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The argument for the appellant invited us to come to the conclusion that an old street might be a "new street" within the meaning of the Metropolis Management Acts. I do not find any indication of that in the Acts. Sect. 52 of the Metropolis Management Amendment Act 1862 applies in terms to a "new street," and then there is a definition of "new street" in sect. 112 of that Act, which is as follows: "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street . . . and also all streets partly formed or laid out." Here the road was an old street before the first Act of 1855 came into operation. It is said that it became a "new street" because new houses were built along one side of it, but it was clearly an old street, and that has been found as a fact by the justices. The cases which have been cited as to a part of a street being a "new street" were all cases in which a new piece had been added to an old street. In this case the whole of the highway had become an old street. I think that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: for the appellants, *Boulton, Sons, and Sandeman*; for the respondents, *Tatham and Hardy*.

Jan. 29 and 31.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

BYNOE v. BANK OF ENGLAND AND ANOTHER. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Action—Cause of action—Alleged wrongful conviction upon alleged false evidence.

So long as a conviction in criminal proceedings stands unreversed, the person convicted has no cause of action against a person for negligently giving false evidence, or for breach of duty, whereby he was wrongfully convicted.

THIS was an appeal by the plaintiff from an order of Jelf, J. at chambers, dismissing his action upon the ground that no reasonable cause of action was disclosed.

The plaintiff brought this action to recover damages from the Bank of England and C. J. Williams.

The statement of claim, so far as is material, was as follows:

1. The plaintiff was, at the time of the matters herein-after complained of, a fully qualified physician and surgeon, holding the double qualification and registered on the General Medical Register.

2. By virtue of diverse Acts of Parliament, charters, and provisions of Government passed, granted, and made, as well for the profit of the defendant corporation as for the public benefit, the Governor and Company of the Bank of England were constituted and are the issuers and custodians for value of a portion of the national currency, that is to say, of the note issue of the Bank of England.

3. It is one of the duties of the Bank of England as such issuers and custodians as aforesaid to check the return from circulation of Bank of England notes, and for that purpose to keep proper books of account, and to make and preserve entries showing the dates on which and the times at which the notes of the Bank of England are severally returned from circulation, and to be and remain prepared, in the interests of public justice and for the prevention of fraud, with evidence of the dates and times and generally of the circumstances of such returns from circulation respectively.

4. On the 14th, 15th, and 16th Jan. 1892 the plaintiff was put upon his trial at the Central Criminal Court on a charge of forgery.

5. In the course of the said trial it became, and was held by the presiding judge who tried the case to be, material to the issue and of the utmost importance and necessity in determining the value of the alibi set up by the defence, and which alibi the judge declared was "perfect" up to one o'clock, that the prosecutor should prove on what day and at what time or times of such day certain Bank of England notes of the aggregate value of 415*l.* were returned to the Bank of England from circulation and by whom.

6. The Bank of England, in pursuance of such duty as aforesaid, attended by their proper officer, namely, by the defendant C. J. Williams, at the said court, and by such officer informed the court, purporting to give such information from the records of the Bank of England, that the said notes were returned to the Bank of England from circulation at one and the same time and by the same person "after lunch" on the 5th May, 1891.

7. The said information, which was supplied to the court as aforesaid from the records of the Bank of England, was and has been admitted both by the Bank of England and by the defendant C. J. Williams to have been erroneous and given from erroneous and negligently prepared records, and was given by the defendant bank

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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falsely and negligently and in breach of their duty as aforesaid.

8. Owing to the negligence, misfeasance and breach of duty of the Bank of England as aforesaid the plaintiff was wrongfully convicted on the said charge and has thereby suffered damage.

9. As against the defendant C. J. Williams, through his negligently giving such false evidence as aforesaid, the plaintiff was wrongfully convicted, and has thereby suffered damage.

10. In consequence of the false evidence of the defendants the plaintiff was convicted of forgery and sentenced to nine years' penal servitude . . . and mainly as a consequence of the refusal of the defendants to supply a statement correcting their false evidence the plaintiff was detained in penal servitude for the whole of the sentence and treated with special surveillance by order from the Home Office.

The plaintiff claimed 25,000*l.* damages. Upon the application of the defendants Jelf, J. at chambers made an order dismissing the action upon the ground that the statement of claim disclosed no reasonable cause of action.

The plaintiff applied for leave to appeal.

The plaintiff, in person.

C. W. Mathews for the respondents.—The order of the learned judge was right. Without going into the facts of the case in any way, it is sufficient to say that it is well settled law that no action can be brought in respect of any conviction for a criminal offence so long as that conviction stands. Further, no action will lie against a witness in respect of any evidence given by him.

Cur. adv. vult.

Jan. 31.—The judgment of the court was read by

COLLINS, M.R.—The plaintiff was unrepresented by counsel in this case, and no authorities were cited by the defendants. We, therefore, thought it well to look a little closer into the law before giving judgment. The plaintiff asks leave to appeal from an order of Jelf, J. dismissing his action on the ground that the statement of claim discloses no cause of action. The claim is against the Bank of England and their officer, C. J. Williams, on the grounds stated substantially in pars. 3 to 9 of the statement of claim. [Reads them.] This claim is obviously open to many objections, based on the immunity of witnesses and other points, some of which might possibly have been cured by amendment. There is, however, one broad principle lying at the root of the whole matter, to which we drew attention during the argument, that is, that as long as the conviction stands, "no one against whom it is producible shall be permitted to aver against it": (see notes to *Duchess of Kingston's* case, 2 Smith's Leading Cases, p. 726, 10th edit., where the authorities are collected). In a modern case, *Baseé v. Matthews* (16 L. T. Rep. 417; L. Rep. 2 C. P. 684), the point was raised that this doctrine could not be held to defeat an action for malicious prosecution which resulted in a conviction, from which, as here, there could be no appeal, and which, therefore, remained unreversed. That case arose on a demurrer which admitted malice and want of reasonable and probable cause. The court, however, overruled the argument. Byles, J. said: "I think we should be disturbing foundations if we were to admit there is any doubt that the criminal proceeding must be determined in favour of the

accused before he can maintain an action for malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment, it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg v. Blake* (Hardr. 194), where Hall, C.J. says that 'if such an action should be allowed,' that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, 'the judgment would be blown off by a side-wind.'" Montague Smith, J. was of the same opinion, and cited the judgment in the case of *Castrique v. Behrens* (4 L. T. Rep. 52; 3 E. & E. 709), in which Crompton, J. said: "There is no doubt, on principle and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage: (*Cotterell v. Jones*, 11 C. B. 713; *Barber v. Lesiter*, 7 C. B. N. S. 175). But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause." A witness charged with negligence only is clearly not in a worse position than a prosecutor who admits malice and want of reasonable and probable cause. It is clear, therefore, that the plaintiff has no possible cause of action, and his application must be dismissed.

Application dismissed.

Solicitors for the defendants, *Freshfields*.

Feb. 3 and 4.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

FITZPATRICK v. EVANS AND CO. LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Employer's Liability—Employer and workman—Colliery proprietor—Contractor employed by colliery proprietor—Workman employed by contractor—Injury to workman—Liability of colliery proprietor—Employers and Workmen Act 1875 (38 & 39 Vict. c. 90), s. 10—Employers' Liability Act 1880 (43 & 44 Vict. c. 42), ss. 1, 8.

The defendants, the owners of a coal mine, employed a contractor to sink a shaft in the mine, who was to be paid so much a yard and was to find all labour. All the workmen employed by the contractor signed a book kept by the defendants, which was a "record book of persons employed" and contained the "conditions of employment." By the conditions it was provided that "every workman employed by a contractor shall, in consideration of being employed at the works, be bound, both as between himself and the contrac-

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

tor and between himself and the owner, by the terms of these conditions."

A workman engaged and paid by the contractor and employed in sinking the shaft was killed by an explosion in the shaft, and his father sued the defendants for damages under the Employers' Liability Act 1880.

Held (affirming the judgment of the King's Bench Division), that the signing of the rules by the deceased workman was not evidence that the relation of employer and workman had been created between him and the defendants within the meaning of the Employers' Liability Act 1880, and that therefore the defendants were not liable under the Act.

THIS was an appeal by the plaintiff from the judgment of a Divisional Court (Wills and Channell, JJ.), allowing an appeal from the judgment of the County Court judge at St. Helena.

This action was brought by the father of a deceased workman, who was killed while employed in sinking a pit at the defendants' colliery, to recover damages for the death of his son, under sect. 1 of the Employers' Liability Act 1880, and under the Fatal Accidents Act 1846.

The defendants were the proprietors of a colliery. They had entered into a contract with one Morris, by which Morris agreed to sink and wall the shaft of a pit at the colliery for a certain price per yard, and upon certain other terms and conditions. Morris was to provide and pay for all labour.

The deceased workman was engaged by Morris to work in the shaft as a sinker, and his wages were paid by Morris.

While the deceased workman was working in the shaft there was an explosion of gas, and he was so injured that he died.

The deceased workman had signed the "record book" kept by the defendants at their colliery. That book was headed "Record book of persons employed on the conditions undermentioned," and contained the following conditions:

Conditions of Employment.—At the collieries and works of Richard Evans and Co. Limited, the Haydock, Ashton, Edge Green, Parr and Golborne collieries and works, for all persons employed at the collieries and works, directly or indirectly. The owners of the said collieries and works are hereinafter called "the employer." The said colliery or collieries and works are hereinafter called "the colliery." Unless the context otherwise requires, in reading this contract, the singular number includes the plural and the male gender the female. (1) The persons directly employed at the colliery are engaged for an indefinite period, determinable upon fourteen days' notice. The employer undertakes to work on each working day, Saturday included (if required), and the employer undertakes to employ them on such days, except in cases of accident, repairs, breakdown, or bad trade. The wages to be paid weekly. (2) This contract shall remain in force and operate as a contract between the workman and the owner for the time being of the colliery so long as the workman continues to be employed at the colliery, notwithstanding any change in the members for the time constituting the employers' firm. (3) All other usual and customary terms and regulations which obtain or exist with respect to the employment of workmen and all other persons employed at the colliery, whether expressed in writing or not, shall be and remain in full force and effect as part of the contract between the employer and the workman or other persons employed.

For Miners and Contractors only.—(4) Every miner and contractor employed at the colliery shall, upon engaging any drawer, workman, or other person to work under him, and before employing such drawer, workman, or other person, require such drawer, workman, or other person to obtain a copy of these conditions from the officer whose duty it is to provide such copies, and inform such drawer, workman, or other person that they are the conditions under which persons are employed at the colliery, and such miner, drawer, workman, and other person respectively shall be bound by such conditions.

For Drawers and Persons working under Contractors only.—Every drawer employed by any miner and every workman or other person employed by a contractor at the colliery, shall, at the request of such miner or contractor, obtain a copy of these conditions from the officer whose duty it is to provide such copies; and such drawer, workman, or other person shall, in consideration of being employed at the works, be bound, both as between himself and the miner or contractor and between himself and the owner, by the terms of these conditions.

The action was tried before the County Court judge with a jury. Morris gave evidence, and stated that the deceased workman was under his control and direction; and that if the manager of the colliery had given him an order relating to the work he would have obeyed the order and would have expected the men to do the same.

It was submitted on behalf of the defendants that the deceased was not a workman in the employment of the defendants, within the meaning of the Employers' Liability Act 1880, and that there was no evidence of negligence on the part of the defendants.

The learned County Court judge overruled the objections, and asked the jury (1) whether the deceased was a workman in the employment of the defendants, and (2) whether the defendants were guilty of negligence.

The jury found that the deceased was a workman in the employment of the defendants, and that the defendants were guilty of negligence; and they assessed the damages at 50l.

The Employers' Liability Act 1880 (43 & 44 Vict. c. 42) provides:

Sect. 8. For the purposes of this Act, unless the context otherwise requires, the expression "workman" means a railway servant and any person to whom the Employers and Workmen Act 1875 applies.

The Employers and Workmen Act 1875 (38 & 39 Vict. c. 90) provides:

Sect. 10. In this Act the expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

The learned County Court judge gave judgment for the plaintiff for 50l.

The defendants appealed, and the Divisional Court (Wills and Channell, JJ.) ordered judgment to be entered for the defendants upon the ground that the deceased was not a workman employed by the defendants: (84 L. T. Rep. 233).

The plaintiff appealed, with leave.

Montague Lush for the appellant.—The decision of the Divisional Court was wrong, and the judgment of the learned County Court judge ought to be restored. There was reasonable evidence for the jury that the relation of employer and workman existed between the defendants and the deceased workman. The test whether the relation of employer and workman exists is whether the alleged employer has the power of control over the workman :

Donovan v. Laing, Wharton, and Down Construction Syndicate, 68 L. T. Rep. 512; (1893) 1 Q. B. 629.

By the signing of the conditions a contract was made between the defendants and the workman; the workman became bound by all those conditions, and thereby became subject to the control of the defendants, and the relation of employer and workman was thereby created between them. Whether the relation of employer and workman exists is a question of fact in every case, and the only question in the present case is whether there was reasonable evidence to be left to the jury upon which they could find that the workman was employed by the defendants. It cannot be said that there was no reasonable evidence when the fact that the workman signed these conditions was proved. Those conditions are clearly some evidence that the relation of employer and workman existed. The case of *Brown v. Butterley Coal Company* (53 L. T. Rep. 964) is really not distinguishable from the present case, and is a clear authority in favour of the appellant. In that case the defendants were the owners of a coal mine, which was worked under the "butty" system, by which the "buttyman" contracted with the owners to get coal at so much a ton, and for that purpose employed men to do the work. It was held that a workman employed by a buttyman was a workman in the employment of the owners, within the meaning of the Employers' Liability Act 1880. As in that case, so in the present case, it is a question of fact whether the real employers were the defendants and not the contractor, and there is evidence in this case, just as in that case, upon which it could be found as a fact that the defendants were the employers. The case of *Marrow v. Flimby and Broughton Moor Coal and Firebrick Company* (79 L. T. Rep. 397; (1898) 2 Q. B. 588) is really an authority in favour of the plaintiff. In that case the only evidence against the defendants was that they had a statutory right of control over the workman, and the court held that that was not sufficient evidence that they were the employers. As was pointed out by Rigby, L.J., there was not in that case any contract which made the rules of the mine binding between the owners and the workman, and his judgment indicates that signing the rules is evidence of the creation of the relation of employer and workman. There is further evidence in this case, for Morris stated in his evidence that, if the manager of the mine had given him an order, he would have obeyed it, and would have expected his men to do the same. That was evidence that the defendants exercised the real control over the workmen engaged by Morris. If there was any evidence that the deceased workman was in the employment of the defendants, the question was rightly left to the jury by the County Court judge, and their

verdict cannot be questioned. There clearly was some evidence from the facts the workmen signed the rules of the mine, and from the statement of Morris. He cited also

Ruth v. Surrey Commercial Dock Company, 8 Times L. Rep. 116.

Buegg, K.C. and *S. H. Leonard*, for the respondents, were not called upon to argue.

COLLINS, M.R.—It seems to me that the decision of the Divisional Court was perfectly right. There can be no doubt whatever but that the employer of the deceased workman was an independent contractor. That is an established fact in the case. That fact of itself distinguishes this case from the "butty case," *Brown v. Butterley Coal Company* (53 L. T. Rep. 964), where the court based its decision upon the ground that the buttyman was not a contractor at all, that his functions were not such as to make him an independent contractor, and that the workmen engaged by him were workmen in the employment of the colliery company. In the present case we have, to begin with, an independent contractor and a workman engaged by that independent contractor. Upon looking at the rules laid down by the colliery company in this case for persons directly employed and indirectly employed, we find no doubt something which creates a privity between the colliery company and the workman, but that is only for special limited purposes, and is not sufficient, in my opinion, to make the workman, who was engaged by the contractor, the servant of the colliery company; it was not intended, in my opinion, to create the relation of employer and servant between them. No doubt the cases draw a very fine distinction, and it is difficult to draw the line in all cases. It is always difficult to say that there is no evidence for the jury, but that rule must receive some reasonable limitation. A mere scintilla of evidence arising from one fact taken by itself ought not to be left to the jury. The whole of the facts must be looked at together. It has been contended that the fact that for some purposes a privity was created between the colliery company and the workman is material to the question whether the deceased workman was the servant of the colliery company, and that therefore there must be a question for the jury to decide. I cannot accept that contention. There may be in any particular case half a dozen factors which together would be sufficient evidence to leave to the jury, but any one of those factors taken by itself might not be sufficient. In my opinion, this case is really on all fours with the case of *Marrow v. Flimby and Broughton Moor Coal and Firebrick Company* (79 L. T. Rep. 397; (1898) 2 Q. B. 588), when it is carefully examined. There there was an obligation between the workman and the company implied by statute. It seems to me that in this case there is no practical difference between that implied obligation and the express stipulations which were entered into. In my opinion, apart from authority this case ought to be so decided, and there is also the authority of the case to which I have just referred. Each particular case must be considered with reference to its own facts. Was there any reasonable evidence in this case that the relation of employer and servant existed to be left to the jury? I think that there was not. The facts are

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precisely the same in substance as they were in *Marrow v. Flimby and Broughton Moor Coal and Firebrick Company* (*ubi sup.*). As to the evidence of Morris and what he said about obeying an order of the manager of the colliery and expecting his men to do the same, that was no evidence that the relation of employer and servant existed between the colliery company and the deceased workman. I entirely agree with the decision of the Divisional Court, and I think that this appeal fails and must be dismissed.

ROMER, L.J.—I also think that there was no reasonable evidence upon which the jury could find that the deceased workman was in the employment of the defendants, for the reasons which have been given by the Master of the Rolls and by the learned judges in the Divisional Court. I agree, therefore, that the appeal must be dismissed.

MATHEW, L.J.—It has been argued in this case that it was satisfactorily shown that the deceased workman could have been dismissed by the defendants' manager. There was, no doubt, a contract between the deceased workman and the defendants, and an obligation upon the workman to obey the directions of their manager in certain cases. That, however, is not conclusive that the workman was the servant of the defendants. It is clear that the workman was employed by the contractor, and that, if the workman had chosen to leave that employment, the defendants could not have complained if he did so. Therefore I think that there was no evidence whatever that the deceased workman was employed by the colliery company. The decision of the Divisional Court was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Charles Russell and Co.*

Solicitor for the respondents, *W. Norton Ellen, for Edwin Peace, Liverpool.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 8 and 10.

(Before JOYCE, J.)

BALFOUR v. CRACE. (a)

Principal and surety—Fidelity guarantee—Construction—Consideration indivisible—Death of guarantor—Knowledge of death—Determination of liability.

The liability under a bond by which the fidelity of a person as receiver of the rents of an estate is guaranteed, and for which the consideration is indivisible, is not determined by notice given during the lifetime of the guarantor or by knowledge of his death. In order that the liability may be so determined it must be expressly so stipulated.

Calvert v. Gordon (3 *Man. & Ry.* 124; 2 *Sim.* 253) and *Lloyds v. Harper* (43 *L. T. Rep.* 481; 16 *Ch. Div.* 290) applied and followed.

The observations of Romer, J. in Re Silvester (72 *L. T. Rep.* 283; (1895) 1 *Ch.* 573) on *Coulthart v. Clementson* (41 *L. T. Rep.* 798; 5 *Q. B. Div.* 42) approved.

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

THE plaintiff was the owner of large estates in Ireland, and in the year 1883 he appointed one Caledon Josias Radclyffe Dolling his agent in relation to such estates, and to receive the rents and profits thereof.

In consideration of Caledon Josias Radclyffe Dolling being appointed such agent and receiver, he and one John Gregory Crace executed a joint and several bond, dated the 25th June 1883, for the sum of 3000*l.* in favour of the plaintiff or his attorney, his executors, administrators, and assigns, for which payment to be well and truly made they bound themselves and each of them their and each and every of their heirs, executors, and administrators, jointly and severally firmly by such bond.

The bond recited (*inter alia*) the appointment of C. J. R. Dolling as such agent and receiver, and the consent of J. G. Crace to become surety for him.

The condition of the bond was as follows:

Now the condition of the above obligation is such that if the above bounden Caledon Josias Radclyffe Dolling shall pay or cause to be paid to the said Blayney Reynell Balfour all sums of money which shall represent the rents, issues, and profits of the said estates payable to the said Blayney Reynell Balfour as executor of Blayney Townley Balfour and shall and will from time to time and at all times hereafter as often as requested by the said Blayney Reynell Balfour, his heirs, executors, administrators, or assigns, well and truly pay or cause to be paid unto the said Blayney Reynell Balfour, his heirs, executors, administrators, or assigns, all such sum or sums of money as he the said Caledon J. R. Dolling shall have had or received of the rents and profits of the said estates and shall and will render to the said Blayney Reynell Balfour and his heirs, executors, administrators, and assigns true, just, full, and perfect accounts of all and every such sum and sums that shall be by him had or collected from the tenants and occupiers of the said estates or from or on account of the rents and profits of the said estates or any part thereof, or for or on account of the said Blayney Reynell Balfour, his heirs, executors, administrators, or assigns, and shall and will whilst he shall continue to act as such agent or receiver well, justly, truly, and honestly in every respect conduct himself in the said office of agent or receiver of the said rents then this obligation and every matter and thing therein contained shall be void and of no effect, otherwise shall remain in full force and virtue in law.

C. J. R. Dolling continued to act as such agent and receiver until Feb. 1900, but in April 1900 he executed an assignment to a trustee for the benefit of his creditors, and afterwards left the country.

The plaintiff then discovered that C. J. R. Dolling had, at the date of the assignment received and appropriated to his own use at least the sum of 2103*l.* 1*s.* 3*d.* in respect of the rents and profits of the Irish estates belonging to the plaintiff.

John Gregory Crace died on the 13th Aug. 1889, having by his will, dated the 13th March 1889, appointed the defendants his executors and given his ultimate residuary estate to the defendant John Diblee Crace.

The plaintiff claimed (1) a declaration that the liability of J. G. Crace under the bond was not determined by his death; and (2) payment by the defendants as executors of J. G. Crace of the sum of 2103*l.* 1*s.* 3*d.* or such other sum as might be due to the plaintiff under the bond.

The defendants alleged that the plaintiff knew of the death of J. G. Crace very shortly after the date thereof, and that the liability of J. G. Crace to the plaintiff under the bond ceased at his death or when such death first became known to the plaintiff.

The plaintiff took out a summons to have the preliminary point of law determined—viz., whether the liability (if any) of J. G. Crace under the bond determined on his death, or when such death first became known to the plaintiff.

The plaintiff, for the purpose of determining such point of law, admitted that J. G. Crace died on the 13th Aug. 1899, and that he knew of his death shortly after that date.

An order on the summons was made directing such point of law to be tried before any evidence was given or issue of fact tried, and this now came on to be argued.

Hughes, K.O. and Bryan Farrer for the plaintiff.—It is said that knowledge of the death of the guarantor determined the liability, and for the purpose of deciding the point of law we admit that we knew of his death. This point, however, arose in 1828 in the case of *Gordon v. Calvert* (2 Sim. 253; 4 Russ. 581) where the facts were more in favour of the defendant than in the present case, because there there was an express notice of death and the employers actually required further security. The action went on at law *sub nom. Calvert v. Gordon* (3 Man. & Ry. 124; 7 Barn. & Cress. 809). [*Younger, K.O.*—It is also reported in 6 L. J. 188, K. B. and 7 L. J. 77, K. B., and the bond is fully set out in the former report.] The authority of that case has never been questioned, and has been referred to in

Burgess v. Eve, 26 L. T. Rep. 540; L. Rep. 13 Eq. 450, at p. 457;

Lloyds v. Harper, 43 L. T. Rep. 481; 16 Ch. Div. 290, at pp. 306, 319.

Younger, K.O. and Gregson for the defendant.—We say that this case depends on two propositions of law, first, whether the guarantor when living has power by notice to determine the guarantee provided the employer has time to find a fresh surety; and, secondly, whether if the guarantor dies notice of his death to the employer amounts to notice of determination of the guarantee. With regard to the first point the plaintiff says that the guarantee binds for all time, and for this proposition he cites *Calvert v. Gordon* (*ubi sup.*). In that case the court came to the conclusion on the construction of the bond that the guarantee lasted during the whole employment, and that notice determining the liability at once was not a sufficient notice. We do not, however, assert this. We say that the liability is determined not immediately on the death but within a reasonable time afterwards. A condition that the liability is to endure for a prescribed time is for the benefit of the surety, but does not preclude it being determined before the expiration of the prescribed time:

Offord v. Davies, 6 L. T. Rep. 579; 12 C. B. N. S. 748.

Coulthart v. Clementson (41 L. T. Rep. 798; 5 Q. B. Div. 42) is important on the question of construction of the guarantee, and also as to the effect of notice of the death of the guarantor. The *ratio decidendi* in *Lloyds v. Harper* (*ubi sup.*) was that by the rules of *Lloyds* the underwriting

member could not be excluded from membership, and therefore it was a guarantee which could not be determined. They also referred to

Phillips v. Fossil, 27 L. T. Rep. 281; L. Rep. 7 Q. B. 666;

Bowland on Principal and Surety, pp. 79, 82.

With regard to our second proposition we say that knowledge of death is equivalent to a notice to determine during the lifetime of the guarantor:

Coulthart v. Clementson (*ubi sup.*).

[*JOYCE, J.*—*Coulthart v. Clementson* does not decide that with reference to a guarantee of this kind.] We submit it does so apply. It has been referred to in the Court of Appeal and never overruled, and is therefore binding on this court:

Beckett v. Addyman, 9 Q. B. Div. 783, at pp. 788, 792.

They also referred to

Re Sherry, 49 L. T. Rep. 556; 25 Ch. Div. 692, at pp. 696, 703;

Re Silvester, 72 L. T. Rep. 283; (1895) 1 Ch. 573;

Re Whelan; *Dodd v. Whelan*, (1897) 1 Ir. Ch. 575.

Hughes, K.C. in reply.—My friend has to establish that this is one of the class of guarantees which can be determined, and that knowledge of death is the same as notice of determination. In order to establish his second proposition he must establish his first, and I submit this he is far short of having done. This case is clearly distinguishable from the case of a banker's guarantee. See

Lloyds v. Harper, 43 L. T. Rep. at pp. 483, 484; 16 Ch. Div. at pp. 306, 313, 317, 318, 319.

Lloyds v. Harper was decided on the principle of *Calvert v. Gordon*, and it is impossible in this court to argue my friend's first proposition. If he could have established his first proposition there might have been something in his second as we admit that *Coulthart v. Clementson* (*ubi sup.*) has not been overruled. [*JOYCE, J.*—The question I have to determine is to be formulated as follows—viz., whether the liability of J. G. Crace determined immediately or otherwise by the mere fact of his death coming to the knowledge of the plaintiff.]

JOYCE, J.—I think it is undoubted law that a continuing guarantee, not under seal, for future advances, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on; and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated. Now, the reasons for this, in the case of such a guarantee, are, I think, quite obvious on a moment's consideration; and they are put very lucidly in the judgment of *Erie, C.J.* in the case of *Offord v. Davies* (6 L. T. Rep. 579; 12 C. B. N. S. 748). When such a guarantee is under seal it has been held at law that the guarantor is not entitled by notice to determine its operation; but in equity, even in the case of a continuing guarantee under seal, such as that I have mentioned, where as *Lush, L.J.* puts it in the case of *Lloyds v. Harper* (43 L. T. Rep. 481, at p. 484; 16 Ch. Div. 290, at p. 319, "the consideration is fragmentary, supplied from time to time, and therefore divisible," the operation of the guarantee as to future transactions may be determined by notice. Now, the right to determine or withdraw a guarantee by notice forthwith cannot

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possibly exist, in my opinion, when the consideration for it is indivisible, so to speak, and moves from the person to whom the guarantee is given once for all, as in the case where the consideration is his giving or conferring an office or employment upon some person whose integrity he guarantees. It is impossible that the guarantor should be entitled by notice, unless he has expressly so stipulated, to determine that guarantee *instantly*. It is admitted that some time, at all events, must be allowed for a lawful determination of the employment by the person to whom the guarantee is given, and I think with reference to a guarantee of the nature and given under circumstances such as the court has to consider in the present case, many other considerations are applicable besides merely that of a lawful determination of the employment by giving six months' or some other reasonable notice. As I said in the course of the argument, six months' notice might determine the employment just in the middle of the audit of rents or at the time when the rents were being collected, or the employer might have put himself in such a position with reference to the person employed that it might be most inadvisable and injurious to him to put an end to the employment. If, however, such a guarantee can be determined by notice at all, what length of notice the employer must necessarily be entitled to, has not ever been determined, and must, I think, depend upon the particular circumstances of the case. Now, that being so, there is no difficulty whatever, to my mind, in answering the question to be determined by me as it was originally framed. It would have been impossible to hold that, there being no stipulation to the contrary, the liability of the guarantor, Mr. Crace, under this bond was determined immediately, either on the death, or on the fact of death coming to the knowledge of the person to whom the guarantee was given. But I am told that is not the real question, and it is proposed to alter the question into a form which was partly suggested by myself; and the question which I have now to decide is, whether the liability, if any, of Mr. Crace under the bond was determined immediately or otherwise by the mere fact of his death coming to the knowledge of the plaintiff. Now, whatever the true answer to that question may be, and whether such a guarantee as this can be determined by notice or not, I certainly am disposed to agree with what Romer, L.J. said in *Re Silvester* (72 L. T. Rep. 283, at p. 285; (1895) 1 Ch. 573, at p. 577), when he observed upon Lord Bowen's (then Bowen, J.) decision in *Coulthart v. Clementson* (*ubi sup.*). He says at p. 577: "I desire to add that I do not assent to the general proposition that where a person who is entitled to the benefits of a contract of guaranty has notice of the death of the guarantor, and he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that *prima facie* it would be a breach of trust on the part of the executor not to give notice to determine the liability." I certainly desire to express my entire concurrence with that, whatever the proper answer is to the question whether such a guarantee as the one which the court has to consider in this case, can be determined by notice or not. Really what I have to decide is this—whether, when a guarantee of this kind is given as part of the consideration

for the employment of a person by the person to whom the guarantee is given, the law requires the guarantor, in case he desires the guarantee to be determinable by notice or by his death, to have it expressly so stipulated; or, does it require the person to whom the guarantee is given to have it expressly so stipulated that the guarantee is not to be determined either by notice or by the death of the guarantor? After listening to the argument, and giving some consideration to the case, I have come to the conclusion that, upon the whole, in a case where an office or employment is conferred in consideration of such a guarantee as the one in this case, it is, I think, safer to hold that the guarantor must expressly so stipulate or provide, if he desires such guarantee to be determined either by notice or by his own death. And in coming to that conclusion I rely upon the case of *Calvert v. Gordon* (2 Sim. 253; 3 Man. & Ry. 124), and I also rely upon what I understood to be the reasoning of the Lords Justices in *Lloyds v. Harper* (*ubi sup.*), although I have not forgotten that there was a special fact in the latter case—namely, that the person whose integrity was guaranteed was in such employment as could not be determined by Lloyds. Therefore I can answer this question as altered by saying that the liability, if any, of the said John Gregory Crace, under the bond dated the 5th June 1883, was not determined immediately, or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff, and order that the costs of both parties be costs in the action.

Solicitors for the plaintiff, Nicholl, Manisty, and Co.

Solicitors for the defendant, Hores, Pattison, and Bathurst.

Jan. 14, 15, and 25.

(Before EADY, J.)

Re HILL; HILL v. HILL. (a)

Will — Construction — Heirlooms — Settlement — Absolute interest — Executory trust.

A testatrix who died in 1891, by her will, made in May 1891, bequeathed certain chattels, including diamonds, miniatures, and a ring, to her son until he should die, "and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds and miniatures and ring shall descend as heirlooms as far as the rules of law and equity will permit." The son entered into possession of the chattels and died in March 1895, being succeeded by his son, who became fourth Viscount Hill, and whose brother became heir presumptive to the title.

On a summons by the fourth Viscount Hill, to which the heir presumptive was defendant, for the determination of the question whether he was entitled absolutely or for life only to the chattels so bequeathed by the testatrix:

Held, that upon the death of the testatrix's son, to whom the chattels were bequeathed for life, they became the absolute property of the fourth Viscount Hill.

(a) Reported by J. TRUSTRAN, Esq., Barrister-at-Law.

THIS was an originating summons in the matter of the trusts of the will of Ann, Dowager Viscountess Hill, dated the 28th May 1891, and of the Settled Land Acts 1882 to 1890, taken out by the fourth Viscount Hill for the determination of the question whether he was entitled absolutely, or for life only, or otherwise to certain diamonds, consisting of a tiara, necklace, pendant, and earrings, and to other chattels bequeathed by the will to descend as heirlooms with the title and dignity of Viscount Hill.

The late Ann, Dowager Viscountess Hill, by her will, dated the 28th May 1891, appointed Fanny Melita Kynnersley and Lewis John Berger executors and trustees, and the will contained the following bequest:

I bequeath my diamonds, consisting of a tiara, necklace, pendant, and earrings, and my two miniatures of Sir Rowland Hill and Miss Jane Hill, which are mounted in velvet as bracelets, and my small ring set with rubies, which was given by the Pretender to Sir Richard Hill, to my son the Right Hon. Roland Clegg Viscount Hill, until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, or any other title or dignity which may be granted to or assumed by any person for the time being entitled to the said title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds and miniatures and ring shall descend as heirlooms as far as the rules of law and equity will permit.

The testatrix died on the 31st Oct. 1891, and her will was duly proved.

The Right Hon. Rowland Clegg, third Viscount Hill, survived his mother, and entered into possession of the chattels. He died on the 30th March 1895, and was succeeded in the title by his son, the plaintiff Rowland Richard Clegg, fourth Viscount Hill, who was born in 1863. The plaintiff was married, but had not any issue.

The heir presumptive to the title was the plaintiff's brother, the defendant Francis William Clegg Clegg Hill, who was born in the year 1866 and was unmarried.

The plaintiff shortly after the death of his father took proceedings to recover a portion of the chattels from his stepmother Isabella Elizabeth, Dowager Viscountess Hill, who claimed the same on the ground that they were subject in the hands of the testatrix to an alleged precatory trust.

The decision of the Court of Appeal established that the chattels were not subject to any precatory trust, and the result of that litigation was that it was determined that the testatrix had power to dispose of them by her will: (*Hill v. Hill*, 76 L. T. Rep. 103; (1897) 1 Q. B. 483).

The nature and extent of the interest taken by the plaintiff under the will of his grandmother, the testatrix, did not arise in those proceedings, and had now to be determined.

This was an originating summons taken out on the 30th July 1901 by the plaintiff, the Right Hon. Rowland Clegg Viscount Hill, for the determination (*inter alia*) of the question whether he was entitled absolutely or for life only to the diamonds and chattels bequeathed by the testatrix to descend as heirlooms with the Hill title.

Errington for the plaintiff.—The question is whether the plaintiff is entitled to the chattels for life or absolutely. This point was not decided

in the case of *Hill v. Hill* (*ubi sup.*), which relates to the same chattels. The words of the will are not sufficient to settle the chattels as heirlooms, but after the death of his father, to whom they were given for life, they became the absolute property of the plaintiff. They are not annexed to land by the provisions of the will, and they are not bequeathed to trustees, but the case is covered by the decision in *Tollemache v. Coventry* (2 Clark & F. 611; 37 R. R. 260). The words do not amount to a settlement as in *Re Sir J. Rivett Carnac's Will* (53 L. T. Rep. 81; 30 Ch. Div. 136). No force can be attributed to the word "heirlooms" in the absence of any contract or special circumstances:

Shelley v. Shelley, L. Rep. 6 Eq. 540;

Re Johnston, 52 L. T. Rep. 44; 26 Ch. Div. 538.

James for a mortgagee of the property.

Brinton for the defendant.—The defendant is the next in succession, after the plaintiff, to the title, and is also residuary legatee under the will. The testatrix clearly intended the present viscount to take only for life. As he was born in her lifetime, she was able to effect this, and has, by the terms of the bequest, effectually done so. The words "as far as the rules of law and equity will permit" are sufficient for the purpose, notwithstanding what was said in

Tollemache v. Coventry (*ubi sup.*);

Sugden's Law of Property, pp. 336-8;

Montagu v. Lord Inchiquin, 32 L. T. Rep. 427;

Re Johnston (*ubi sup.*);

Harrington v. Harrington, L. Rep. 5 H. L. 87.

The three latter cases (of which the last-mentioned was decided in March 1871, some years after *Shelley v. Shelley* (*ubi sup.*), treat those words as material. If they are not, then the whole gift after the third Viscount Hill's death is bad under the law against perpetuities according to the judgment of Lord Cairns in *Harrington v. Harrington* (*ubi sup.*), and the defendant, as residuary legatee, takes the chattels absolutely.

Errington in reply.—The construction placed on the words of the will on behalf of the defendant is executory:

Lord Scarredale v. Curson, 1 J. & H. 40.

There is nothing in the will to cut down the absolute interest which the plaintiff takes in the chattels:

Mackworth v. Hinzman, 2 Keen, 658.

Cur adv. vult.

Jan. 25. — EADY, J. delivered the following written judgment:—It is not disputed that under the will, the son of the testatrix—namely, the third Viscount Hill—was entitled to possession of the chattels during his life. Upon his decease the plaintiff contends that the chattels vested absolutely and indefeasibly in himself. The defendant F. W. C. Clegg Hill contends that the chattels do not vest absolutely in the plaintiff, but that upon his death within twenty-one years after the death of the testatrix they will pass and belong to the next Viscount Hill, subject in turn to be similarly divested in favour of the next succeeding viscount, if he succeeds to the title within the said period of twenty-one years, and that the person who is Viscount Hill at the expiration at the said period of twenty-one years will become indefeasibly entitled to the said chattels. The defendant founds this contention

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on the clause in the will of the testatrix bequeathing the chattels to each and every of the persons who should in turn succeed to the title and dignity of Viscount Hill, severally and successively as they should in turn succeed to the title, her intention being that the chattels should descend as heirlooms so far as the rules of law and equity will permit. It is clear that, subject to the rule against perpetuities, chattels may be settled to follow the devolution of a dignity: (*Re Johnston*; *Cockerell v. Earl of Essex*, 52 L. T. Rep. 44; 26 Ch. Div. 538, at p. 548; *Hill v. Hill*, 76 L. T. Rep. 103; (1897) 1 Q. B. 483, at p. 490). I have, however, to consider whether in the present case the articles have been effectually settled in the manner contended for by the defendant F. W. C. Clegg Hill, and whether the words which I have read are sufficient to create an executory trust and cut down the interest taken by the plaintiff to a defeasible interest, in the event of his dying within the period of twenty-one years from the death of the testatrix. That the mere addition of the words "so far as the rules of law and equity will permit" will not make the trust executory, or amount to a direction to settle appears from *Lord Scarisdale v. Curzon* (1 J. & H. 40, at p. 50). In *Shelley v. Shelley* (*ubi sup.*) the testatrix gave certain jewellery "to my nephew John Shelley, to go and be held as heirlooms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants as far as the rules of law or equity will permit." I stop there, omitting the subsequent direction in that will because there is nothing equivalent to it in the present case. Wood, V.C. held in substance that the words which I have read, if they had stood alone and unqualified by the subsequent direction, would have created an absolute interest in the nephew John. Again, in *Re Viscount Exmouth*; *Viscount Exmouth v. Praed* (48 L. T. Rep. 422; 23 Ch. Div. 158) the facts were that the second Viscount Exmouth bequeathed to trustees certain plate, jewels, and other chattels "upon trust to permit and suffer the same to go and be held and enjoyed with the title and honours of Exmouth so far as the rules of law and equity will permit, by the person who for the time being shall be actually possessed of the said title, in the nature of heirlooms." There followed in that case other words to which there is nothing equivalent in the present case. In dealing with the portion of the gift which I have read, Fry, L.J. said (at p. 162): "There can, in my judgment, be no doubt that the effect of that clause standing alone would be to give an absolute interest in the chattels to the first person who succeeded to the honours, and that, therefore, if it had stood alone, the third Viscount would have become absolutely possessed of these chattels. That, I think, follows from the case of *Tollemache v. Coventry* (*ubi sup.*). In the case of *Countess of Harrington v. Earl of Harrington* (L. Rep. 5 H. L. 87) Lord Westbury pointed out (at p. 101) that in the case of a direct gift of chattels, upon trusts corresponding with the ownership of real estate, up to the limit of time allowed by the law against perpetuities, it is settled that, so soon as the real estates (to which the personal chattels are thus made accessory) vest in a tenant in tail in possession, the transmissibility of the

personal estate ceases, although the time allowed by the rule against perpetuities has not expired, and the personal chattels become the absolute property of the tenant in tail in possession, although he may be an infant, and may afterwards die without having attained majority. To meet the difficulty of the chattels becoming severed from the real estate by reason of the death of an infant tenant in tail, it is usual to impose a condition that the heirlooms shall not vest absolutely in any tenant in tail unless he shall attain twenty-one. In the same case Lord Cairns pointed out (at p. 107) that none of the authorities (except Lord Hardwick, whose views had not been followed) had doubted, but that, indeed, all had assumed, that a general trust of chattels to go with settled estates, or to be held by persons for the time being entitled to the possession of settled estates, as long as the rules of law and equity would permit, would be effectual, and effectual by means of those particular words, to carry the chattels to the first person with an estate of inheritance, but that the doctrine of the same authorities was that the Court of Equity could not further protect the chattels if that person died under twenty-one, and if the instrument of settlement did not contain any valid clause of defeasance in that event. In my judgment, a similar rule applies where chattels are settled to follow the devolution of a dignity and to descend as heirlooms so far as the rules of law and equity will permit, and in the absence of any clause of defeasance in the instrument of settlement they will vest absolutely in the first person upon whom the dignity devolves, upon the decease of any person or persons to whom limited interest in the chattels are expressly given. In the present case, upon the decease of the third Viscount Hill, to whom the chattels were given for his life, or until his death, the chattels passed absolutely to the fourth Viscount, and I make a declaration accordingly. The plaintiff is to pay the costs of all parties of this application.

Solicitors, *Upperton and Co.*; *Chester and Co.* for *Lucas and Salt*, Wem, Salop.

KING'S BENCH DIVISION.

Dec. 13 and 16, 1901.

(Before WALTON, J.)

MANCHESTER LINERS LIMITED v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY LIMITED. (a).

Marine insurance—Policy on "chartered or hire money" to cover "loss of hire money"—Loss of hire through vessel becoming inefficient—Government charter-party—Option to discharge vessel—Loss by discharge of vessel—Right of assured to recover on policy.

By a charter-party in the Government form the Admiralty chartered a vessel for transport service for three months certain, and thenceforward until they should give notice to the owners that the vessel was discharged from their service, such notice to be given when the vessel was in port in the United Kingdom; and the charter-party provided that if the ship became incapable from

(a) Reported by W. W. OAK, Esq., Barrister-at-Law.

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any defect, or from any cause whatsoever, to perform the service efficiently, the Admiralty might make abatement by way of mulct out of the freight. The shipowners effected a time policy upon "chartered or hire money" to "cover the loss of hire money calculated at" so much per day caused by (amongst other things) want of repairs or breakdown of machinery, rendering the vessel inefficient for the service. Under the charter-party the vessel had made a voyage and had returned to England, and, the three months having previously expired, the Admiralty had continued the employment, and had given instructions that the vessel was to proceed on another voyage on a certain day. While the vessel was in dry dock it was discovered that some of the blades of her propeller were cracked and that it would take some time to repair the damage. In consequence of this the Admiralty, under their option in the charter-party, gave the owners notice discharging the vessel, and the vessel was discharged from the Government service as from that date. The vessel then underwent repairs, which took fifteen days from the date of her discharge by the Admiralty. In an action on the policy by the owners of the ship to recover from the insurers the loss of hire money for the fifteen days:

Held, that the "chartered or hire money" in the policy meant "hire money" in the nature of freight payable under a contract; that the loss of such hire to the shipowners for the fifteen days was caused by the exercise of the option which the Admiralty had under the charter-party to discharge the vessel from their service, and not by the want of repair, breakdown of machinery, or other perils insured against under the policy, and that there was therefore no loss under the policy, for which the shipowners were entitled to recover.

COMMERCIAL ACTION tried by Walton, J. without a jury, the plaintiffs' claim being for a partial loss upon a policy of marine insurance underwritten by the defendants. The plaintiffs, the Manchester Liners Limited, were the owners of a steamship called the *Manchester Corporation* of 5473 tons, and the policy upon which they now sued was a policy effected with the defendants, an insurance company, on the 9th March 1900.

The *Manchester Corporation* was chartered by the Government for transport service by a charter-party dated the 14th Dec. 1899. The charter-party was in the Government form, and was made between the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of the one part, and the agent on behalf of the owners of the vessel of the other part, and after reciting that a copy of the regulations for Her Majesty's transport service had been delivered to the owners and the master of the ship, provided that the *Manchester Corporation*

shall on and from the 25th Nov. 1899 be at the service of the said commissioners to the extent hereinafter mentioned for the space of three calendar months certain and thenceforward until the Commissioners for Executing the Office of Lord High Admiral aforesaid for the time being shall cause notice to be given to the second party named [that is, to the agent of the owners of the ship], his executors or administrators, or to the master or other person having charge of the said ship, that she is discharged from Her Majesty's service, such notice to be

given when the said ship is in port in the United Kingdom.

Then, as to the rate of payment, the owners

shall be allowed and paid for the freight of the ship at the rate of twenty-four shillings per ton per calendar month for the number of tons above-mentioned during such time as the said ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged.

The charter-party contained the following clause:

Provided always and it is hereby agreed and declared that if at any time or times hereafter it shall be made to appear to the said commissioners that any delay has been caused or has accrued by breach of orders or neglect of duty, or that the said ship became incapable from any defect, deficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the freight of the said ship as they shall adjudge fit and reasonable.

Under this charter-party the vessel had made a voyage to South Africa, and she was on her homeward voyage on the 9th March 1900 when the policy of insurance sued upon was effected with the defendants. She arrived in England on the 31st March, and the Commissioners of the Admiralty gave orders that she should proceed on another voyage to South Africa, the date fixed for the sailing from London being the 13th April.

By the permission of the Admiralty the plaintiffs put the vessel in dry dock for the purpose of being cleaned and repainted, and while the vessel was in dry dock it was discovered that three of the blades of her propeller were cracked; and, in consequence of that, on the 5th April 1900 notice was given by the Admiralty to the master of the ship "that the hired transport *Manchester Corporation* was that day discharged from Her Majesty's service," and on the 7th April the Director of Transports on behalf of the Admiralty wrote to the plaintiffs' agents that "the *Manchester Corporation* was discharged from Her Majesty's service on the 5th inst."

In answer to a letter from the plaintiffs' agents the Director of Transports on the 9th July 1900 wrote:

That it was intended that this vessel should make another voyage, and she was being prepared to that end when it was discovered on the ship going into dry dock that three of her propeller blades were cracked, and the Divisional Transport Officer, Royal Albert Dock, reported that they would probably take about eighteen days to replace. As she has lost blades of her propeller on the way out, and had to put into Gibraltar to replace them, and as she lost further blades between Gibraltar and the Cape, it was decided to discharge her from the service and appropriate another transport in her place.

And subsequently, on the 16th Nov. 1901, in answer to a letter written by the defendants' solicitors, the Director of Transports wrote admitting that the reason of their decision was:

That the Admiralty were unwilling to run the risk of further trouble similar to that which had been previously experienced.

The material terms of the policy of insurance, dated the 9th March 1900 (being for a sum of

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3000*l.* at a premium of 3*l.* per cent.) were as follows :

And it is hereby agreed and declared that the said insurance shall be and is an insurance (lost or not lost) at and from and for and during the space of three calendar months from 8th March 1900 to 7th June 1900, both days inclusive, Greenwich mean time. If required by the assured it is agreed to return *pro rata* daily premiums on cancelling this insurance and arrival. And it is also agreed and declared that the subject-matter of this policy as between the insured and the said company, so far as concerns this policy, shall be and is as follows, upon chartered or hire money valued at 19,500*l.* To cover and pay the loss of hire money calculated at 216*l.* 13*s.* 4*d.* per day as per clause attached. In the event of total or constructive total loss of steamer, no claim to be made for the unexpired time in the ship or vessel called the *Manchester Corporation*.

The clause attached, which was contained in a printed slip, was as follows :

The amount to be paid on this policy in the event of loss of time as mentioned in this clause shall be 216*l.* 13*s.* 4*d.* daily on 19,500*l.* In the event of loss of time from deficiency or inefficiency of men or stores, collisions, stranding, want of repairs, breakdown of machinery, or any causes appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four hours, or rendering her inefficient for the service, the payment of hire shall cease from the hour when the detention or inefficiency begins until she be again ready and in a fully efficient state to resume her service. . . . Being for and during the space of three calendar months (beginning and ending with Greenwich mean time) as employment may offer.

The plaintiffs in their points of claim alleged that the policy sued on was a policy executed by the plaintiffs in continuation of a policy with the defendants on the 8th Dec. 1899, while the *Manchester Corporation* was employed in Her Majesty's transport service under a contract with the Director of Transports of the 25th Nov. 1899; that on the 5th April 1900, while still employed under this contract, the vessel became inefficient for service under the contract, by reason of damage to or defect in the propeller, and was not ready and efficient to resume the service until 5.30 p.m. on the 20th April 1900, a period of fourteen days and seventeen and a half hours; and the plaintiffs claimed 491*l.* 15*s.* 7*d.*, defendants' proportion of loss of hire on fourteen days and seventeen and a half hours.

The defendants, in their points of defence, alleged that notice that the vessel was discharged from Her Majesty's service was given on the 5th April 1900; that the plaintiffs had not between the 5th and the 20th April any chartered or hire money at risk, and had between those dates no insurable interest within the terms of the policy; and that if there was any loss of chartered or hire money the proximate cause of the loss was the notice of the commissioners discharging the vessel, and not the alleged inefficiency, and that the defendants were under no liability to the plaintiffs.

Carver, K.C. (L. Noad with him) for the plaintiffs.—What is said here is that there was no loss within the meaning of the policy. The plaintiffs' contention is that there was a loss, and that what was lost was the use of the ship for the period from the 5th April to the 20th April, when she was again fit for service. What was at risk was the loss of hire which would accrue under a clause in this form. The Government

charter-party does not contain a cesser clause, or a cesser of hire at all; it contains a clause which enables the Admiralty to deprive the shipowner of hire; but it does not make the hire cease on certain events, and under the clause it would be a matter of discretion for the commissioners to make the pay cease. The first question is, What was the subject-matter insured by this policy? The policy, which was a time policy, does not refer to the charter-party, and the charter-party does not contain a cesser clause, so that the insurance effected by the policy is not a limited insurance merely against the loss of hire arising under this form of a Government charter-party, but is a general insurance against the loss of hire which would take place assuming that the vessel were working under a charter-party with the cesser of hire clause in it. Therefore the risk insured against accrues if the vessel becomes unable to work within the meaning of that clause for twenty-four hours. Our first argument, therefore, is on the assumption that this was an insurance on the actual employment of the ship and against the loss of the use of the ship, and, arguing on that assumption, there must be a loss under the policy caused by something done under the charter-party. The loss of the hire by the cancellation of the agreement is a loss within the policy; it was a loss by the action of the Admiralty in giving notice under the charter-party. Secondly, even if the plaintiffs are wrong in their first contention, and if the policy is limited to freight under the charter-party, the plaintiffs are still entitled to recover. There was a want of repair or breakdown of machinery within the meaning of the marginal clause in the policy. The plaintiffs had an interest in the "hire money" payable under the charter-party, and there was a loss of this hire money by perils of the seas insured against. There was a defect within the meaning of the marginal clause, and also within the meaning of the charter-party, which entitled the commissioners to put the ship out of pay. The loss arising therefrom was a loss from perils of the seas; and this loss arose, not from the act of the commissioners, but from the defect which brought about that act. *Inman Steamship Company v. Bischoff* (47 L. T. Rep. 581; 7 App. Cas. 670) appears at first sight to be against the plaintiffs' contention, but when carefully looked at it is really in their favour. In that case, which also turned on the Admiralty charter-party, the Admiralty simply took under their power of mulct any freight that had been earned. No doubt Lord Selborne there says that he came to the conclusion, though with reluctance, that the loss was not so proximately resulting from the perils of the seas insured against as to make it payable under the policy; but he puts a hypothetical case which precisely applies to this case. He says: "If, in the present case, the other terms of the charter-party being the same, a power had been reserved to the charterers or their agents to determine the contract, and their liability to further freight, on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable." Here there were two causes opera-

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ting: the first was a defect in the ship, which was the proximate cause of the loss, and that was a peril insured against, and that defect, coupled with the decision of the Admiralty, caused the loss which was a loss of the chartered or hire money. In such cases the proximate cause of the loss is considered by Cleasby, B. and Bramwell, B. in *Jackson v. Union Marine Insurance Company Limited* (31 L. T. Rep. 789, at pp. 793-4; L. Rep. 10 C. P. 125, at pp. 127, 148). The plaintiffs are entitled to recover on the two grounds, that there was by perils insured against a loss of the Government employment, and that, apart from Government employment, there was a loss of expectant hire which they were prevented from earning. [He also referred to Phillips on Insurance, sect. 1208.]

Scrutton, K.C. and *Loehnis* for the defendants. —It is said for the plaintiffs that there was a loss of the Government employment, but the answer to that is that there was not a loss by perils insured against. The insurance was not such a general insurance as the plaintiffs contend it was. It was not an insurance against the loss of expected employment, but was only against loss under a contract. The subject-matter of the policy is said to be chartered or hire money; but it is perfectly clear on the authorities that chartered or hire money means money accruing due for the use of the ship under a contract: (per Blackburn, J. in *Barber v. Fleming*, L. Rep. 5 Q. B. 59, at pp. 70, 71; per Lord Selborne, L.C. in *Inman Steamship Company v. Bischoff*, 47 L. T. Rep. at p. 582; 7 App. Cas. at p. 672; per Lord Ellenborough in *Forbes v. Aspinall*, 13 East, 323; *Patrick v. Eames*, 3 Camp. 441; *Re Jamieson and Newcastle Steamship Freight Insurance Association*, 72 L. T. Rep. 648; (1895) 2 Q. B. 90). To come within the policy the hire money must be due under a contract, as the insurance is an insurance of hire money arising under a contract. The first thing to determine is the subject-matter of the insurance. In this case that subject-matter is "chartered or hire money valued at —"; that is, hire money to be earned under a contract in the nature of a charter-party. Then, when the subject-matter is ascertained, the next thing to be considered is, against what perils the subject-matter is insured. The perils insured against are set out in the clause attached to the policy, as the policy states that the insurance is "to cover and pay the loss of hire money as per clause attached." What was at risk immediately before the 5th April was the freight payable under the charter-party; after the 5th April there was no freight payable as the service had been determined. There was therefore no hire money at risk from the 5th to the 20th April, and therefore there was no loss of such hire money by any perils insured against. The freight or hire money was lost, not by any of the perils insured against, but by the exercise of the option to cancel in the charter-party, and the exercise of that option was the proximate cause of the loss: (*Mercantile Steamship Company Limited v. Tyser*, 7 Q. B. Div. 73; per Lord Watson in *Inman Steamship Company v. Bischoff*, 47 L. T. Rep. at p. 587; 7 App. Cas. at p. 690). Therefore the defendants' answer is twofold: first, that the subject-matter of the policy was chartered or hire money arising under an existing contract (namely, the charter-party) which was determined

by the option given to the hirers by that contract, and that at the time when this money sued for was alleged to have accrued there was no existing contract under which any hire money was payable, and therefore there was no hire money at risk; and, secondly, there was no loss by any perils insured against, but the loss arose merely from the exercise by the Admiralty of the option to determine the contract given to them in that contract. For these two reasons the defendants are entitled to succeed.

Carver, K.C., in reply, referred to *Joyce v. Kennard* (25 L. T. Rep. 932; L. Rep. 7 Q. B. 78) and *Crowley v. Cohen* (3 B. & Ad. 478).

Cur. adv. vult.

Dec. 16.—*WALTON, J.*—In this case the plaintiffs are the Manchester Liners Limited, and the action is brought against the British and Foreign Insurance Company upon a marine policy of insurance. The plaintiffs were the owners of a steamer called the *Manchester Corporation*, which was chartered by them to the Admiralty by a charter-party made on the 14th Dec. 1899, and by that charter-party she was placed at the service of the commissioners for the space of three months certain, and "thenceforward until the commissioners shall cause notice to be given to the said second-named party"—that is the shipowners—"that she is discharged from Her Majesty's service, such notice to be given when the said ship is in port in the United Kingdom." Therefore the service was for three months certain, to be continued until notice was given that the service was at an end, and that notice might be given at any time when she was in a port in the United Kingdom. Then the rate of payment was provided for and a clause inserted that the ship might under certain conditions be put out of pay. [His Lordship read these clauses of the charter-party.] The service therefore under that charter-party commenced as from the 25th Nov. 1899, and was upon the terms stated. On the 9th March 1900 the shipowners effected with the defendants a policy of insurance for the space of three calendar months, from the 8th March 1900 to the 7th June 1900, both days inclusive, and it was on "chartered or hire money valued at 19,500*l.* to cover and pay the loss of hire money calculated at 21*l.* 13*s.* 4*d.* per day, as per clause attached. In the event of total or constructive total loss of steamer, no claim to be made for the unexpired time." [His Lordship then read the clause attached.] On the 3rd April 1900 the vessel was in a port in the United Kingdom—namely, in London. She had made a voyage to the Cape and had returned. In the course of that voyage to the Cape there had been some trouble with the blades of her propeller, and she had been repaired at Gibraltar, and again at the Cape. On the 3rd April she was back again in London and was preparing, under the instructions of the Admiralty, to proceed on another voyage, and I think there is no doubt that but for what happened she would have proceeded on another voyage, and her services under the charter-party would have been continued. She was put into dry dock, no doubt for the purpose of the voyage, and when there it was discovered that some of the blades of the propeller were cracked, and in consequence of that the Admiralty gave the shipowners notice that

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the ship was from that date discharged from Her Majesty's service. A further notice was given on the 7th April, but there is no doubt that from the 5th April the service was put an end to and the vessel discharged as from that date from Her Majesty's service, that is, from the service under the charter-party. As to the reason why the Admiralty exercised their right which they had under the charter-party so to put an end to the service, two letters from the Admiralty were put in and admitted as evidence. [His Lordship read these letters, and proceeded:] Therefore the position, so far as the undoubted facts are concerned, was this: The three months certain in the charter-party had expired, and the service was being continued on the terms of the charter-party, which provided that at any time when the vessel was in a port in the United Kingdom, the Admiralty could, with or without reason, put an end to the service, and they did so on the 5th April for the reason stated in their letters. The blades of the propeller were repaired, and the repairs occupied from the 5th April, when the vessel was discharged from the service, till 5.30 p.m. of the 20th April, so that from the 5th to the 20th April the vessel was undergoing repair and was not fit to be used. Under the circumstances which I have stated, the plaintiffs claim payment, under the policy, by the defendants of their proportion of 216*l.* 13*s.* 4*d.* a day from the 5th April to 5.30 p.m. on the 20th April 1900. The defendants contend that the subject-matter of the insurance was hire money to be earned under a contract in the nature of a time charter; that the only hire money at risk on the 5th April was the freight payable under the charter-party of the 14th Dec.; and that there was no loss of such freight by the perils insured against. On the other hand, counsel on behalf of the plaintiffs contended that the subject-matter of the insurance was not limited to freight or hire money payable under a contract, but included or covered the interest of the shipowner in the use of his ship, entirely independent of any particular contract for the payment of freight or hire. It seems to me clear that a shipowner has an interest in the use of his ship, and that he may insure himself against the loss which he may undoubtedly suffer from being deprived of its use by perils of the seas or other causes. But in cases of this kind it is not enough to consider what interest the shipowner had, and against what losses he might lawfully have insured himself; the true question must be whether the interest in respect of which he claims to be insured, and the loss against which he claims to be indemnified, were in fact covered by the terms of the policy which he effected, and upon which he sues. In the present case the subject-matter of the policy is "chartered or hire money," and, in my judgment, this means hire money in the nature of freight payable under a contract. I do not think that it is enough for the plaintiffs, in order to entitle them to succeed in this action, to show that they were interested in the use of their ship, and that they were deprived of such use for fourteen or fifteen days by a peril insured against. Counsel, however, contended on behalf of the plaintiffs that they had an interest, as undoubtedly they had, in the "hire money" payable under the charter-party of the 14th Dec. 1899; and that they lost this

hire money from the 5th April to the 20th April by perils insured against under the policy. Reading the policy and slip together, it seems sufficiently plain that the insurance was against the loss of hire money by reason of the payment of the hire ceasing in consequence, amongst other things, of want of repairs or breakdown of machinery preventing the working of the vessel for more than twenty-four hours or rendering her inefficient for the service, which must mean for service under the contract upon which she is at the time employed. It is said that in the present case there was a want of repair or breakdown of machinery which prevented the working of the vessel for more than twenty-four hours, and which rendered her inefficient for service under the charter-party of the 14th Dec. 1899, and that, in the language of the slip, it was on this event, and in consequence of this, that the payment of hire ceased from the 5th April until the 20th April. Is this a correct statement of the facts? It appears to me that this is the question which I have to decide in this case. The fact is that the hire ceased on the 5th April (not merely till the 20th April, but altogether), because on the 5th April the charter-party came to an end; and it came to an end on the 5th April because the Admiralty had on that day, the vessel being then in a port in the United Kingdom, an absolute right at their discretion, whether with or without reason, to discharge the vessel from the service, and they exercised this right. The motive upon which the Admiralty acted, and their reason for acting, were undoubtedly that they ascertained, when the vessel was put into dry dock, that the propeller blades were cracked and would require repair, and they were afraid that they might give trouble again in the future. It is clear, however, that as between the plaintiffs and the Admiralty, the motive upon which, or reasons for which, they acted were altogether irrelevant; and, as against underwriters on the policy in question, I do not think that it was competent to the plaintiffs to search into the reasons which induced the Admiralty to act, and to say that, because their reason for putting an end to the contract, as they were entitled to do with or without reason, was the want of repair or breakdown of machinery, there was therefore a claim under the policy. If the service had continued, and the Admiralty had put the vessel out of pay from the 5th April to the 20th April, the case would have been different. It is to be observed that in the event of a total or constructive total loss of the vessel, the underwriters were not to be liable for the loss of hire for the unexpired time; and still less, in my opinion, was it the intention of the parties, as expressed in this policy, that the underwriters should take the risk of the employment of the vessel ceasing by the exercise by the hirers of the absolute right given to them by the contract to put an end to the service, whatever the motive or reason influencing them in so acting may have been. I have carefully considered the authorities cited by counsel for the plaintiffs, and his very clear and, if I may say so, very useful argument. Perhaps I ought to say a word as to the instances to which he referred of the loss of freight by damage to, or loss of, the ship by perils of the seas. He suggested that in such cases, or some of them, an argument similar to that relied upon by the defendants in the

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present case might be used, to the effect that the freight was lost not by the perils of the seas, but by the act of the shipowner in electing either not to repair his ship or not to forward the cargo by another vessel. If the cases are considered, they will be found, I think, to be very different from the present case. In such cases the freight may be lost because the necessary repairs will cause so much delay that it frustrates the voyage. In that case the freight-earning voyage being destroyed by perils of the seas, there is a clear loss of the freight by the same perils. Or again, the cost of repair may be so great, as compared with the value of the ship when repaired, that a reasonable uninsured shipowner would not repair the ship at all, and in that case the ship is practically lost, and the freight also, by perils of the seas; at all events, unless there is another vessel available by which the cargo can be carried to its destination. If there is another such vessel available, the shipowner may—but he is not bound as between himself and the cargo owner to—forward the cargo and earn his freight. It is said by counsel for the plaintiffs that, if under such circumstances the shipowner elects not to forward the cargo, the freight may be said to be lost by his act, and that it is notwithstanding a loss by perils of the seas and recoverable against underwriters. In the first place I desire to avoid expressing an opinion whether in such a case the loss would be a loss by perils of the seas, if the cargo could be forwarded at an expense to the shipowner less than the freight to be earned by forwarding it. But, if in such a case the loss is to be treated as a loss by sea perils, it must, I think, be on the ground that the freight insured was the freight arising from the carriage of the cargo by the ship named in the policy, that this was lost by the loss of the ship, and therefore by perils of the seas, and that the right remaining in the shipowner to save as much as possible of the money lost by forwarding the cargo in another vessel is in the nature of salvage, to the benefit of which the underwriter is entitled on payment of a total loss; and on this basis, therefore, it is plain, as in the other cases, that the freight insured is lost by perils of the seas. I think, therefore, there is no true analogy between any of these cases and the present case. But, after all, every case of this kind must depend upon the terms of the particular contract and their application to the particular facts of the case; and I have come to the conclusion that the loss in respect of which this action is brought was not a loss covered by the policy underwritten by the defendants. Therefore, there must be judgment for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *William A. Crump and Son*.

Solicitors for the defendants, *Waltons, Johnson, Bubb, and Whotton*.

Thursday, Jan. 30.

(Before WRIGHT, J.)

Re AN ARBITRATION BETWEEN THE RURAL DISTRICT COUNCIL OF ST. THOMAS AND THE HEAVITREE URBAN DISTRICT COUNCIL. (a)

Local government—Severance of part of district—Constitution of new district—Adjustment of liabilities—Adjustment and agreement as to existing accounts—Right to claim subsequent adjustment for loss by severance—Local Government Act 1888 (51 & 52 Vict. c. 41), s. 57, sub-s. 1 (c.)—Local Government Act 1894 (56 & 57 Vict. c. 73), ss. 54, 68, sub-s. 1.

By an order made by a county council under sect. 57 of the Local Government Act 1888, a part of a rural district was severed from the district and constituted a new urban district, and all necessary adjustments were to be made in accordance with the provisions of sect. 68 of the Local Government Act 1894. An adjustment of accounts was then made and an agreement entered into between the councils providing for the payment of certain sums in respect of matters therein specified, and these sums were paid. Subsequently, the rural council, finding that the severance was a pecuniary loss to them, requested the urban council to come to an agreement as to the amount to be paid for such loss, but the councils were unable to agree and an arbitrator was appointed to determine the question of adjustment of the financial loss sustained by the rural district by the severance of the urban district, in so far as such loss was not determined by the prior agreement. No claim for such loss was included in the prior agreement:

Held, that the adjustment claimed by the rural council was an adjustment within the meaning of sect. 68 of the Local Government Act 1894, although the severed portion had been formed into an urban district of itself and had not been transferred to an existing district; and further that the claim to have such adjustment was not barred by the prior agreement between the councils.

AWARD of an arbitrator stated in the form of a special case.

By the County of Devon (Heavitree) Confirmation Order 1896, being an order under the seal of the Local Government Board confirming, subject to certain modifications and alterations therein appearing, an order of the County Council of Devon, it was ordered that as and from the 24th June 1896 the parish of Heavitree, which formed part of the St. Thomas' Rural District Council, should be severed from the St. Thomas' Rural District, and duly constituted an urban district to be called the Heavitree Urban District; and it was further ordered in clause 7 of the order that "all adjustments necessary in consequence of this order shall be made in the manner provided by and in accordance with the provisions contained in sect. 68 of the Local Government Act 1894, and any sum required to be paid for the purpose of an adjustment or of any award by any authority affected by this order, may be paid out of such funds as shall be determined by the agreement or by the arbitrator."

By an agreement dated the 5th Nov. 1897 and

(a) Reported by W. W. Oaa, Esq., Barrister-at-Law.

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made between the rural district council of St. Thomas (therein called the rural council) in the county of Devon of the one part and the urban district council of Heavitree (therein called the urban council) of the other part, after reciting that the district of the urban council was formerly part of the district of the rural council, but had been severed therefrom, and upon adjustment of the accounts between the two councils there was found to be due from the rural council to the urban council the sum of 908*l.* 11*s.* in respect of the highways, and the sum of 44*l.* 8*s.* in respect of the sanitary account, and there was also found to be due from the urban council to the rural council the sum of 3*l.* 10*s.*, being one-sixth part of the amount paid on precept by the rural council to the Exeter Port sanitary authority from the 28th July 1896 to the 30th Sept. 1897, which sums of 908*l.* 11*s.* and 44*l.* 8*s.* had on or before the execution thereof been paid to the urban council, and which sum of 3*l.* 10*s.* had at the same time been paid to the rural council (the receipt of which sums the two councils thereby respectively acknowledged), and after reciting that the rural council was liable to pay annually the sum of 3*l.* 8*s.* 10*d.* to the clerk and surveyor of the late Ottery St. Mary Highway Board, and the apportionment of that sum falling to the share of the urban council amounted to 10*s.* 8*d.*, and the sum of 12*s.* 5*d.* in respect thereof up to the 30th Sept. 1897 was due from the urban council to the rural council and had been paid, it was witnessed:

(1) That the urban council thereby released the rural council from all claims in respect of the highways and sanitary accounts respectively, and thereby covenanted and agreed to pay annually to the rural council on the 30th Sept. in every year so long as the same was payable the said sum of 10*s.* 8*d.*

(2) The urban council thereby covenanted and agreed with the rural council to pay to them yearly and every year a sum equal to one-sixth of the whole amount paid in that year by the rural council to the Exeter Port sanitary authority.

(3) The rural council thereby covenanted and undertook upon receipt of the said annual payment of 10*s.* 8*d.* to discharge from time to time the above sum of 3*l.* 8*s.* 10*d.*, and did thereby release the urban council from all claims in respect of the sum so paid by the rural council to the Exeter Port sanitary authority as aforesaid.

On the 15th Feb. 1901 the rural district council of St. Thomas by their clerk wrote to the clerk of the urban district council of Heavitree as follows:

I am instructed by this council to write to you as clerk to the Heavitree Urban Council with reference to the loss this rural district has sustained in consequence of the withdrawal of Heavitree from its contributory rateable area by virtue of the order of the county council of March 1896. Experience proves that the loss is considerable, and I beg therefore to invite your council to go into the matter with my council, so that an agreement may be come to under sect. 68 of the Local Government Act 1894, settling the amount which will be paid by Heavitree as compensation for the loss mentioned.

On the 21st Feb. 1901, the urban district council of Heavitree wrote that they had considered the matter with regard to the compensation, and that they did not acknowledge any liability, and that they must therefore decline to accept the invitation of the rural council.

The rural and urban district councils being unable to come to an agreement on the matters mentioned in the letters, and failing to agree upon some person to act as arbitrator between them in these matters, an order was made on the 5th Nov. 1901 by a master at chambers under the powers contained in sect. 68 of the Local Government Act 1894, appointing an arbitrator "to determine the question of adjustment of accounts between the parties to the extent to which the rural district council of St. Thomas have been financially damaged by the withdrawal of the parish of Heavitree from the rural district council of St. Thomas, so far as such question is not determined by the agreement of the 5th Nov. 1897."

By an agreement of the 6th Dec. 1901, made between the rural district council of St. Thomas and the urban district council of Heavitree, after reciting that the rural district council had made an approximate statement or claim in writing dated the 25th June 1901 against the urban district council, setting forth the amount and also the capitalised loss sustained by them in consequence of the severance of the district of the Heavitree Council from that of the St. Thomas' Council, and that there had been an examination of the statement or claim and the accounts on which the same was based, it was settled and agreed by the two councils in order to facilitate and shorten the proceedings under the arbitration—

(1) That the annual loss of the St. Thomas' Council as aforesaid should be admitted and agreed at the net sum of 100*l.*, such admitted loss being attributable to highways. (2) That the St. Thomas' Council should waive so much of its claim as arose under the Public Health Acts. (3) That this agreement was without prejudice to the contention of the Heavitree Council (denied by the St. Thomas' Council) that the claim was barred by the agreement dated the 5th Nov. 1897.

The two councils, by their counsel and witnesses attended before the arbitrator on the 17th Dec. 1901.

The rural district council of St. Thomas claimed from the urban district council of Heavitree the sum of 3000*l.*, being thirty years' purchase of the above sum of 100*l.*, agreed upon as the annual loss to the rural council by such severance as aforesaid.

On behalf of the urban district council of Heavitree it was contended that—(1) The portion severed from the St. Thomas district (namely, the Heavitree Urban District) having itself been formed into and constituted an urban district, and not transferred from one existing district council to another existing district council, there was no case for adjustment within the provisions of sect. 68 of the Local Government Act 1894; (2) the agreement of the 5th Nov. 1897 was a bar to the claim made in this arbitration; (3) in any event no sum should be awarded to be paid to the St. Thomas' Rural District Council in respect of the claim in this arbitration.

The arbitrator found the following facts: (1) At the date of the agreement of the 5th Nov. 1897—(a) Both the councils were aware that the severance of the parish of Heavitree would be a considerable loss of income to the rural district council of St. Thomas; (b) No claim other than appears by the above agreement was made or put forward for such loss of income occasioned by the

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severance; (c) Neither council was aware that the rural district council of St. Thomas had any right or power to make any such claim as was made in this arbitration. (2) The matters in respect of which the claim was made in this arbitration were not referred to or included in the agreement of the 5th Nov. 1897.

The questions for the opinion of the court were: (1) Whether the adjustment claimed in this arbitration was an adjustment within the meaning of sect. 68 of the Local Government Act 1894, having regard to the fact that the portion severed from the rural district of St. Thomas (namely, the urban district of Heavitree) had been formed into and constituted an urban district and had not been transferred from one existing district council to another existing district council; (2) Whether the agreement of the 5th Nov. 1897 was a bar to the claim made by the rural district council of St. Thomas in this arbitration.

If the court should be of opinion in the negative on the first question, or in the affirmative on the second question, then the arbitrator found and awarded that the rural district council of St. Thomas was not entitled to recover anything against the urban district council of Heavitree, and he awarded and directed that the rural district council of St. Thomas should pay to the urban district council of Heavitree the costs of the reference, including the costs of and incidental to the preparation of the agreement of the 6th Dec. 1901, and also the costs of this award.

If the court should be of opinion in the affirmative on the first question and in the negative on the second question, then the arbitrator found and awarded that the urban district council of Heavitree should pay to the rural district council of St. Thomas the sum of 2375*l.* and interest on the same sum at the rate of 3½ per cent. per annum from the 15th Feb. 1901 until payment of the above sum of 2375*l.*, and that the parties should each bear their own costs of this reference, including the costs of and incidental to the preparation of the agreement of the 6th Dec. 1901, and should pay one-half the costs of this award, and that if either party should in the first instance pay the whole or more than the one-half of the costs of this award, the other party should repay them so much of the amount as should exceed the one-half of the costs.

The Local Government Act 1888 (51 & 52 Vict. c. 41) provides:

Sect. 57 (1). Whenever a county council is satisfied that a *prima facie* case is made out as respects any county district not a borough, or as respects any parish, for a proposal for all or any of the following things; that is to say . . . (c) the conversion of any such district or part thereof, if it is a rural district, into an urban district, and if it is an urban district, into a rural district, or the transfer of the whole or any part of any such district from one district to another, and the formation of new urban or rural districts; the county council may cause such inquiry to be made in the locality, and such notice to be given, both in the locality, and to the Local Government Board, Education Department, or other Government department, as may be prescribed, and such other inquiry and notices (if any) as they think fit, and if satisfied that such proposal is desirable, may make an order for the same accordingly. (3) In any other case the order shall be

submitted to the Local Government Board, &c. (5) The Local Government Board, on confirming an order, may make such modifications therein as they consider necessary for carrying into effect the objects of the order.

The Local Government Act 1894 (56 & 57 Vict. c. 73) provides:

Sect. 54 (1). Where a new borough is created, or any other new urban district is constituted, or the area of an urban district is extended, then—(a) as respects any rural parish or part of a rural parish which will be comprised in the borough or urban district, provision shall be made, either by the constitution of a new parish or by the annexation of the parish or parts thereof to another parish or parishes, or otherwise, for the appointment of overseers and for placing the parish or part in the same position as other parishes in the borough or district, and (c) provision shall also, where necessary, be made for the adjustment of any property, debts, and liabilities, affected by the said creation, constitution, or extension. (2) The provision aforesaid shall be made—(c) Where any other new urban district is constituted by an order of the county council under sect. 57 of the Local Government Act 1888.

Sect. 68 (1). Where any adjustment is required for the purpose of this Act, or of any order, or thing made or done under this Act, then, if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may thereby adjust any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement. (2) In default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration in accordance with the Arbitration Act 1889, and the arbitrator shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily, and his award may provide for any matter for which an agreement might have provided.

The order made by the county council, after reciting sect. 57 of the Local Government Act 1888 and sect. 54 of the Local Government Act 1894, and that the parish of Heavitree formed part of the St. Thomas' Rural District, and that the county council, being satisfied that a *prima facie* case was made out for a proposal for the conversion of the parish of Heavitree into an urban district, had duly caused an inquiry to be made in the locality, and had given the requisite notice, and were satisfied that the conversion of the parish into an urban district was desirable, provided that the parish of Heavitree should be an urban district, and should be called the Heavitree Urban District.

The order was submitted by the county council to the Local Government Board for confirmation under the provisions of sect. 57, sub-sect. 3 of the Local Government Act 1888, and was confirmed subject to certain modifications.

Macmorran, K.C. (R. Cunningham Glen and Jenkin with him) for the rural district council of St. Thomas.—The adjustment claimed in this case is an adjustment within sect. 68 of the Local Government Act 1894. The order was made by the county council under sect. 57 of the Local Government Act 1888, and that is really the section under which the constitution of this urban district is provided for. It gives the county council power, in sub-sect. 1 (c), to convert a rural district or any part thereof into an urban district, or an urban district into a rural district. Sect. 68 of the Act of 1894 pro-

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vides for adjustment of property and liabilities, and enacts that where any adjustment is required for the purpose of the Act, or of any order or thing done under the Act, the authorities interested may make agreements for the purpose, and may thereby adjust any liabilities so far as affected by the Act. In *Re an Arbitration between Buckinghamshire County Council and Hertfordshire County Council* (80 L. T. Rep. 85; (1899) 1 Q. B. 515) it was held that where, by an order under the Local Government Act 1888, part of one county was transferred to another county and the part so transferred contained no county bridges and no main roads, the arbitrator had power to award a sum of money in respect of the loss to the county of an area which contributed to expenditure on bridges and roads without involving the county in any corresponding outlay on its own account. This principle was very soon afterwards affirmed by the Court of Appeal, in *Re an Arbitration between Rochdale Union and Haslingden Union* (80 L. T. Rep. 146; (1899) 1 Q. B. 540), where it was held that there was a case for adjustment, and Lord Russell, C.J. dealing with the question whether the case was one for adjustment between the two unions, said: "The taxation of that area" (that is, the area taken away) "was a gain to the union, because the character of the district taken away was such that the union got more out of the district in rates than was required to be expended on that portion of the union for its poor. It is said that Haslingden Union has got the benefit of this, and that an adjustment ought to take place; and, in my view, that contention is right." The former case was an adjustment under sect. 62 of the Act of 1888, and the latter case was under sect. 68 of the Act of 1894, which is similar to sect. 62. In this case there has been a rateable area—namely, Heavitree—taken away from the St. Thomas district, and the part so taken away was a source of profit to the St. Thomas' district. Therefore the principle of the two cases cited would apply if Heavitree had been added to another existing district—if, for instance, it had been transferred to Exeter, instead of having been constituted a separate area or district of itself. There is no difference in principle whether the separated area be added to another existing district, or be constituted a new district of itself. In either case the parts are equally affected, and therefore they are in the same position. With regard to the second point, the agreement of the 5th Nov. 1897 is no bar to the present claim. It does not purport to be a settlement of all differences in the case, but only of certain claims in respect of highways and sanitary accounts. It is said that the Act contemplates one adjustment and no more; but by sect. 62 of the Act of 1888 the councils affected by the order "may from time to time make agreements for the purpose of adjusting any liabilities," so that there may be a series of agreements and a series of adjustments; and the Act of 1894 is still more explicit. Therefore the case is one for adjustment, and if so, the principle of the above cases applies although Heavitree was constituted a separate district, and the agreement is no bar to the claim.

C. A. Russell, K.C. (*Roskill* with him) for the Heavitree Urban District Council.—Dealing with the question whether the facts show a case for

adjustment within the Act of 1894, all that the two cases cited decide, and the whole gist of them, is that where you have a transfer of something from one county to another county, or from one authority to another authority, and where that something which is transferred is a source of income or profit to the one from which it is taken, then there is a case for adjustment under these Acts. That principle is made perfectly clear by *Wills, J.* in *Re an Arbitration between Buckinghamshire County Council and Hertfordshire County Council* (80 L. T. Rep. at p. 89), and later on he says: "Justice in such a case means at the very least that neither county shall obtain any material advantage at the expense of the other. . . . In the present case, if it be true that the transferred area is such as to contribute much to, but to take little out of, the common fund, justice requires that the county which loses it should be paid something by the county which gains it. How much is for the arbitrator to say." The *ratio decidendi* is that on one side there is a loss and on the other side a corresponding gain. That has no application here. There was no advantage gained by Heavitree at the expense of the St. Thomas' district, and therefore we have here none of the facts which were said by *Wills, J.* to be the reasons for his judgment; and the same principle is laid down by Lord Russell, C.J. and Smith, L.J. in the *Rochdale* case (*ubi sup.*). What was there held to give rise to a case for adjustment was that what was taken away from Rochdale and given to Haslingden was a loss or detriment to Rochdale and a gain or advantage to Haslingden. Those two elements are necessary, and they are not present in this case. Those decisions, therefore, ought not to be applied to such a case as this, where the separated part is constituted a new district, and there ought to be no adjustment. With regard to the second point, as to whether it is competent for the rural council to put forward this claim, having regard to the fact of the agreement made on the 5th Nov. 1897 the two parties met in 1897 for the purpose of adjusting their liabilities, and it ought to be now held that where the parties, with full knowledge of the facts, and in the belief on both sides that the whole matters were being adjusted, made an agreement, and on that agreement made an adjustment, it ought not to be competent for them to reopen the matter and have a second adjustment. Upon both grounds the urban council are entitled to succeed.

WRIGHT, J.—I think there is nothing in the last point raised as to whether the agreement of the 5th Nov. 1897 is a bar to the claim made in this case. The agreement of the 5th Nov. 1897 appears to me to be plainly confined to a settlement of the existing accounts when there were liabilities which the undivided district was already under an obligation to pay; and I do not think that the existence of that agreement precludes the claimants here from putting forward this claim. I think it is material to notice what counsel for the claimants pointed out, that the order for the division of the district, and the constitution of the urban district out of part of the rural district, was made under the Local Government Act 1888, s. 57, and sect. 62 of that Act therefore applies to this extent, that it authorises the parties from time to time to make agreements. I think that is a guide to what the

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Legislature meant, and the fact of the Local Government Board having applied sect. 68 of the Local Government Act 1894, does not of itself show that the parties are precluded from making a further claim by arbitration because they had before that time already settled their differences by agreement. It seems to me plain that in these cases there may constantly be a necessity for a supplemental agreement; and I think it would be very unfortunate if there were any language in these Acts which absolutely bound the parties by the result of an agreement, or arbitration, undertaken very likely to deal with arguable matters, and undertaken and concluded before the parties had had time to ascertain what their relative positions were. Nor can I see any sufficient defence against this claim for adjustment in the suggestion that this is not the case of a transfer of a district from one existing body to another existing body, but is the constitution of a portion of the district into a separate Local Government Board unit. Both of these cases are in one sense transfers, and the order of the Local Government Board applies sect. 68 of the Act of 1894, so that I cannot see that there is anything in that point. Then comes the main and real question. Certainly I find great difficulty in believing that any such contention as is here put forward for the claimants, the rural district council, was ever intended by Parliament. The words used are no doubt wide enough, and no doubt properly and intentionally wide enough, to include any possible adjustment, because any sort of adjustment may arise in a particular case, and if so, it must be provided for and covered. For instance, where there is any kind of a joint rate, or where a burden has been undertaken by one of the joint districts which would not fall within it, but would be undertaken by it for the benefit of the other, the words must be wide enough to deal with a case of that kind. Therefore I do not see how the Act could have been drawn not wide enough to cover a case where there is no joint rating and no burden undertaken for a consideration given as in this case. One of the main reasons for constituting an urban district out of part of a rural district very often is that it is unfair to make one part pay for the expensive works and arrangements necessary for the other part. The populous part of a district wants better sewerage and lighting, which the rural part does not want, and they divide for the very purpose of leaving the populous part to bear its own cost, which is for its own benefit; but here the rural council turn round to the urban council and say: "We used to levy rates on you; now pay us something because we have gone away from you." In view of the decision of the Court of Appeal in the case of *Re an Arbitration between Rochdale Union and Haslingden Union* (*ubi sup.*), I cannot say that it is impossible that such a claim can be maintained. Lord Russell, C.J. says (80 L. T. Rep. at p. 148; (1899) 1 Q. B. at p. 544): "The substantial cause of complaint of the Rochdale Union is that there has been taken away from it a portion of the rateable area formerly comprised in it. The taxation of that area was a gain to the union, because the character of the district taken away was such that the union got more out of the district in rates than was required to be expended on that portion of the union for its poor. It is

said that Haslingden Union has got the benefit of this, and that an adjustment ought to take place; and, in my view, that contention is right." Then Smith, L.J. says: "It is a case of a detriment to one union and an advantage to the other; and, in my opinion, it is a case which comes within sect. 68, as it certainly does within sect. 36." In view of these expressions of opinion I have only one course open to me, and that is to say that it is not impossible that such a claim as this can be maintained. That is all I can deal with. Unfortunately the two authorities here have come to an agreement as to an amount to be paid which I should have thought it impossible that any arbitrator could ever have arrived at. I should have thought that if the section meant that any contribution should be made, it ought only to be a nominal one, unless there were some consideration for it; but, of course, I cannot deal with that. There may have been reasons why the parties thought that there was good ground for awarding a substantial sum; but as they have agreed on that point I cannot deal with it in any way. It may possibly be that in future cases of this kind the Local Government Board may think it right to deal with the matter themselves, as they have power to do under sect. 59, sub-sect. 4 of the Local Government Act 1888. I see no reason why they should not deal with this case. They can deal with part of the arrangements as well as with the whole, and I should be very much surprised if they lay down any such general rule as that which is involved in this claim. As the matter stands, I must give judgment on the case for the claimants.

Judgment for the claimants.

Solicitors for the Rural District Council of St. Thomas, Coode, Kingdon, and Cotton, for Arthur E. Ward, Exeter.

Solicitors for the Heavitree Urban District Council, Geare and Pease, for J. W. W. Mathew, Exeter.

House of Lords.

Nov. 25, 26, and Dec. 17, 1901.

(Before the LORD CHANCELLOR (Halsbury); Lords SHAND, DAVEY, BRAMPTON, and ROBERTSON.)

BLAIR v. DUNCAN AND ANOTHER. (a)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Law of Scotland—Testamentary disposition—Bequest "for such charitable or public purposes as my trustee thinks proper"—Vagueness and uncertainty.

By the law of Scotland a testator may in the disposition of his property select a particular class of individuals or objects, and then give to some person the power after his death of appropriating the property, or any part of it, to such particular individuals among that class as such person may select.

The law of Scotland does not attach such a technical meaning to the word "charitable" as is given to it in England under the Act of Elizabeth (43 Eliz. c. 4).

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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A testatrix by her will directed that, in the events which happened, one-half of the residue of her estate should be applied "for such charitable or public purposes as my trustee thinks proper."

Held (affirming the judgment of the court below), that the words must be read disjunctively, and that the bequest was void for vagueness and uncertainty.

THIS was an appeal from a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice-Clerk (Macdonald), Lords Young, Trayner, and Moncreiff, who had reversed a decision of the Lord Ordinary (Pearson). The case is reported 38 Sc. L. Rep. 209; 3 F. 274.

The appellant, John Blair, Writer to the Signet, Edinburgh, as sole trustee and executor of the late Miss Agnes Wilson Young, was the defender in the action which was brought against him at the instance of Archibald Young, advocate, Edinburgh, since deceased (whose trustees and executors, now represented by James Barker Duncan and Robert Greig Scott, the respondents, were after his decease assisted as pursuers), for the purpose of having it found and declared that the direction contained in a codicil executed by Miss Agnes Wilson Young was void and ineffectual, and that in consequence the original pursuer as her heir-at-law and sole next of kin, or otherwise as sole residuary legatee under her will, was entitled to receive from the appellant an accounting of his intromissions, and payment of the whole residue of her estate.

The testamentary writings under which the appellant was nominated and appointed were a will and codicil, both dated the 5th Dec. 1898 and registered on the 2nd Feb. 1900.

In her will the testatrix, after providing for the payment of debts, &c., and certain legacies, left the residue of her estate to her brothers, Archibald Young and the Rev. James Gerard Young, equally between them, and if either predeceased her, then the whole to the survivor.

The codicil, which was of the same date, but was executed later in the day, was in the following terms:

Referring to the will which I have signed to-day, I direct that, in the event of either of my brothers predeceasing me, the half of the residue, and, in the event of both predeceasing me, the whole of the residue, shall be applied for such charitable or public purposes as my trustee thinks proper.

Her brother, the Rev. James Gerard Young, predeceased the testatrix. On the death of the testatrix the appellant accepted office as trustee and executor, and he was prepared to carry into practical effect the direction contained in the codicil as regarded half of the residue, amounting to about 9000*l.*, when the present action was brought against him.

The sole question to be decided, in the circumstances which had happened, was as to whether the direction contained in the codicil respecting the disposal of the one-half of the residue was valid, or was void from vagueness and uncertainty.

It was decided by Lord Pearson that the gift was valid; but on appeal it was declared to be void from vagueness and uncertainty.

The Lord Advocate (Graham Murray, K.C.), J. Wilson, K.C., R. Scott Brown (all of the Scotch

Bar), and A. J. Lawrie appeared for the appellant, and argued that the law as to charitable trusts was settled in England, but not in Scotland. The Scotch law follows the Roman law as laid down in the Digest (Lib. xxx., Tit. 1, sect. 43, *De legatis et fidei commissis*). The Scotch law is to be found in three decisions of this House:

Hill v. Burns, 2 W. & S. 80;

Orichton v. Grierson, 3 W. & S. 329;

Miller v. Black's Trustees, 2 Sh. & McL. 866.

See also

Williams v. Kershaw, 5 Cl. & F. 111;

Orichton v. Orichton's Trustees, 4 Shaw, 533;

Re Jarman's Estate, 39 L. T. Rep. 89; 8 Ch. Div. 584.

In Scotland there has been no such definition of "charitable" purposes laid down as there has been in England. "Charitable" is as vague a word as "public," but bequests for "charitable" purposes have been held good, and therefore a bequest for "public" purposes may be good in Scotland. The earlier cases in Scotland before the House of Lords decisions are

Murray v. Fleeming, in 1729 (Mor. Dict. 4075);

Horn's case, in 1741, cited in *Hill v. Burns*;

Wharris v. Wharris, in 1760 (Mor. Dict. 6599);

Brown's Trustees' case, in 1762 (Mor. Dict. 2318);

Snodgrass v. Buchanan, in 1806 (Mor. Service of Heirs, Appendix, 1).

After the decisions in the House of Lords we have *Dundas v. Dundas* (15 Shaw, 427) and *Robbie's Trustee v. McCrae* (20 R. 358), which shows that there must be a trustee with a power of selection:

Low's Executors v. Macdonald, 11 Macph. 744;

Kelland v. Douglas, 2 Macph. 150.

In *McLean v. Henderson's Trustees* (7 R. 601) there is a dictum of Lord Moncreiff that a bequest for charitable purposes would be void for uncertainty, but it does not seem to be supported by authority. The cases cited, together with *Cobb v. Cobb's Trustees* (21 R. 638), *Brown's Trustees v. Young* (6 Sc. L. T. 43), and *McGregor's Trustees v. Bosomworth* (33 Sc. L. Rep. 364), exhaust the authorities on the subject, for the case of *Sutherland's Trustees* (20 R. 925) went off on another point and is not relevant. The text-writers do not give much assistance. We contend that there is no reason or authority why this bequest should not be held good. The case of *Miller v. Black's Trustees* (*ubi sup.*) shows that *Williams v. Kershaw* would have been decided otherwise if it had been a Scotch case. The cases show that there must be a trustee to exercise a discretion, and where the bequests have been held bad there has been no appointment of a trustee or the appointment has lapsed. A bequest for "benevolent" purposes, as distinct from "charitable" is good in Scotland, and, if so, a bequest for "public" purposes is good. The Scotch law is not narrower than the interpretation which the English law has put on the statute of Elizabeth.

The Solicitor-General for Scotland (Scott-Dickson, K.C.), Younger, K.C., and D. Miller (of the Scotch Bar), for the respondents, maintained that the House of Lords cases cited laid down the general principle that the law of Scotland takes a liberal view of "charitable" bequests, but there is no authority extending it to "public" purposes. The appellant must go so far as to say that a bequest to such purposes as the trustee pleases

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would be good, which would lead to an absolute contradiction between the law of England and that of Scotland, which is not suggested in any of the cases. It lies upon him to show that a bequest which would be void for vagueness in England may be good in Scotland. Charitable bequests are favoured in both countries, and the statute of Elizabeth is only a guide to the English courts in deciding what is "charitable." The law in both countries is independent of statute. The Scotch cases turn on the word "benevolent." See

Dolan v. Macdermot, L. Rep. 5 Eq. 60; L. Rep. 3 Ch. 676;

Mitford v. Reynolds, 1 Phill. 185;

Nightingale v. Goulbourn, 2 Phill. 594;

Commissioners of Income Tax v. Pemsel, 65 L. T. Rep. 621; (1891) A. C. 531.

"Public" purposes are not sufficiently definite, and this trust is void for uncertainty in Scotland as it would be in England. "Charitable" trusts are an exception to the general rule.

The Lord Advocate was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halbury).—My Lords: In this case I do not propose to repeat what I said at some length in *Commissioners of Income Tax v. Pemsel* (65 L. T. Rep. 621; (1891) A. C. 531), nor do I think it necessary to appeal to the decision in that case for the purpose of the decision of this. I will only say that in my view the decision of that case is an authoritative determination, and in speaking of a taxing Act, which applies to both countries, the decision of that case must of course be supreme. But speaking of a Scottish instrument, and the interpretation to be given to the word "charitable" in Scotland, I regard the decision in *Baird's Trustees v. Lord Advocate* (15 R. 682) as still being an authoritative exposition of the law of Scotland. I am not quite certain that it is important to consider that question at any length here, because, in the view that I take of this particular testamentary disposition, it appears to me that it is impossible to deny that the words on which the main question turns—namely, "charitable or public"—are used disjunctively. Under those circumstances it appears to me that it would be equally the law of England as it would be the law of Scotland that the discretion here given to the trustee to determine what particular public purposes should be the objects of the trust is too vague and uncertain for any court either in England or Scotland to administer. The result of that is, as it appears to me, that the decision of the court below was perfectly right, and I therefore move your Lordships that this appeal be dismissed with costs.

LORD SHAND.—My Lords: I am of the same opinion. The whole argument of the appellant was founded upon the alleged analogy between a bequest for public purposes and a bequest for charitable and benevolent purposes, which are objects of peculiar favour both in the law of Scotland and in that of England. In my opinion the analogy clearly fails, and I concur in thinking that a bequest for public purposes to be taken by a person or persons named by the

testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest. I will only add that I concur in the judgment of Lord Robertson, which he has given me the opportunity of reading and considering.

LORD DAVEY.—My Lords: The short question on this appeal is whether a trust for such "charitable or public purposes" as the executor may select is a valid disposition of the testator's property according to the law of Scotland, or is void for uncertainty. Your Lordships were exhorted by the Lord Advocate to dismiss from your minds all preconceived notions derived from the English law of charities, and I have done my best to humbly obey that exhortation. There is no doubt that the English law has attached a wide and somewhat artificial meaning to the words "charity" and "charitable," derived (it is said) from the enumeration of objects in the well-known Act of Elizabeth, but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words. In the course of the argument there was some discussion as to the meaning attached by Scotch judges to the words "charitable purposes." I think that those words include a wider range of objects than such as are of a mere eleemosynary character, and I find authority for saying so in the opinion of Lord Watson in the case of *Commissioners of Income Tax v. Pemsel* (*ubi sup.*). But I do not find it necessary to pursue or elaborate the discussion of this topic in the present case, because it is, in my opinion, clearly established that whatever may be the legal definition of the expression the courts of Scotland will give effect to a disposition, in favour of charitable purposes to be selected by a named individual. In other words, such a trust is treated as being sufficiently definite to be the subject of a valid disposition. There are three cases in this House to which your Lordship's attention was called. In *Hill v. Burns* (2 W. & S. 80) a bequest to trustees was held valid, whereby a testatrix appointed the residue of her estate to be applied by her trustees in aid of "the institutions for charitable and benevolent purposes established or to be established in the city of Glasgow or neighbourhood thereof," to be appropriated in such manner as to the trustees might seem proper. In *Crichton v. Grierson* (3 W. & S. 329) a gift to trustees of a residue to be applied in such charitable purposes and bequests to such of the testator's friends and relations as might be pointed out by his wife with the approbation of the majority of the trustees was also held valid. Lastly, in *Miller v. Black's Trustees* (2 Sh. & McL. 866) a bequest for such charitable and benevolent purposes as the trustees might think proper was held valid. If, therefore, the words in the present case were merely "charitable purposes" or were "charitable and public purposes," I think that effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character. But the words which we have here are "charitable or public purposes," and I think that these words must be read disjunctively. It would, therefore, be in the power of the trustee to apply the whole of the fund for purposes which are not charitable, though they might be of a public

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character. Now, I am not aware of any case in which effect has been given in the Scotch courts to a trust for "public purposes," and I find in the cases which have been referred to indications that such a trust could not be considered valid. In *Crichton v. Grierson* (*ubi sup.*) Lord Lyndhurst, L.C. states the question thus, whether effect may be given to a power of selection amongst the individuals comprised in "particular classes of individuals and objects," and he answers the question by saying that, according to the authorities in the law of Scotland, a person may make such a disposition. Can it be said that "public purposes" is within the description of a particular class of individuals or objects? I think not. Illustrations were given at the Bar, and might be multiplied to any extent, of purposes which would come within the description of "public" and the statement of which would reduce the gift almost *ad absurdum*. The Lord Advocate argued that the expression "public" was no more vague than "charitable." I do not agree, although an exhaustive definition of "charitable" might be difficult, and to attempt it would be unwise. At any rate it is *positivi juris* that the courts will give effect to a gift for charitable purposes to be selected by an individual. It may be that the law of Scotland is more liberal to the interpretation of bequests for charitable purposes than other bequests, as was said by Lord Gifford in advising this House in *Hill v. Burns* (*ubi sup.*); and in *McLean v. Henderson's Trustees* (7 R. 601), Lord Moncreiff expressed himself in words which show that, in his opinion, a bequest might be void for uncertainty if not within the category of charitable bequests. It appears to me that the point to which I have directed my observations is put clearly and concisely by Lord Young, when he says that he could not on authority or principle sustain public purposes as a valid direction to a testamentary trustee. For these reasons I am of opinion that the appeal should be dismissed with costs.

LORD BRAMPTON.—My Lords: In the event which has happened the testatrix by a codicil to her will directed that one-half of the residue of her estate should be applied for such "charitable or public purposes" as the testamentary trustee nominated in her will should think proper. It is not disputed that if the word "charitable" had stood alone the devise would have been sufficiently definite and valid; but it is urged by the respondents that the addition of the words "or public purposes" renders the devise indefinite, and void because of its vagueness. It seems to me that the addition of those words would confer upon the trustee the power, at his option, of setting aside charitable purposes altogether, and of applying the whole of the bequest solely to any one or more of innumerable public purposes extending over an unlimited area. In short, the intentions of the testatrix are, on the face of the will and codicil, left, so far as relates to the "public purposes" to be benefited, in absolute uncertainty. I think, therefore, that this appeal should be dismissed with costs.

LORD ROBERTSON.—My Lords: The argument at your Lordships' Bar, able and ingenious as it was, makes it necessary to remember that the question now before the House is whether a bequest of money

for such public purposes as the trustee under the will thinks proper is or is not valid, and I am clearly of opinion with your Lordships that the gift to public purposes is disjoined from that to charitable purposes. Now, it is a significant fact that this question, on its merits, has been little if at all discussed by the learned counsel for the appellants. If a bequest by A. to any public purpose to be selected by B. is defensible on its merits, it must be on one of two grounds; either that by law A. may validly leave money to be given to any public purpose whatever named by B., or that the purposes named—viz., "public purposes," are not vague and uncertain. The former of these propositions was asserted by the appellant, but no more than asserted, on the authority of the opinions delivered in the Court of Session in *Hill v. Burns* (2 W. & S. 80). When those opinions and the authorities cited in them are examined, it will be found that they give no support to the proposition that a bequest is valid which consists merely of a direction that a certain sum of money shall go to any purpose that a nominated trustee may think proper. The case then before the learned judges was not such an unlimited power at all, but a direction to trustees to select as the object of the legacy such of the benevolent and charitable institutions in Glasgow as they thought fit. And in speaking of *alienum arbitrium* they were defending the bequest against the objection that the intervention of *alienum arbitrium* to any extent made the legacy void. This is made perfectly plain by the reference by the Lord President to the cases of *Brown* (*ubi sup.*) and of *Snodgrass v. Buchanan* (*ubi sup.*), in both of which the *alienum arbitrium* was invoked merely to select from the testator's own relations. There is, so far as I know, no authority for the broader proposition—that according to Scotch law a good bequest is made by A. when he directs B. to make a will for him as regards either the whole or a part of his estate, and it is contrary to the fundamental idea of testamentary disposition. What has been established as regards the intervention of a trustee is thus stated by Lyndhurst, L.C. in *Crichton v. Grierson* (*ubi sup.*), and the passage touches the very core of the present case. He says that "according to the authorities in the law of Scotland, it is quite clear that a man may, in the disposition of his property, select particular classes of individuals and objects and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select." This is the rule which has got to be applied in the present case, and the question is, has this testatrix done what Lord Lyndhurst describes, has she selected a particular class or particular classes of objects among which her trustee is to select? Now, as I have already remarked, we have not had much argument from the appellant on this question by itself, and apart from the medium of the decisions about charities. I cannot say that I am surprised, for it seems to me that this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice. Now, I have not heard any

one say that this bequest is not vague and uncertain; what is said is merely that a gift to any charitable purpose to be selected by a trustee is equally vague, and that the law allows the validity of a gift to any charitable purpose to be selected by a trustee. The soundness of this argument must therefore be considered. First of all, I do not agree that charitable purposes is as wide or nearly as wide as public purposes. Even giving to the word charitable the widest extension ever allowed to it, there are, as I should believe, many public purposes completely outside it. Giving to the word charitable its proper meaning, as it occurs in a Scotch testament, its comprehensiveness still further falls short of the word "public." As was suggested at the Bar, the trustee would be within his powers if he gave this 9000*l.* to the election fund of any of the political parties that he pleased. It would be equally within his powers to subscribe the money towards raising a yeomanry regiment. Each of these purposes is public; neither is charitable. Innumerable other illustrations might be given. A great deal of the appellant's argument was directed to enforcing the relevancy of the decisions about the word "charitable" by showing that they could not be distinguished from the present case. With this view your Lordships had presented to you an elaborate and interesting discussion of the difference between the law of charities in England and the law of charities in Scotland. Much that was thus advanced was unquestionably sound (although I consider it inconclusive of the present question). "Ever since its institution," said Lord Watson in *Commissioners of Income Tax v. Pemsel* (*ubi sup.*), "the Court of Session has exercised plenary jurisdiction over the administration of all trusts, whether public or private, irrespective of the particular purpose to which the estate or income of the trust may be appropriated; and there has consequently been no room for those numerous questions as to a trust being charitable or not which have arisen in England under the statute of Elizabeth." The relations of the Court of Session to charities had been based on the same general ground by Lord Onninghame and Lord Cockburn in *Ross v. Heriot's Hospital* (5 D. 589), and it cannot be doubted that this is an accurate statement of the law. Nor do I think that exception can be taken to the interesting comparison of the laws of the two countries given by Lord Stormonth-Darling in the case of *Cobb v. Cobb's Trustees* (21 R. 638), although I do not concur in the deductions drawn by that learned judge, so far as bearing on the word "public." But while charitable trusts are, as matter of legal doctrine, merely one class of trusts, and while their prominence in legal decisions results from nothing more than their being the most numerous class of public trusts, I do not think that it is true that they have been uniformly treated by the court in Scotland exactly as other trusts would be treated. The courts have, I think, as matter of historical fact, reflected more or less, consciously or unconsciously, the bias which disposes every one favourably towards charity; and this never appeared more plainly, or was avowed more frankly, than in the decision of your Lordships' House in the case of *Mayor of Dundee v. Morris* (3 Macq. 134). To this favour for charities I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee

may select. Accordingly, when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class. On the merits of the question now before your Lordships I am unable to hold that the designation of public purposes is a compliance with the rule.

Younger, K.C. said that it had been agreed between the parties, subject to their Lordships' approval, that the costs should come out of the estate.

Judgment appealed from affirmed, and appeal dismissed. No order as to costs.

Solicitors for the appellant, Faithfull and Owen, for Davidson and Syme, Edinburgh.

Solicitors for the respondents, A. and W. Beveridge, for Duncan and Black, Edinburgh.

Feb. 6 and 7.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON, and LINDLEY.)

LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL AND OTHERS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

London County Council—Statutory powers—Tramways—Omnibuses—Local Government Act 1888 (51 & 52 Vict. c. 41)—London County Tramway Act 1896 (59 & 60 Vict. c. li.), s. 2—Powers of Attorney-General.

By sect. 2 of the London County Tramway Act 1896 the London County Council were authorised to purchase and work tramways, and in exercise of the powers conferred by the statute they purchased certain tramways from a limited company.

The company had run omnibuses in connection with their tramways, and the county council continued to run them.

Held (affirming the judgment of the court below), that the statute gave them no power to purchase or run omnibuses, such a business not being incidental to the working of the tramways.

A court of law has no power over the action of the Attorney-General suing on behalf of a relator on a matter within his jurisdiction.

Attorney-General v. Great Eastern Railway Company (40 L. T. Rep. 265; 11 Ch. Div. 449) explained.

THIS was an appeal from a judgment of the Court of Appeal (Rigby, Williams, and Stirling, L.JJ.), reported 84 L. T. Rep. 245; (1901) 1 Ch. 781, who had affirmed a judgment of Cozens-Hardy, J., reported 82 L. T. Rep. 671.

The action was brought by the Attorney-General, at the relation of a large number of omnibus proprietors as co-plaintiffs, they being also ratepayers.

The appellants had, under statutory powers, acquired a large number of tramways within the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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area of their jurisdiction. In connection with these tramways they had been running omnibuses over various routes. They claimed the right to do so in virtue of their having purchased the undertaking of the London Tramways Company, and also because such omnibuses were necessary to the proper management of the tramways and ancillary thereto. A further ground was that, by sect. 2 of the Local Government Act, the council had all the powers of a municipal corporation. Their power of acquiring tramways was given by sect. 2 of the London County Tramway Act 1896, which is in the following terms:

2. It shall be lawful for the council to exercise with respect to any tramways authorized by the local Acts mentioned in the schedule to this Act which have been or shall be purchased or acquired by them under their statutory powers the same powers of working such tramways respectively as were possessed by the company or companies respectively owning such tramways, and the council may provide, place, and run carriages thereon and provide such horses, cars, fixed and movable plant, harness, and apparatus as may be requisite or convenient for enabling the council to exercise such powers, and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by them; and the several provisions relating to the working of the tramways and the taking of tolls, rates, and charges therefor contained in any Act relating to any such tramway shall extend and apply *mutatis mutandis* to, and in relation to, such tramway for the time being worked by the council, and to the council instead of to the company.

The respondents contended that the council's powers were defined by and strictly limited to the terms of this statute, and that being a corporation created by statute their rights were only such as were expressly conferred by that statute—that is, the Local Government Act 1888—and did not extend to owning and running omnibuses.

Haldane, K.C., Vernon B. Smith, K.C., and Methold appeared for the appellants.

Asquith, K.C., the Hon. E. C. Macnaghten, K.C., and Blaiklock, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: It appears to me that, as far as any question of general law is involved in this case, the whole ambit of the considerations that arise has been completely traversed by the two cases of *Ashbury Railway Carriage and Iron Company v. Riche* (33 L. T. Rep. 450; L. Rep. 7 H. L. 653) and *Attorney-General v. Great Eastern Railway Company* (42 L. T. Rep. 810; 5 App. Cas. 473), and I do not think that much would be gained by going through each individual topic of it, because I think that it cannot now be doubted that those two cases, if we look at them, do constitute the law upon the subject. It is impossible to go behind those two cases. They are now part of the law of this country, and we must acquiesce in them, whether we like them or not. So far as the particular questions before us here are concerned, depending as they do upon the statute itself, with the utmost respect for the learned counsel I think that the contentions hardly admit of plausible statement. The power

which is expressly given to the London County Council excludes from them, and to my mind is intended to exclude from them that which did exist as a separate business under the earlier statute, and was not conferred and obviously was not intended to be conferred upon the London County Council. It appears to me to be, as I say, hardly susceptible of plausible statement to suggest that those words can possibly include this separate business. The only argument which, as it appears to me, is capable of plausible statement in the matter is the argument derived from the somewhat clumsy phrase used in the statute with reference to their being in the same position as the council of a borough divided into wards. At first sight that looks as if they were intended to be identified in all particulars, but when one looks at the context of that section and sees what it refers to I think it manifest, to use Williams, L.J.'s expression, that it is a section for the machinery governing and arranging the powers and the order of their exercise inside the corporation, when you have got the corporation, but not in the smallest degree intended to enlarge the original objects of it or to give them any powers other than those previously conferred upon them by statute. That seems to me to dispose of that point, which was, to my mind, the only thing that caused me to consider whether this question was capable of plausible argument or not. One question has been raised, and though not, I think, urged here, it appears to have been urged in the court below, and I confess that I do not understand it. I mean the suggestion that the courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation in that respect or not. Considering the profound respect with which I regard all the observations made by the late James, L.J. I cannot help thinking that he did not himself suppose that he was laying down any absolute rule of law. In *Attorney-General v. Great Eastern Railway Company* (40 L. T. Rep. 265; 11 Ch. Div. 449) (a) I think that he was only giving, in response to the Attorney-General himself, some sort of pious opinion as to the mode in which the discretion of the Attorney-General, and of the Attorney-General alone, should be exercised in cases where he has thought it his duty to intervene. In cases where, as a part of his public duty, he has the right to inter-

(a) This case was affirmed on appeal to the House of Lords (42 L. T. Rep. 810; 5 App. Cas. 473), but the matter in question was not dealt with by their Lordships.

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vene, that which the courts can decide is whether there is the excess of power which he, the Attorney-General, alleges. Those are the functions of the court, but the initiation of the litigation and the determination of the question whether it is a proper case for the Attorney-General to proceed in, are matters entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the discretion of the Attorney-General. I make this observation upon it, though the thing has not yet been urged here at all, because it seems to me to be very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it by the first law officer of the Crown. I do not think it necessary to go through this case because the very elaborate and careful judgments delivered both by Cozens-Hardy, J. and by the three learned Lords Justices in the Court of Appeal, appear to me to exhaust the whole question, and, as I have said before, I think that in a great measure the whole question has been already determined by the two cases which have been referred to. Under those circumstances I invite your Lordships to say that this appeal should be dismissed with costs.

Lord MACNAGHTEN.—My Lords: I am entirely of the same opinion. I must say that it seems to me to be a very clear case. The London County Council are carrying on two businesses—the business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament, for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together, they may be worked with each other and no doubt that is an advantageous mode of working them; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of a line of steamers in connection with it is incidental to the undertaking of a railway company which has its terminus at a sea port. I think it a perfectly clear case. The only thing further that I should like to say is that I regret most sincerely that the rates and the money of the public should have been spent in defending up to the last tribunal a case as plain as this. As regards the argument that the county council have all the powers of a municipal corporation, I think that it is disposed of at once if you look to the Act of Parliament, because the sentence on which the counsel for the appellants relied is contained in the first chapter as to the constitution of the council, and there is a separate chapter which deals entirely with the powers of the council, and in that chapter I can find nothing to warrant the contention of the appellants. With regard to the position and duties of the Attorney-General, I only want to say that I entirely concur with what has fallen from the Lord Chancellor. I am of opinion that the appeal should be dismissed with costs.

Lords SHAND, BRAMPTON, ROBERTSON, and LINDLEY concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *W. A. Blackland*.
Solicitors for the respondents, *Hicks, Davis, and Hunt*.

Judicial Committee of the Privy Council.

Wednesday, July 24, 1901.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury) Lords HOBHOUSE, MACNAGHTEN, DAVY, ROBERTSON, and LINDLEY.)

Ex parte ALDRED. (a)

PETITION FOR LEAVE TO APPEAL FROM THE COURT OF GENERAL GAOL DELIVERY IN THE ISLE OF MAN.

Practice—Criminal case—Evidence for jury—Leave to appeal.

In a criminal case where there is evidence for the jury in support of a conviction the Judicial Committee will not give leave to appeal.

THIS was a petition for leave to appeal from a conviction and sentence of the Court of General Gaol Delivery in the Isle of Man dated the 14th Nov. 1900.

The petitioner was an auditor of Dumbell's Banking Company, and was convicted of having been a party to the issue of false balance-sheets by that company, which had stopped payment in February 1900. The petition alleged that there had been misdirection by the judge at the trial, and that there was no evidence to support the charge, or that the petitioner had acted with any fraudulent intention. He was found "guilty in a minor degree" and recommended to mercy.

Muir Mackenzie appeared for the petitioner.

C. Mathews and *Carrington*, for the Government of the Isle of Man, were not called upon to address their Lordships.

At the conclusion of the argument for the petitioner their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury) as follows:—Their Lordships are of opinion that whatever may be said about this matter, and there are some observations, undoubtedly, which commend themselves to their minds, there is nothing here which can justify any court in setting aside the conviction. There is no fact established sufficient to countervail the solemn determination of the judge and the jury here. It would be impossible to set aside this conviction upon such grounds as have been brought forward. There appears to have been evidence for the jury. Whether or not their Lordships would have formed the same opinion and found the same verdict is not the question. If they would not, that is not enough to set aside the verdict of the jury which has been arrived at; and their Lordships must, therefore, decline to advise His Majesty to grant leave to appeal.

Solicitors for the petitioner, *Jacques and Co.*

Solicitors for the Government of the Isle of Man, *Light and Galbraith*.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Wednesday, Feb. 12.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords ASHBOURNE, MACNAGHTEN, SEAND, DAVEY, and LINDLEY.)

NELSON v. THE KING. (a)

ON APPEAL FROM THE COURT OF GENERAL GAOL DELIVERY OF THE ISLE OF MAN.

Criminal law—Fraudulent misappropriation of funds—Evidence.

The appellant, a director of a banking company, opened a "trust account" irregularly, and without the consent of the board, and had from time to time considerable overdrafts on the account. The bank stopped payment, and at that time a large sum was due from the appellant on such overdrafts, but he was solvent at the time such overdrafts were made.

Held, that under the circumstances there was no evidence of fraudulent misappropriation of the funds of the bank.

Judgment of the court below reversed.

THIS was an appeal from a conviction by the Court of General Gaol Delivery holden at Douglas in the Isle of Man on the 19th Nov. 1900, when the appellant was convicted by a jury for that he, being a director of a certain public company, namely Dumbell's Banking Company Limited, unlawfully and fraudulently did take and apply to his own use and benefit certain property, to wit, money of and belonging to the said Dumbell's Banking Company Limited.

The trial was commenced upon the 15th Nov. 1900 when, together with one John Shimmon, he was arraigned upon and pleaded "not guilty" to an indictment containing twenty-six counts, and on the 19th Nov. 1900 both the appellant and John Shimmon were convicted upon ten counts of the indictment and were acquitted upon the remaining counts, and both the appellant and John Shimmon were severally sentenced to terms of five years penal servitude.

The material facts proved during the trial were as follows:—

The appellant was a director of Dumbell's Banking Company Limited, and so acted from 1884 to the 2nd Feb. 1900, when the bank ceased to carry on business, and from time to time during the whole of this period he attended the board meetings, and from year to year received his director's fees. During the whole of the period between these dates one Alexander Bruce, who died on the 12th July 1900, some four months before the commencement of the trial, was general manager, and John Shimmon was manager of Dumbell's Banking Company Limited.

The various sums of money which the appellant was convicted of having fraudulently taken and applied to his own use and benefit were respectively the amounts of ten cheques drawn by the appellant upon an account opened at the Ramsey branch, and styled in the books of the bank "Charles Banks Nelson Trust Account." The aggregate amount of these ten cheques was 15,034l. 7s. 8d.

In addition to the ten cheques referred to as above, there were put in evidence by the prosecution during the course of the trial twenty-nine other cheques, drawn by the appellant upon

the same account, amounting in their aggregate to 7287l. 10s. 11d.

There were payments made from time to time between the 18th April 1887 and the 23rd March 1888 to the credit of the account such payments amounting in their aggregate to 9555l. 2s. 11d.

The interest charged on the account calculated down to the 2nd Feb. 1900, when the bank ceased to carry on business, amounted to 8581l. 2s. 10d., which, being added to the sum of 22,321l. 18s. 7d., the amount of the cheques drawn out, made a total of 30,903l. 1s. 5d., and, after giving credit for the sum of 9555l. 2s. 11d. paid into the account, left a debit balance of 21,347l. 18s. 6d. on the account. For the first half-year after such account was opened interest and commission was charged upon the debit balance of the account at the rate of 6 per cent. and from that to Dec. 1893 at 5 per cent. calculated with half-yearly rests.

From Jan. 1894 to June 1899 simple interest only at 5 per cent. was charged upon the account.

There was no payment to the credit of the account after the 23rd March 1888 nor was there any drawing operation upon it after the 16th Dec. 1892 after which date it lay for all operative purposes a dormant account, the interest being added to it as has been said at half-yearly intervals until and including the 30th June 1899.

It was proved at the trial and admitted by the appellant in the course of his examination as a witness called on his own behalf that the account was opened to pay for losses in a speculation in the shares of a brewery company called Samuel Allsopp and Sons Limited, such speculation being carried out on the joint account of the appellant, Alexander Bruce, general manager, and John Shimmon manager of the bank, and it was admitted by the appellant in the course of his examination that the account was operated upon solely for and in relation to this speculative venture in which the bank had no interest of any kind. It was further admitted by the appellant in the course of his evidence that no security was at any time deposited with the bank in relation to this overdrawn account and it was proved by John Shimmon in the course of his examination when called as a witness on his own behalf that there was no entry in relation to this account in the minute book of the banking company where it would have been his duty to have entered it had the account ever been called to the attention of the board of directors.

According to the statement of the appellant made in the course of giving evidence for himself this speculation was undertaken at the suggestion of Alexander Bruce and the management of the whole matter was left to Alexander Bruce. He stated that he (the appellant) knew nothing about the details but that Alexander Bruce would tell him what moneys were wanted, whereupon he (the appellant) would sign the cheques which were debited to the account, and that the payments into the account were all made by Alexander Bruce.

The articles of association of Dumbell's Banking Company Limited which were put in evidence at the trial contain the following provisions with respect to advances to directors and officers of the company:

Art. 6 provides that

The company shall not make any advance or allow any credit to a director or officer of the company on

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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his own personal security except with the consent in writing of the board. This is declared to be a fundamental rule of the company.

Art. 89, sub-sect. 9, provides that

... No director shall vote upon any motion respecting the loan or advance of money or otherwise giving credit to himself, his partner, father, brother, son, or son-in-law, or respecting any such loan or advance, or giving credit on any security or discounting any bill, promissory note, or other security offered by himself or by his partner or by any such relation as aforesaid.

During the whole period covered by the account there were three directors other than the appellant who formed the board of the bank, and meetings of the board were regularly held and the appellant from time to time attended such meetings, but this so-called "Trust Account" was never brought to the knowledge of the board of directors or to that of any one of the directors other than the appellant himself individually.

Besides the overdraft on the account the appellant, between 1887 and 1900, had other large overdrafts upon other accounts upon which he was liable to the bank, all of which remained unsecured until August 1899, when he gave a charge upon his property to secure his overdrafts. The charge against the appellant and John Shimson was made under sect. 218 of a statute of the Isle of Man Legislature, which is as follows :

Whoever being a director, member, or public officer of any body corporate or public company shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to any of the punishments which the court may award as hereinbefore last mentioned.

The appellant was represented by counsel on his trial, and no submission was made at the close of the case for the Crown, that there was no case to go to the jury, or that the case should be withdrawn from the jury, and the main if not the only contention raised by the appellant's counsel in his address to the jury, was that there was no evidence, and certainly no sufficient evidence, of any fraudulent intention in the appellant's mind at the date of the different operations upon the account to bring the appellant within the section of the statute, and in support of this contention it was strongly urged that the appellant was solvent, or believed himself to be solvent, between 1887 and 1893.

His Honour Deemster Shee, in summing up the case to the jury, directed them that it was for them to say whether the moneys were taken out of the said account under such circumstances as to amount to a fraudulent taking, and left the question of intention to the jury to decide.

No objection was taken by the appellant's counsel to the summing up of the learned Deemster, either in the course of it or at its close, nor was he asked to add in any way to his direction.

The hearing of the evidence, the addresses of counsel, and the summing-up of Deemster Shee, K.C., were concluded at 4.50 p.m. on Saturday, the 17th Nov., when the jury retired to consider their verdict. After an absence of nearly six hours the jury returned at twenty minutes to 11 p.m., and the foreman informed the court that they were divided, and unable to come to a verdict;

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and that they seemed to have come to a deadlock. The foreman said: "If we put our difficulty before the court it might enable your Honour to give us your assistance," to which Deemster Shee replied that he would be glad to assist the jury, whereupon the foreman further stated, "We differ on what in this case constitutes fraud within the meaning of the law. Some of the jurors are of opinion the defendants were solvent at the time of incurring the liabilities, and therefore not guilty of fraud." Deemster Shee thereupon said, "Is that the only difficulty you have?" and the foreman replied, "I think so practically."

Whereupon the Deemster gave the following ruling :

Well, solvency alone would not be sufficient evidence they were not guilty. It might be a matter for you to consider, but, in my opinion, solvency alone would not be evidence they were not guilty of fraud. It is an element for you to consider where there was fraud. You have to consider the whole of the circumstances in the case; the date of the account; the fact that there were other overdrafts of the defendants; the size of the overdrafts; the way in which they were kept; and the account the prisoners have given of how they embarked in these transactions. All the circumstances in the case have to be taken into your consideration. To say simply because one of the defendants was solvent that therefore he could not be guilty of fraud would not be right. You must consider about the circumstances; and considering the importance of the case I should advise his Excellency to ask you to retire to consider your verdict again.

At 11.50 p.m. the jury were again sent for, and asked whether they had agreed upon a verdict, and upon the foreman stating that they had not, but that they seemed to be nearly arriving at a decision, Deemster Shee warned them that if they had not decided upon a verdict before midnight they might have to be locked up over Sunday. The jury again retired; and as they had not returned before 12.10 a.m. the court adjourned, and the jury were ordered to be locked up until the following Monday.

On Monday, the 19th Nov. 1900, the foreman announced the verdict of the jury: "Guilty on the Nelson trust account only," with a recommendation to mercy, and upon this verdict the court sentenced appellant to a term of five years' penal servitude. At the same time the appellant was sentenced to a term of three years' penal servitude upon conviction on another indictment, the said terms to run concurrently.

On the 14th Nov. the appellant had been convicted on another indictment, charging him with having been a party to the issue of false balance-sheets. He presented a petition for leave to appeal against both convictions, but their Lordships, on the 13th March 1901, gave leave to appeal against the conviction for fraudulent misappropriation only.

Lawson Walton, K.C. and Muir Mackenzie appeared for the appellant.

The Attorney-General for the Isle of Man (Ring, K.C.) and C. W. Mathews for the Crown.

At the conclusion of the arguments their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury) as follows:—This was a charge against the defendant of having fraudulently appropriated to his own use money of the Dumbells Banking Company. Their Lordships are of opinion that there was

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no sufficient legal evidence against the defendant of that offence, and under those circumstances their Lordships will recommend that this part of the conviction, the only one on which leave to appeal has been given, should be set aside. It is impossible not to notice that the mode in which the question has been propounded from time to time, both by counsel and, one regrets to say, also by the learned Deemster himself who presided, confuses what is the nature of the charge made, with the general charge of irregularity in the conduct of the proceedings of the bank. That is not the criminal charge which was preferred by the indictment, and ought to have been found by the jury. The charge was of fraudulently appropriating money of the bank. The facts sufficiently show that for a period of some years, beginning at all events as early as 1887, and going down to 1893, the person convicted was in the habit of drawing partly upon his own private account, and partly on an account which was called a trust account, but still in his name, and that from time to time that account was operated upon in the ordinary and natural way in which the account of a customer of a bank is treated. Money was paid in and money was paid out, at one time a very large overdraft, and at another time that overdraft reduced to an amount of something like 300*l.* or 400*l.*, down to the period of two or three years after the trust account had first begun. Then it is suggested that after a period of six years altogether has elapsed it is possible to pick out some of the earlier drafts that have been made under the circumstances, and treat a particular draft as having been itself an offence—that is to say, a misappropriation of the money of the bank to the use and purposes of the person who drew it. The real truth is that if what is suggested as the offence had been committed, every cheque was itself a theft. I use the phrase compendiously, because, although it is not stealing in the language of the statute, the elements of stealing must exist in it, and in order to determine whether this offence has been committed in the sense which the law requires in order to sustain the conviction, one must see whether it is true to say that every one of those cheques so drawn, and the money obtained by reason thereof, was a theft. Their Lordships are of opinion that there was no legal evidence of any such proposition. It may have been extremely irregular, and may have been wrong, and was wrong under the circumstances of this bank to allow the account to have been entered into at all. The board ought to have been consulted, and the board ought to have given its consent in writing that such an account should be entered into, or at all events that overdrafts should have been allowed on it; but that each of these transactions which is made the subject of indictment was practically a stealing of the money obtained by the cheque, there appears to be no evidence whatever, and their Lordships are unable to see that the question was ever properly before the jury at all. It was a natural and proper inquiry by the jury which they made of the learned Deemster, whether or not they ought to have some guidance as to what was a fraud within the meaning of the law, because, as they explained, they were anxious to learn. Some of them thought there could be no fraud at the time, because the person was solvent

who was drawing these cheques, to which inquiry no answer apparently was given by the learned Deemster in the language which the jury required, but he goes on to say that it is not conclusive that the defendant was not guilty because he was solvent—an entire inversion, their Lordships regret to observe, of what ought to have been told the jury at the time. Strictly, and as a matter of verbal accuracy, indeed it is not conclusive that the person was not guilty; but the question which the jurymen obviously desired to have answered was whether or not, given the circumstances of this case, the man being perfectly solvent at the time, and having ample assets to answer the cheque which he was drawing, they ought to infer from the nature of the transaction that it was a taking or misappropriation within the meaning of the statute. Upon that it is impossible to say the jury received any guidance whatever. In the result their Lordships are of opinion that there may have been ample evidence that the account was improperly obtained, and it may have been in one sense fraudulently obtained, but there is no evidence justifying the charge that this money was appropriated to the use of the person who drew the cheque in fraud of the right of the bank to have the money, and therefore that the offence contemplated by the statute was committed, or at all events there was no evidence of its being committed so as to justify the verdict of “guilty.” For these reasons their Lordships will humbly advise His Majesty that the conviction of the 19th Nov. 1900 should be set aside. There will be no order as to costs against the Crown.

Solicitors for the appellant, *Hores, Pattison, and Bathurst.*

Solicitors for the respondent, *Light and Galbraith.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 5 and 6.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Electric light—Supply—Discontinuance—Receiver—Agent—“Occupier”—Electric Lighting Act 1882 (45 & 46 Vict. c. 56), ss. 19, 20, 21—Electric Lighting Orders Confirmation (No. 2) Act 1889 (52 & 53 Vict. c. clxxviii.)—Schedule (London Electric Supply), clause 47.

The plaintiff was in possession of an hotel as receiver, under an order made by the court in a debenture-holders’ action against the company which had issued the debentures and formerly carried on the hotel.

A motion was made by the plaintiff in an action against the defendants, an electric lighting company, that the defendants might be restrained until the trial of the action or further order from taking any proceedings by cutting off or discontinuing the supply of electric current from

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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their mains to the hotel, to recover the amount due to them by the company in respect of electric current supplied by the defendants to the company prior to the 17th Jan. 1902.

On that date the court, in the debenture-holders' action, had appointed the plaintiff as the receiver of the undertaking and property of the company, and directed the company to deliver up possession of the property to him so far as was necessary for the purposes of such receivership.

On the same day the plaintiff took possession of the property, including the hotel.

On the 20th Jan. 1902 the defendants threatened to cut off the current unless the plaintiff paid about 400l. arrears due from the company to the defendants for current supplied to the hotel.

An interlocutory injunction was granted by Kekewich, J. upon the undertaking of the plaintiff to make such necessary application and enter into a new contract as required by clause 47 of the provisional order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act 1889. The defendants appealed on the ground that the plaintiff was not an "occupier" of the hotel within the meaning of the provisional order; and that consequently the defendants were not bound to supply him with electric current, or at any rate, not until he had entered into a new contract with the defendants.

Held, that assuming that the company's occupation of the hotel had come to an end and that there was a new occupation by the plaintiff, he was not entitled to any supply of electric current unless and until he had entered into a new contract with the defendants, pursuant to sect. 19 of the Electric Lighting Act 1882; that if, on the other hand, it were supposed that the old contract with the company remained in force, and the supply continued thereunder, the defendants were undoubtedly entitled to cut off the supply until the arrears due by the company had been paid; and that in either case, therefore, it was not right to grant an injunction.

Decision of Kekewich, J. reversed.

On the 17th Jan. 1902 Ernest Innis Husey was appointed by Eady, J. receiver in an action of *Re Mansions Proprietary Limited*; *Wood v. Mansions Proprietary Limited*, on behalf of the plaintiffs and other debenture-holders of the company, of the undertaking property and assets of the company comprised in and subject to the security and charge created by the debenture stock issued by the company to the trustees for the plaintiffs and the other debenture stockholders of the company, and of the property of the company comprised in and subject to the trusts of two indentures dated the 15th Feb. 1898 and the 31st Aug. 1900 respectively.

On the same day Ernest Innis Husey took possession of all the property of the Mansions Proprietary Limited, including therein one of the principal assets known as St. Ermin's Hotel.

By the order under which Ernest Innis Husey was appointed receiver the Mansions Proprietary Limited were ordered to deliver over to him as such receiver all books, leases, deeds, papers, and documents relating to the property comprised in the trust deeds, and all the stock-in-trade and effects in the possession of the company of the business carried on by them, and the licences

relating thereto, and also possession of the premises so far as was necessary for the purpose of such receivership.

St. Ermin's Hotel was a first-class hotel, and at the date of the order was occupied by over 200 guests.

Shortly after the making of the order—viz., on the 20th Jan. 1902—the London Electric Lighting Corporation Limited, through their secretary, informed the representative of Ernest Innis Husey that unless he agreed to pay the sum of 437l. 2s., being the amount for electric energy supplied to the Mansions Proprietary Limited prior to his appointment as receiver, they would cut off the electric light, and the secretary handed to the representative a form of agreement to be signed by Ernest Innis Husey, failing which the secretary threatened to exercise what he alleged were the rights of the corporation to cut off the electric supply.

The form of agreement was as follows:

To The London Electric Lighting Corporation Limited.—*Re The Mansions Proprietary Limited*, St. Ermin's Mansions, Westminster.—I, Ernest Innis Husey, the receiver appointed by the Court of Chancery in the above matter, hereby personally undertake and promise that your account for electric energy supplied to the above, which is at present outstanding and amounts to 437l. 2s., shall be paid within twenty-eight days from the date hereof, and that accounts for supply of electric energy subsequent to the 18th inst. shall be paid weekly during the tenure of my receivership.—Dated this 9th day of January 1902.

Ernest Innis Husey contended that if this threat were put into effect it would absolutely ruin the whole of the business of the hotel; and that one of the principal assets of the Mansions Proprietary Limited would be lost.

When he took possession of the assets of the Mansions Proprietary Limited there was very little cash, and he was not in a position at the present time to pay the amount due for electric energy supplied prior to his appointment as receiver, even if he was liable for the same. He had informed the corporation that he was willing to become personally liable for electric energy supplied since his appointment, but they would not accept his undertaking in this respect unless the sum of 437l. 2s. was also paid.

Ernest Innis Husey accordingly commenced this action against the corporation, and then moved for an order that the defendants might be restrained until the trial of the action or further order from taking any proceedings by cutting off or discontinuing the supply of electric current from their mains to St. Ermin's Hotel to recover the amount due to them by the Mansions Proprietary Limited in respect of electric current supplied by them to the company prior to the 17th Jan. 1902.

The Electric Lighting Act 1882 provides as follows:

Sect. 19. Where a supply of electricity is provided in any part of an area for private purposes, then, except in so far as is otherwise provided by the terms of the licence, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply.

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Sect. 20. The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the licence, order, or special Act authorising them to supply electricity.

Sect. 21. If any local authority, company, or person neglect to pay any charge for electricity, or any other sum due from them to the undertakers in respect of the supply of electricity to such local authority, company, or person, the undertakers may cut off such supply, and for that purpose may cut or disconnect any electric line or other work through which electricity may be supplied, and may, until such charge or other sum, together with any expenses incurred by the undertakers in cutting off such supply of electricity as aforesaid, are fully paid, but no longer, discontinue the supply of electricity to such local authority, company, or person.

By the Electric Lighting Order Confirmation (No. 2) Act 1889, a provisional order granted by the Board of Trade to the defendant corporation in that year was confirmed.

Clause 47 of that order provided that the undertakers (that is, the defendant corporation) should

Upon being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the undertakers . . . give and continue to give a supply of energy for such premises in accordance with the provisions of this order . . . subject to the conditions following (*inter alia*): Every owner or occupier of premises requiring a supply of energy shall "serve a notice upon the undertakers specifying the premises in respect of which such supply is required," the maximum power required and the day on which the supply is required to commence; and "enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least two years of such an amount that the payment to be made for the same, at the rate of charge for the time being charged by the undertakers for a supply of energy to ordinary consumers within the area of supply shall not be less than 20 per cent. per annum on the outlay incurred by the undertakers in providing any electric lines required under this section to be provided by them for the purpose of such supply" and give to the undertakers (if required by them) security for payment. If, after notice by the undertakers, security is not given by the owner or occupier within seven days, or if the security given becomes invalid or insufficient, "the undertakers may, if they think fit, discontinue to supply energy for such premises so long as such failure continues."

On the 24th Jan. 1902 the motion came on to be heard before Kekewich, J., when the following judgment was delivered:—

KEKEWICH, J.—In this case the defendant corporation are anxious to obtain payment of a considerable sum of money owing by an insolvent company, and which probably, unless they make some bargain with Mr. Husey, they will not get paid. That is reasonable enough, and I understand their position. But it seems to me that they were most unhappy in the method they adopted in order to get that payment. Possibly they might have made terms with Mr. Husey; in fact I think that it is not only possible, but that it is highly probable that there would not be much difficulty about that. But instead of doing that, they have taken the line that unless he will pay—I do not think they contend that there is an agreement to pay—or at any rate unless he will secure the payment of these arrears, he (Mr.

Husey) shall have no electric light. That seems to me to be entirely wrong. I do not think that it is a question of "cutting-off." I will come to the Electric Lighting Act 1882 in reference to that in a moment; but I do not think that the question depends upon that statute. I think that it depends upon the liability of the supply company under the provisional order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act 1889. Under that they are bound to supply on certain terms every "owner," or "occupier." That they have ignored. They say that Mr. Husey is not "owner" nor "occupier." Well, he is not an owner, so that we need not discuss that. But is not he an "occupier"? The court in a debenture-holders' action—that is to say, in an action instituted by persons who have a charge on these premises—has appointed not only Mr. Husey receiver (it is perfectly immaterial whether he is receiver or what else he is called) but has ordered the company to deliver up possession to him. And the company in obedience to that order have delivered up possession to him. I am not considering what is the meaning of the word with reference to any particular Act of Parliament, but what it means in plain language. Then, is not Mr. Husey an "occupier"? I do not see how he can be anything else. He is not there as the agent of the company, who have given up possession; far from it. They are gone; they were bound to go in order to get out of the way. Whether he is the officer of the court, or in whatever character he is there, is immaterial. He certainly does not come in to hold the property for the company, but against the company. He occupies the premises, and being there is "occupier." He does not continue the occupation of the company, and it seems to me that he would be clearly entitled under clause 47 of the provisional order—under certain terms—to have a supply of electric energy. But the defendant corporation, instead of saying, "You must comply with these terms, and we have certain forms which you must fill up, and so forth," say, "Unless you pay, we will cut off the supply of electric energy." I do not think that they were entitled to do that under sect. 21 of the Act of 1882. As at present advised, I think that they have no right to cut off. But that is not the real question, and I do not think that the defendant corporation have raised the real question. It would be monstrous for them to come into court and to say, when they did not put the real question forward, that until Mr. Husey has filled up these forms and entered into a proper contract, they will cut off the supply altogether. That is what they want to do. They say he is not entitled to have a supply, and upon that I hold against them. Then they say that if he is entitled to a supply he is not entitled to a supply until he has complied with certain conditions which they have never insisted upon although he has been in possession several days; and that in the meantime he shall not have a supply because they want to put the screw on. That seems to me to be extremely unfair. I think that the defendant corporation have taken a wrong view of the case. Mr. Husey, either upon his own responsibility, or with the sanction of the court in the debenture-holders' action (with which I have nothing to do) must serve the proper notice, enter into a contract, and put himself into a position under the 47th clause of the

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provisional order to have a proper supply; and he must undertake to do that, of course. But until a reasonable time has been allowed for that purpose the supply must continue, and I will not have the supply cut off in the meantime. Therefore I think that I can suspend the order, but I must make the right order. I cannot, because it is inconvenient to the defendant corporation, and they do not like the conclusion, make what I consider to be a wrong order. I do not think that I ought now to restrain them from cutting off in the way which has been mentioned before they are supplying, and Mr. Husey is entitled to be supplied. I am restraining them now—I do not say that I may not have other very good reasons—because they have never told Mr. Husey up to this time how he might put himself right, and they have insisted upon terms which I think were wrong. Of course, there may be other good grounds, and there may be bad grounds, and there may be a different form of order. But if the defendant corporation are going to the Court of Appeal—as I am very glad they should—I wish them to take to the Court of Appeal what I think is the right order, and not the wrong order. The right order I think is what I have said. I will suspend that order so that it shall not be acted upon for a reasonable time. What I say is that on the plaintiff—I do not call him the receiver—undertaking to apply according to the 47th clause of the provisional order and to enter into a written contract according to that order within a reasonable time I will restrain the defendant corporation from cutting off the supply of electric energy; and then, as the defendants desire an opportunity of appealing, I will let that application and the written contract be postponed until after the hearing of the appeal. I think that Mr. Husey would have to make an application and enter into a new contract. What the exact terms would be is another thing.

The order as drawn up was as follows:

"The plaintiff, Ernest Innis Husey, by his counsel undertaking to make such necessary application and enter into a new contract as required by clause 47 of the provisional order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act 1889; and the plaintiff by his counsel undertaking to abide by any order this court may hereafter think fit to make as to damages in case the court shall be of opinion that the defendants shall have sustained any by reason of this order, which the plaintiff ought to pay; this court doth order that the defendants, the London Electric Supply Corporation Limited, be restrained, until such undertaking to make such application aforesaid be complied with, from cutting off or discontinuing the supply of electric current from their mains to the premises known as St. Ermin's Hotel."

From that decision the defendant corporation gave notice of appeal.

The plaintiff gave cross notice of his intention to contend that the decision of the learned judge, that the plaintiff must give the undertaking contained in the order as a condition for the granting of the injunction therein mentioned, ought to be reversed; and that an injunction ought to be granted in the terms of the order unconditionally till the hearing of the action or further order.

The appeal now came on to be heard.

P. Ogden Lawrence, K.C. and Austen-Cartmell for the appellants.—The defendants' power to discontinue the supply of electric current is disputed as against the plaintiff, the receiver, although not as against the company. But the plaintiff is in one of two positions. Either he is an incoming tenant, and he is therefore a new occupier of the hotel, or else he is continuing the occupation of the company, there having been no change of possession. If the latter is the true position, and there has been no change of occupation, the old contract between the defendants and the company remains in force, and the supply of electric current continues thereunder. Consequently the plaintiff is not entitled to have a supply unless he pays up the arrears owing to the defendants by the company:

Paterson v. Gas Light and Coke Company, 74 L. T. Rep. 280, 640; (1896) 2 Ch. 476.

If, on the other hand, the order for delivery of possession creates a change of occupation, the plaintiff has become a new occupier for the purpose of the Rating Acts, and the old contract has been determined. Upon this point, see

Re Marriage, Neave, and Co. Limited; North of England Trustees Debenure and Assets Corporation Limited v. Marriage, Neave, and Co. Limited, 75 L. T. Rep. 169; (1896) 2 Ch. 663.

As a new occupier the plaintiff must comply with the statutory provisions and make a proper demand if he requires a supply of electric current. Under sect. 19 of the Electric Lighting Act 1882 and clause 47 of the Provisional Order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act 1889, an electric lighting company are only obliged to supply electric current to persons within their area of supply on application by such persons. In the present case there has been no application made to the defendants; and as there are arrears unpaid the defendants are entitled to discontinue the supply of electric current under sect. 21 of the Act of 1882:

Metropolitan Electric Supply Company v. Ginder, 84 L. T. Rep. 818; (1901) 2 Ch. 792.

Warrington, K.C. and C. T. Mitchell for the respondent.—The injunction was properly granted by Kekewich, J., but the plaintiff ought not to have been required to give an undertaking to make an application to the defendants for a supply of electric current and to enter into a new contract relating thereto as a condition of the granting of the injunction. According to the provisions of sect. 19 of the Act of 1882, the plaintiff is a person within the area of supply of electricity for private purposes who, on application, is "entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply." The plaintiff is so entitled whether or not he is a new occupier. The section says nothing as to the person being an owner or occupier. On application for a supply of electricity, the person applying undertakes to pay on the same terms as other applicants. The plaintiff having expressed his willingness so to do, the defendants are bound to give him a supply. Under sect. 21 of the same Act an electric lighting company has power to cut off the supply of electricity if there is neglect to pay any charge for electricity, and the defaulter is the same person as the person who has contracted to take

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the supply. But there is no power to refuse a supply to a person because his predecessor has made default. In that respect the Electric Lighting Act 1882 differs from the Gas Acts which were the Acts upon which the cases of *Paterson v. Gas Light and Coke Company* (*ubi sup.*) and *Re Marriage, Neave, and Co. Limited* (*ubi sup.*) turned. The fact that the defendants have refused to give the plaintiff a supply of electricity unless he pays up the arrears exempts him from making a formal application for a supply pursuant to the statute, as he knows that it would be useless. He has expressed his wish for a supply and has offered to pay for it and that, under the circumstances, is a sufficient compliance with sect. 19 of the Act of 1882. Clause 47 of the provisional order scheduled to the Act of 1889 only applies in the case of a first supply. It does not apply where there has already been a supply to the premises in question. In the cases of *Paterson v. Gas Light and Coke Company* (*ubi sup.*) and *Re Marriage, Neave, and Co. Limited* (*ubi sup.*) there was no change of possession. In the present case there has been a change of possession, an order having been made for delivery of possession to the plaintiff. As regards the authorities, the case of *Re Smith; Ex parte Mason* (67 L. T. Rep. 596; (1893) 1 Q. B. 323) arose under the Gas Act 1871, and there it was held that a debtor's occupation of premises was not determined by a receiving order which had been made against him, and that the trustee was not, therefore, the occupier within the meaning of sect. 11 of that Act. The case of *Re Flack; Ex parte the Trustees v. East London Waterworks Company* (82 L. T. Rep. 503; (1900) 2 Q. B. 32) arose under the Metropolis Water Act 1871, and there it was held that a trustee in bankruptcy in occupation of a debtor's premises was the "next tenant" within the meaning of sect. 48 of that Act; and that the water company was bound to supply him with water without requiring payment of the arrears of water rate due from the debtor. In the case of *Richards v. Overseers of the Poor of the Parish of Kidderminster* (74 L. T. Rep. 483; (1896) 2 Ch. 212) it was held that the appointment of a receiver by the trustee of a covering deed securing debentures on the goods of a company created a change in the occupation of the goods; and that the same were not distrainable for payment either of a poor rate assessed against the company or of a general district rate assessed against the company, which rates the company had left unpaid.

Austen-Cartmell replied.

WILLIAMS, L.J.—This is an appeal against an order of Kekewich, J. granting an injunction. The injunction was granted subject to certain undertakings which were to be given by the plaintiff, and it runs thus: [His Lordship read the terms of the injunction, and continued:] Now, the question in this case is whether Kekewich, J. was right in granting that injunction. The facts of the case, put very shortly, are these: A company which is called the Mansions Proprietary Limited had entered into a contract with the London Electric Supply Corporation for the supply of electricity to an hotel. The company had issued debentures, and the debenture-holders had obtained an order for the appointment of a receiver and a manager. The

receiver was Mr. Husey, and Mr. Husey, having gone into possession of the hotel, desired to have a continuance of the supply of electricity. At the moment when he went into possession in this way there was due from the company to the London Electric Supply Corporation a sum exceeding 400*l.* for electric energy supplied. Mr. Husey did not at that time suggest that he was prepared or was ready to enter into any fresh contract himself, and never said anything upon the basis or hypothesis that the contract with the Mansions Proprietary Limited had come to an end. But he did intimate his desire for the electric light to be continued to be supplied after he had been appointed receiver. The London Electric Supply Corporation were not willing to supply the electricity under the old contract unless some provision was made for the discharge of the debt which was due for the previous supply. The secretary of the London Electric Supply Corporation submitted to the receiver, Mr. Husey, a draft which he invited the receiver to sign if he wished the supply of electric light to be continued. It ran thus: [His Lordship read it, and continued:] The receiver was not willing to sign that, and the London Electric Supply Corporation proposed under those circumstances to cut off the supply of electricity. In the result the receiver issued a writ in which he claimed to have the London Electric Supply Corporation restrained from cutting off the electricity. I am not now going to read the indorsement on the writ. I only wish to say with regard to it that it is perfectly obvious, if you look at that indorsement, that the claim was made upon the basis that the contract between the London Electric Supply Corporation and the company was still a subsisting contract. But when the case came before Kekewich, J. the receiver took up an alternative sort of position; namely, that the occupation by the company had come to an end, and that there was a new occupation by him. Now, I shall assume at first, at all events, that that latter contention of his was right, and I think that that is the contention which puts the receiver in the best position. I assume that there was a new occupation by him—that the occupation by the company had come to an end, and that he was a new occupier. If that is so, in my judgment the receiver was not entitled to any supply of electric lighting unless and until he made a new contract with the London Electric Supply Corporation. Of course, on the other hand, if one is to suppose that the old contract with the company continued, and that the supply was to continue under that old contract, there can be no doubt about it that the London Electric Supply Corporation were entitled to cut off the electricity because of the default that had been made and not discharged under the contract between the London Electric Supply Corporation and the company for the past supply of electric energy. Now, under those circumstances, it seems to me that in whichever way you put it it was not right to grant this injunction restraining the London Electric Supply Corporation from cutting off the electricity. I think that whether one looks at it on the assumption that the old contract continued, or whether one looks at it on the assumption that there was a change of occupation, in neither case ought the London Electric Supply Corporation to have been

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restrained. We have had a very long argument here to-day as to whether or not the 47th section of the provisional order scheduled to the Electric Lighting Order Confirmation (No. 2) Act 1889 applies to anything else than the first contract for the supply of electric energy. It is said that certain clauses, especially the clauses containing the first and second conditions for the contract, do not apply to any case but a case where there is for the first time a supply of electric energy. And it is said that those clauses have no application to a case in which there is an existing supply of electric energy and the connections which have been made by the electric lighting company under a previous contract. I do not propose to decide how that may be. I think that there are a great many cogent reasons which might be urged to show that that 47th section is a section of general application. I cannot shut my eyes to the fact that there are some arguments which were most forcibly urged by Mr. Warrington to the contrary, but I do not think that one need decide that question at all. According to my view, whether the 47th section applies to electricity supplied other than the first supply, it is quite plain that under the Electric Lighting Act 1882 no one is entitled to demand a supply of electric energy unless and until he has made a contract with the undertakers who have the authority to supply the electric energy. According to my view the basis of the general Act of 1882 is that persons requiring a supply shall be entitled to contract for the same, provided that the undertakers shall not charge a price exceeding the limits imposed by the license, order, or special Act authorising the undertakers to supply electricity, and provided also that the undertakers show no preference. That is really provided for by the 19th section, the effect of which is that every person shall be entitled to a supply of electric energy on the same terms on which any other person under similar circumstances is entitled to a corresponding supply. But that is only a provision which assumes that there is already a contract fixing the terms of supply as between the corporation and some other persons who are supplied. Then the Act of Parliament says in effect that any other person who wishes for a supply under similar circumstances is to have a right to insist upon having a similar contract. But all that assumes that there will be a contract; and sect. 20 (which is the section which provides for the limit in prices) also is a section drawn upon the basis that there is to be a contract. Sect. 20 enacts that [His Lordship read that section, and continued:] The outcome of all this, in my judgment, is shortly as follows: The receiver here is not entitled to any supply of electricity unless and until he has made a contract for that supply. He has not made that contract, and so long as he has not made that contract he is not entitled to have the London Electric Supply Corporation restrained from cutting off the electricity. As I have already said, if the receiver is not the occupier—if there has been no change of occupation and the company are still in occupation—then *a fortiori* the London Electric Supply Corporation ought not to be restrained. I only wish to add one word upon a point that has been urged upon us in respect of the purpose which it is said the London Electric Supply Cor-

poration have here in insisting upon cutting off the electricity unless and until a contract is made. It is said that their real object is not to get a contract, but to compel the receiver for the debenture-holders to pay this 400*l.*, the old account for electricity supplied, which the debenture-holders are not really liable to pay. I do not know whether that is the object entirely, or whether it is not; but I will assume that it is part of the object. Even supposing, however, that the London Electric Supply Corporation have a right to say "We will cut off the supply of electric energy until a new contract is made," and the truth is that the debenture-holders would sooner pay the old account than keep the hotel or mansions in darkness for a few days, so much the better for the London Electric Supply Corporation. They have a perfect right to exercise any powers that they possess, and not the less a right to enforce their powers, because by so doing they will be likely to get a collateral advantage. I cannot say at the present moment whether the company would prefer to remain in darkness for a week, or with only candles or something of that sort. But it seems to me that the question of what the ultimate purpose of the London Electric Supply Corporation may be has really nothing to do with the abstract question of law that we have to decide here. It has been said that one can have no sympathy with the London Electric Supply Corporation, who are putting the screw on in this way. I do not say that that is not so; but it is not necessary to have sympathy for a corporation, because a corporation never has sympathy for anyone else.

STIRLING, L.J.—I am of the same opinion. This action is based upon the infringement of a legal right. The injunction which has been granted is not sought on any equitable ground, but simply because it is contended by the plaintiff that the defendants threaten and intend to violate a legal right of the plaintiff—viz., as to the continuous supply of electric light to the St. Ermin's Hotel. In order, therefore, to obtain an injunction he must show a legal right to that supply. Now, the position of the plaintiff is this: He is a receiver appointed in the debenture-holders' action of their property called the St. Ermin's Hotel, which was formerly in the possession of a limited company. By the order appointing this gentleman receiver the company was ordered to deliver up possession to him. The company had entered into a binding agreement with the defendants, the London Electric Supply Corporation, for the supply of electricity to that company, and that contract was not put an end to by the appointment of a receiver. The debenture-holders have a charge upon all the property of the company. This contract formed part of that property, and I apprehend that the receiver, by taking proper steps in the name of the company, might enforce the provisions of that contract and obtain a supply through the company. But there is a very good reason why he should not adopt that course; because the agreement, which is in the first place made for the period of one year from the 1st Jan. 1897, provides as follows: "This agreement shall continue in force for the period mentioned above and thereafter until it shall be terminated by either party giving to the other three months' notice in

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writing, expiring on any of the usual quarter days, but the company—i.e., the Electric Supply Corporation—"shall be at liberty to discontinue the supply of energy if and so long as the consumer shall make default in making payment in accordance with the agreement hereinbefore contained." Now, the limited company, who were the owners of the hotel, have made a serious default, and a large sum is due in respect of the electric supply from them. The stipulations in this contract, if the receiver adopts it, would be binding as against him, but he objects to pay the arrears. Therefore naturally he will have nothing to do with this contract. It is not for me to say—and I do not express an opinion one way or the other—whether he can be compelled to adopt that contract, or can only get a supply by entering into another and fresh agreement. But if he does not choose to avail himself of that contract the only other way in which he can get a supply is by virtue of his being occupier of the hotel. Now, his title to that arises either under the Electric Lighting Order Confirmation Act of 1889, or under the general provisions of the Electric Lighting Act of 1882. The learned counsel for the plaintiff rather relied, I think, upon the provisions of sect. 47 of the provisional order scheduled to the Electric Lighting Order Confirmation Act of 1889. That begins by imposing an obligation on the electric lighting company, which I will read. [His Lordship read it, and continued:] Therefore, that imposes the duty of giving and continuing to give a supply of energy when required so to do by the owner or occupier of any premises, but such supply is to be given and continued in accordance with the provisions of the order. Now, that extends, I suppose, to every owner and occupier within the defined limits. The subsequent portion of the section imposes obligations upon the owner and occupier. The second part of it begins "Every owner or occupier of premises requiring a supply of energy shall" do certain things. The language, as far as I have read it, is as extensive as that which is used with reference to owners and occupiers in the preceding portion of the order, and it seems to me that *prima facie* the meaning must be taken to be that every owner or occupier who desires to avail himself of the provisions of the earlier part of the order and to seek a supply from the undertakers is on his part to comply with the directions which are given in the subsequent portions of the order. These require him to serve a notice upon the undertakers specifying the premises in respect of which such supply is required, and the maximum power required, and so forth, and to enter into a written contract. Now, I quite agree that, notwithstanding the wide language which is used, it may be that the terms of the section and the nature of the obligations imposed show that it is not to receive a narrower interpretation. And it is said that in part at least the language as to some of the obligations which are there imposed does show that it did not apply to owners or occupiers who were not requiring a supply for the first time, or at all events to occupiers who became such at the time when there was an existing supply to the premises. I do not think that it is necessary for me on this occasion to do more than say that I am not satisfied that that limitation exists. And, notwithstanding the

points which were very forcibly put both by Mr. Warrington and Mr. Mitchell, I remain, as at present advised, of opinion that every owner or occupier must fulfil the conditions imposed by sect. 47 of this order. But if I am wrong in that, then I agree entirely with what Williams, L.J. has said as to the effect of sect. 19 of the Act of 1882. And *quicumque viâ datâ* I am of opinion that the occupier is not entitled as of right to a supply of electric light until he enters into a contract with the corporation. The plaintiff does not profess to have entered into any such contract, and therefore it seems to me that there is no ground for the injunction. I will only add this, that if, as I think, the defendants had the right which they insist upon, of cutting off the electric light, the court has no jurisdiction to interfere with them simply because they may not do it for the motive which is suggested. It has been held by the House of Lords in a well-known case—*Corporation of Bradford v. Pickles* (73 L. T. Rep. 353; (1895) A. C. 587)—that even the existence of malice does not prevent a person exercising his legal right or found a right for an injunction against such person. Here the facts fall very short of that; and it seems to me therefore that there is no foundation for the granting of the injunction which has been granted by Kekewich, J.

COZENS-HARDY, L.J.—I am entirely of the same opinion. The injunction which has been granted can only be justified on the ground of a breach or threatened breach of some contract between the plaintiff and the defendants; or on the ground of a breach of some statutory duty imposed upon the defendants in favour of the plaintiff. Now, there is one contract in existence which has been called the old contract—that is, the contract between the London Electric Supply Corporation and the limited company. That is a contract upon which the plaintiff here does not rely, for the best possible reason, that, under the expressed terms of that contract the London Electric Supply Corporation has the right to cut off the supply on the ground of non-payment of the arrears due. No new contract is even alleged by the plaintiff, but it is suggested—at least this is how I understand that it is put—that there is a breach of some statutory duty which entitles the plaintiff to relief by way of injunction. Now, I assume, without in any way deciding the point, that the plaintiff in this case, the receiver in the debenture-holders' action, is, by virtue of the form of the order appointing him, to be deemed an "occupier" of these premises. If he is not an occupier, then it seems to me to be plain that there is no statutory duty towards him. But if he is an occupier, and treating him on that footing, I cannot find anything in the statutes which entitles a person, from the mere fact of being in occupation of premises which have been supplied with the electric light, to say to the defendants, "You must continue this supply although there is no contract between you and me; and, in fact, you are bound to continue it for at least seven days without any security—without any right whatever on my part." Now, I prefer to base my view rather, as Williams, L.J. has done, upon the Act of 1882, s. 19. I think sect. 19 contemplates an arrangement or a contract between the occupier and the corporation, and that the words

"entitled to a supply" mean entitled to a supply under and by virtue of a contract made between the occupier and the corporation. The terms of supply may vary. There is a maximum, and there is a clause in the Act which prevents undue preference. But within those limits it is left to the electric lighting corporation to make such bargains as they may think fit with individual customers who apply to them for a supply of electric light. This seems to me really to have been the view taken by Buckley, J. in *Metropolitan Electric Supply Company Limited v. Ginder* (84 L. T. Rep. 818; (1901) 2 Ch. 799), which has been referred to, from which I will only read one passage (at p. 810 of (1901) 2 Ch.) He says: "Under sect. 19, every person within such area as this is entitled to a supply on the same terms on which any other person in the area 'is entitled under similar circumstances to a corresponding supply.'" Now that expression "person entitled" means, I think, entitled by arrangements made between him and the company. No such arrangements have been made here; no such contract is alleged now to exist between the plaintiff and the defendants. I think that for these reasons the injunction granted by Kekewich, J. ought to be discharged, with, I suppose, the usual consequences, unless of course, the parties desire to make an end of the action.

Appeal allowed.

Solicitors for the appellants, *Deacon, Gibson, Medcalf, and Marriott.*

Solicitor for the respondent, *S. J. R. Stammers.*

Jan. 24 and 31.

(Before COLLINS, M.R., ROMER, and MATHEW, L.JJ.)

SAUNDERS v. WHITE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of sale—Validity—Form in schedule to Act—Bill given by two separate grantors—Bills of Sale Act 1878 Amendment Act 1882 (45 & 46 Vict. c. 43), s. 9, schedule.

By a bill of sale given by way of security for the payment of money a husband and wife, and each of them, assigned certain household goods which were described in the schedule to the bill. None of the goods described in the schedule belonged to the two grantors jointly, but some belonged to the husband and the rest to the wife. No distinction was made in the schedule as to which of the goods belonged to the husband and which to the wife.

Held (affirming the decision of the King's Bench Division (83 L. T. Rep. 712; (1901) 1 K. B. 70), that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act 1878 Amendment Act 1882, and was therefore void.

THIS was an appeal by the claimant in an interpleader issue against a decision of the King's Bench Division (Lord Alverstone, C.J. and Kennedy, J.) affirming a decision of the judge of the Wandsworth County Court.

The plaintiff in the action had recovered judgment against the defendant J. W. White, and

certain goods in the possession of the judgment debtor had been seized in execution.

These goods were claimed by Biggs as grantee of a bill of sale over them, and an interpleader issue was accordingly directed to be tried.

The bill of sale was in the following terms:

This indenture made the 3rd day of May 1900 between Joseph William White, of West End House, Hayes, in the county of Middlesex, builder, and Emily White, of the same place, his wife, of the one part, and Samuel Thomas Biggs, of 24, Lincoln's-inn-fields, in the said county, solicitor, of the other part, witnesseth that in consideration of the sum of 80*l.* now paid to the said Joseph William White and Emily White by the said Samuel Thomas Biggs, the receipt of which the said Joseph William White and Emily White do, and each of them doth, hereby acknowledge, they the said Joseph William White and Emily White, and each of them, do hereby assign all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of 80*l.* and interest thereon at the rate of 15 per cent. per annum, and the said Joseph William White and Emily White do, and each of them doth, further agree and declare that they will duly pay to the said Samuel Thomas Biggs the principal sum aforesaid together with the interest thereon due by four equal monthly payments of 20*l.* each on the 7th day of June, the 7th day of July, the 7th day of August, and the 7th day of September next, and the said Joseph William White and Emily White do, and each of them doth, also agree with the said Samuel Thomas Biggs that they and each of them will during the continuance of this security insure and keep the said chattels insured against loss or damage by fire in the sum of 200*l.* at the least in the joint names of the said Joseph William White, Emily White, and Samuel Thomas Biggs, and will produce on demand the policy of such insurance and the receipt for the current year's premium payable in respect thereof, and will punctually pay all rent, rates, taxes, assessments, and outgoings payable in respect of the premises on which the said chattels and things or any of them may at any time be and produce to the said Samuel Thomas Biggs, his executors, administrators, or assigns, upon demand in writing, the last receipt or receipts for such rent, rates, taxes, assessments, and outgoings. And it is further agreed that it shall be lawful for the said Samuel Thomas Biggs, his executors, administrators, or assigns, at all reasonable times during the continuance of this security to enter into and upon the premises where the said chattels and things may at any time be to view the state of the said chattels and things and to take inventories thereof. Provided always that the said chattels and things hereby assigned shall not be liable to seizure or to be taken possession of by the said Samuel Thomas Biggs for any cause other than those specified in sect. 7 of the Bills of Sale Act 1878 Amendment Act 1882. In witness, &c.

The goods, which were duly described in the schedule, were the household furniture and effects in the house occupied by the two grantors of the bill. Some of them belonged to the husband and the rest to the wife. None of them belonged to the husband and wife jointly. There was nothing in the schedule to distinguish which of the goods therein described belonged to the husband and which belonged to the wife. There was no evidence of any agreement between the two grantors altering the property as between themselves.

The County Court judge held that the bill was void upon three grounds: (1) Because it was not in accordance with the form in the schedule to the Bills of Sale Act 1882; (2) because the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.
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grantors were not the true owners within the same Act; and (3) because the consideration was not truly stated.

The claimant's appeal to the King's Bench Division was dismissed by Lord Alverstone, C.J. and Kennedy, J.

The claimant appealed.

Jan. 18 and 20.—*Mattinson, K.C. and Firminger* for the claimant.—The bill is in accordance with the form in the schedule to the Act of 1882. The fact of there being two grantors does not make the bill contravene the form in the schedule to the Act. It can never have been intended that partners should not be able to grant a bill of sale as security for the payment of money. It is true that the grantors here are not joint owners of the goods, but if the bill is in accordance with the statutory form it is good; parol evidence is not admissible to show that it is bad under sect. 9 of the Act:

Ex parte Popplewell; *Re Storey*, 47 L. T. Rep. 274; 21 Ch. Div. 73;

Melville v. Stringer, 50 L. T. Rep. 774; 13 Q. B. Div. 392;

Re Tamplin; *Ex parte Barnett*, 62 L. T. Rep. 264;

Heseltine v. Simmons, 67 L. T. Rep. 611; (1892) 2 Q. B. 547.

Duke, K.C. and J. R. Atkin for the execution creditor.—The two grantors are not joint owners of the goods as partners would be. The bill is therefore in substance and in reality two bills given in one document. That is not allowable under the Act of 1882. If this bill is good any number of people might join together and so borrow small sums on their goods and chattels, making together a sum of 30l., so as to be within the Act. The objects of the Act would be thereby defeated. They referred to the following cases:

Ex parte Stanford; *Re Barber*, 54 L. T. Rep. 894; 17 Q. B. Div. 259;

Thomas v. Kelly, 60 L. T. Rep. 114; 13 App. Cas. 506.

They also contended that the bill was void, except as against the grantors, under sect. 5 of the Act of 1882, because the grantors were not the "true owners" within the meaning of the section of the goods described in the schedule, because there was nothing to distinguish between which of the goods belonged to the husband and which to the wife.

Mattinson, K.C. replied.

Cur. adv. vult.

Jan. 31.—*COLLINS, M.R.* read the following judgment:—The question on this appeal is as to the validity of a bill of sale. The Divisional Court, affirming the decision of the County Court judge, have held that it was bad under the Bills of Sale Act of 1882. The question arose upon an interpleader issued between the grantee under the bill of sale and an execution creditor of one of the grantors. The bill of sale purports to be made between Joseph William White and Emily White, his wife, of the one part, and Samuel Thomas Biggs, of the other part, whereby it is witnessed that in consideration of the sum of 80l. then paid to Joseph William White and Emily White by the said Samuel Thomas Biggs, the receipt of which Joseph William White and Emily White do, and each of them doth, hereby acknowledge, they, the said Joseph William White and Emily

White, do, and each of them doth, hereby assign to Samuel Thomas Biggs, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for payment of 80l. and interest thereon at the rate of 15 per cent. per annum; and the said Joseph William White and Emily White do, and each of them doth, further agree and declare that they will duly pay to the said Samuel Thomas Biggs the principal sum aforesaid, together with the interest then due, by four equal monthly payments of 20l. each on days therein named, and do, and each of them doth, agree with Samuel Thomas Biggs to insure and produce the policy and receipts. Then follow covenants as to which no question arises. Then follows the schedule, in which a number of articles of furniture are specifically described. The facts, as found by the County Court judge, are that none of the chattels named were jointly owned by the two grantors, but some of them belonged to the husband and some to the wife. There was no evidence of any agreement between the grantors altering the property as between themselves. Indeed, the bill was originally prepared by the grantee on the footing that the loan was made to the husband and that the goods belonged to him solely, and it was not until he went to prepare the schedule that he ascertained that some only belonged to the husband and the rest to the wife. He then altered the bill to its present form. The schedule, though it named the goods, did not distinguish which of them belonged to the husband and which of them to the wife; the result is that this bill of sale operates, if at all, as two separate grants of separate portions of furniture, which are not distinguished as belonging to either of the grantors. The court below have held that such an arrangement cannot be brought into the form prescribed by the Act of 1882, and is, therefore, void under sect. 9. They also held that it was bad under sect. 5 by reason of the fact that the husband was not the true owner of the wife's furniture, nor the wife of the husband's at the time of the grant, and that, as to these chattels respectively, the bill of sale was void against either of them. I am of opinion that the decision of the Divisional Court was right. The transaction which it was sought to carry out by this bill of sale cannot stand apart from the document which purports to describe it—viz., the bill of sale. Indeed, it was not contended that it could be supported *aliunde*: (see per Bowen, L.J. in *Ex parte Hubbard*; *Re Hardwick* (17 Q. B. Div., at p. 698). It seems to me, therefore, that the question is, Can such a transaction, if stated according to the truth, be brought within the statutory form, that is, can it be framed in accordance with the form in the schedule according to the interpretation put on those words by the decisions in this court and in the House of Lords? See *Ex parte Stanford*; *Re Barber* (*ubi sup.*) and *Thomas v. Kelly* (*ubi sup.*). In *Ex parte Parsons*; *Re Townsend* (53 L. T. Rep. 897, at p. 899; 16 Q. B. Div. at p. 545), Lord Esher says: "If they (the Legislature) have forbidden every such document except one which is made in a particular form, we are bound to give to their legislation the ordinary meaning of language. It seems to me that the words of sect. 9 strike at all documents which give a security upon goods for the payment of money, and I take it the Legislature

intended to say—if you cannot make your agreement by a document in the form specified in the schedule, you shall not be able to make it by any document at all.” And it was there held that, the transaction being one which, from its nature it was impossible to carry out in the statutory form, the document describing it was void as substantially deviating from the prescribed form. In *Thomas v. Kelly* (*ubi sup.*) the present Lord Chancellor says: “I think that sect. 9 must be construed to enact not only what a bill of sale must contain, but also what it must not contain; so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the statute is not appropriate.” And further on he says: “The form is here, in my judgment, intended to be exhaustive of what may or may not be included in such a deed.” The judgment of Lord Fitzgerald seems to me to be on the same lines, and though Lord Macnaghten says of sect. 9, “This section seems to me to deal with form and form only,” I do not think he meant to lay down anything inconsistent with the passages I have cited from the judgment of the Lord Chancellor. Indeed, it seems to me to follow from the fact that the Legislature has prescribed a particular form in which alone a valid bill of sale can be shaped that it thereby excluded from documentary validity all transactions which, if described according to the true facts, could not be brought substantially within the form. I say documentary validity, for, as pointed out particularly by Bowen and Fry, L.J.J. in many cases a transaction may stand apart from the document which embodies it. But where it has to seek support from the document it must stand or fall with it. I cannot, therefore, accept the argument that, if a document be so framed as to make it possible to construe it in such a way as not to be incompatible with the form, it cannot be impeached, although if construed as describing the real transaction it would be outside the form. In this case the document can be construed in accordance with the facts only by reading the joint words of grant as superfluous, and confining the effect of the grant to two separate grants by the husband of his chattels and by the wife of hers. I do not think that it would be possible to claim protection for a transaction incapable of being described according to the facts in the statutory form by misdescribing it in the form so as to bring it apparently within the schedule, and I think the authorities I have cited are conclusive to this effect. See also per Fry, L.J. in *Beckett v. Tower Assets Company* (64 L. T. Rep. 497; (1891) 1 Q. B. 638). The learned Lord Justice there says: “Upon principle—that is to say, on the plain construction of the statute—it seems to me clear that, in considering whether the Bills of Sale Act applies, the court not only may but must inquire into the real nature of the transaction. . . . Again, the real truth of the transaction must be applied to the construction of documents for the purposes of the Act, and if a document construed according to the true nature of the transaction be within the Act, then it will not be protected by its form.” Does, then, the schedule contemplate and cover two separate grants by two grantors of separate sets of chattels not so described as to be capable of being referred specifically to either grant? If it covers two

grants, why not three or more? And where is the line to be drawn, and what is the object of the provision for specific description of the chattels, if in such a case the bill and the schedule together do not show to which section of the things granted each grant is applicable? It seems to me that to hold that two or more separate grants could be brought within the terms of the schedule would involve such an extension of the symbol A.B., which is used to describe the grantor in the schedule, as to involve a departure from the statutory form in something which, in the language of Lord Macnaghten in *Thomas v. Kelly* (*ubi sup.*), “is a characteristic of that form,” and to introduce inadmissible complications. I think the reasoning of Bowen, L.J. in *Melville v. Stringer* (*ubi sup.*) covers this case: “If one examines the form, a substantial part of it is, as it seems to me, that property must be assigned to the person who finds the money, and that to such person repayment is to be made of the money borrowed; and therefore I do not think that a bill of sale is within the Act if the money is lent by one person and made repayable to another person, or if the property is assigned by it to one person and the repayment is to be to another, nor if the assignment of the property is to one person to secure repayment to another. Mr. French has contended that that construction would exclude from the Act the case of a trustee to whom property has been assigned for securing the repayment of money to those beneficially interested therein. My answer is that that is an illustration of what is struck at by this sect. 9, which section is against any substantial variation of the form. If that is what that section means, can it be said that an assignment to parties who are not joint creditors when the repayment is not to be of the sum secured to those creditors jointly, but only of portions of such sum to each of them separately, is in accordance with the form in the schedule? So far from it being such, I think it is inconsistent with that form, and is therefore invalid.” If the form were capable of being extended so as to cover several separate grants by separate grantors and covenants incident thereto, I do not see why it could not be extended to cover all the transactions negatived as admissible by Bowen, L.J. in the passage above cited. I think it is clear on the face of the schedule that only one grant is contemplated, though it may be, but it is not necessary to decide it, that that grant might be made by two or more joint owners, and I think the same complication in the case of several separate grantees which was held to avoid the bill of sale in *Melville v. Stringer* (*ubi sup.*) would arise in the case of several separate grantors, and for the reasons pointed out by all the judges in that case be on that ground outside the schedule. There would in point of fact be two separate bills of sale in one document, and the subject-matters of the bills would be undefined by the instrument itself so as to be incapable of being specifically referred to either of them. This would surely be to sin against that simplicity and certainty which is said to have been the main object of the Legislature: (see per Lord Esher, M.R. in *Melville v. Stringer* (*ubi sup.*) and per Lord Fitzgerald in *Thomas v. Kelly* (*ubi sup.*)). I find nothing in *Haseltine v. Simmons* (*ubi sup.*) inconsistent with the views above stated. There the

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objection was treated as going to the truth of the consideration only, which is the subject of a special section. The larger question of whether it would have been possible to state the true consideration without departing from the statutory form was not raised or discussed. It was decided after *Melville v. Stringer* (*ubi sup.*) and *Ex parte Parsons* (*ubi sup.*), to both of which cases Lord Esher, who was a member of the court that decided it, had been a party. It cannot, therefore, I think, have been meant to decide anything inconsistent with the principles laid down in those cases. As in my opinion the bill of sale is bad on the grounds above stated, it is not necessary to consider the point taken under sect. 5.

ROMER and MATHEW, L.JJ. concurred.

Appeal dismissed.

Solicitors for the execution creditor, *Willett and Sandford*.

Solicitors for the claimant, *Biggs-Roche, Sawyer, and Co.*

Monday, Feb. 17.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

LANCASHIRE BRICK AND TERRA COTTA COMPANY LIMITED v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY. (a)

APPEAL FROM THE RAILWAY AND CANAL COMMISSION COURT.

Railway—Private sidings — Branch railway — Owner's right of communication with line of railway company—Railway Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), s. 76.

Sect. 76 of the Railway Clauses Consolidation Act 1845 enables the owners of land adjoining a railway to lay down collateral branches of railway to communicate with the railway for the purpose of bringing carriages to or from or upon the railway; and requires the railway company, subject to certain conditions, to make communication between their line and the branch railway.

Held, that the object of this section was to enable the owner of a branch railway to make use of a railway company's line as a highway on which he might work his own rolling stock; and that the section could not be made use of to compel a railway company to make communication with a private siding in order that the communication, when made, might serve as an occasion to the owner of the siding for demanding facilities under other Acts of Parliament.

Decision of the Railway and Canal Commission Court, ante, p. 26, reversed.

THIS was an appeal by the defendant railway company from a decision of the Railway Canal Commission Court, which is reported *ante*, p. 26; (1902) 1 K. B. 381.

The only question argued on this appeal was whether the applicants had an absolute right under sect. 76 of the Railway Clauses Consolidation Act 1845 to have a communication made between their private siding and the defendant company's railway line.

The section of the Act and the facts of the case are set out in the report of the case in the court below.

C. A. Russell, K.C. (*E. Moon* with him) for the railway company.

Foote, K.C. and R. Whitehead for the applicants.

The following cases were cited:

Bell v. Midland Railway Company, 4 L. T. Rep. 293; 10 C. B. N. S. 287;

Hughes v. Chester and Holyhead Railway Company, 7 L. T. Rep. 197; 3 D. F. & J. 352;

Powell Duffryn Steam Coal Company v. Taff Vale Railway Company, 30 L. T. Rep. 208; L. Rep. 9 Ch. 331;

Hall v. London, Brighton, and South Coast Railway Company, 53 L. T. Rep. 345; 15 Q. B. Div. 505;

Cowan v. North British Railway Company, 3 Ct. Sess. Cas. 5th series (3 F.), 677.

COLLINS, M.R.—The applicants in this case entered into a contract with the railway company on the 27th Sept. 1894, whereby they acquired the right of having their goods received on and sent by a siding in connection with the railway company's line. The contract contained a clause providing for the determination of the agreement upon six months' notice in writing, to be given by either party, after the expiration of five years from the date of the agreement. The piece of land owned by the applicants on which their siding was made was about thirty-eight acres in extent, and after the applicants had established themselves there, they let part of these thirty-eight acres to some persons who set up some chemical works. The railway company were willing to give facilities for the traffic of the applicants and for that of the chemical works; but, not being minded to give facilities for any further works that might be built on the applicants' land, they gave notice to terminate the agreement. Thereupon the question has arisen whether, under sect. 76 of the Railway Clauses Consolidation Act 1845, the railway company can be forced to allow an opening to be made for the applicants to their siding. The application to the Railway Commissioners was based upon wider grounds, but in this court the only point raised is whether under sect. 76 the applicants have the absolute right to demand an opening from their siding on to the railway company's line. Now, I will not read that section at length. The substance of it is fairly well expressed by the side note: "Power to parties to make private branch railways communicating with the railway." Now it has been admitted as a fact that it would be impossible to carry out the provisions of sect. 76 in their entirety, and to allow the applicants to have access to the railway for the purpose of working their own carriages and wagons on the line, with safety to the public and without injuring the railway and causing inconvenience to the traffic thereon. That was clearly expressed by Wright, J., who said that it would be quite out of the question in these days that any such thing could be allowed to be carried out upon a public railway working under modern conditions. I take that as established, and in view of that fact the question arises whether the applicants have the right to demand that the railway company shall submit to their making an opening on to their line. I am of opinion that they have not. I think we should be straining the Act of Parliament both beyond its words and beyond its spirit, if we were to give the applicants in this case the right of

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

forcing an opening on to the line, not for the purpose named in the Act or anything like it, but simply for the purpose of giving them a *locus standi* so that, having effected an opening on to the line, they may be able hereafter to come and ask for reasonable facilities at that point for the receipt and delivery of their traffic. In 1845, when sect. 76, following upon previous sections passed from the same standpoint, was enacted, a railway was looked upon merely as a form of highway on which all people who had the means of travelling along any particular line of railway had the right to do so. And this particular section gave facilities to persons owning land adjoining a line of railway to get access to that line for the purpose of transit upon it. The section speaks of collateral branches of railway to communicate with the railway for the purpose of bringing carriages to or from or upon the railway. What is asked for now by the applicants is not a means of transit in the sense of the section, but a place which might be regarded as a station, for the purpose of insisting that it was such a place on the railway that members of the public have a right to come and demand reasonable facilities for receiving and delivering and forwarding traffic at that place. I think that we have only to look at the legislation of which sect. 76 is a part, and to look at the section itself, to see that that is in no sense the object of the section. The object was simply to empower persons who wanted to run branch lines into the railway to have access to the railway for the purpose of conveying their own traffic over the branch line on to the railway and *vice versa*. That seems to me to dispose of this case. Whether or not the applicants have any other remedy, either under the general powers for getting facilities under the Railway and Canal Traffic Act 1854, or under the undue preference clauses, it is not necessary for me to consider. The question has been discussed as to both points in a case in Scotland—*Cowan v. North British Railway Company* (*ubi sup.*)—and there the judges, as I understand, held that the court had no jurisdiction to give to a trader the right to demand access to a line at a particular point where it should not exist, and they also decided, as I read it, that where access had previously existed under an agreement, and that agreement had been determined, they had no jurisdiction to do any more than if there had never been any agreement at all. On that matter I desire to keep an open mind, and therefore express no opinion at all. I decide the present case upon the short ground that I have already mentioned, that sect. 76 cannot be made use of simply to create an occasion for demanding facilities under other Acts. The present case is not one to which that section is applicable, and I therefore think that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. I doubt very much whether it can be said here that the applicants have laid down a “collateral branch of railway” for the purpose of bringing carriages to or from or upon the railway within the meaning of those words as used in sect. 76. But, passing that by, it appears to me that the argument which was used on behalf of the applicants as to the limitation of the right of communication contained in that section is not well founded. The

limitation is this: there is no right to make the communication at any place on the railway apart from the question as to the place being on an inclined plane or a bridge or a tunnel, or used for any specific purpose with which such communication may interfere. I am speaking of the words used in the earlier part of sect. 76. The limitation is this: the opening can only be made in places where the communication can be made with safety to the public, without injury to the railway, and without inconvenience to the traffic thereon. It is said that that is limited to a liability to the consideration of the difficulty of physical communication only; that is to say, you have only to see whether the openings in the rails, and the communications with the rails of the additional line that the railway company has to make, can be effected physically with safety to the railway company's own traffic or the traffic to come on to their line from the branch railway. In my opinion that cannot be so. I have already pointed out that the collateral branch—the communication—is to be used for the purpose of bringing carriages to or from or upon the railway; and where, in the phrase with which I am now dealing, you find a provision as to any places where the communication can be made with safety to the public and so forth, it means the communication previously referred to, that is, a communication by means of carriages to be brought on to the railway. In considering whether the communication can be made “with safety to the public and without injury to the railway and without inconvenience to the traffic thereon,” it appears to me that you are to bear in mind the possibility of injury and inconvenience arising from the passing of carriages from the branch railway on to the main railway. To hold otherwise would be putting a very narrow and untrue construction upon the section. Is this place, then, one where the court ought to allow a communication which would give the applicants the right to bring their traffic on to the main line? That question appears to me to be one which can be answered in only one way. The communication cannot be made without the injury and inconvenience that is referred to in the section. That being so, there is an end of the matter. That conclusion of fact ought to have been followed in the court below by the conclusion that the section could not be applied here. I agree, therefore, that the appeal should be allowed.

MATHEW, L.J.—I am of the same opinion. The argument put forward on behalf of the applicants would lead, if pushed to its legitimate results, to very formidable consequences. As I understand the argument, it comes to this: that anybody who chooses to make a siding by a railway may call upon the railway company to make a communication with it, and to afford facilities for the purpose. Is that the law? Let us deal with the facts of the case. The arrangements between the applicants and the defendants had their origin in an agreement which might be determined by a notice given by either party. Without that written and specific agreement the applicants had no right whatever to approach the railway at that point. It seems impossible to me that this agreement, which was terminable by notice and was so determined, can be converted into something that creates a permanent

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obligation on the railway company. Reliance was placed on sect. 76. The language of that section seems to me to be as plain as it could be. What was contemplated by the section was the use of the railway by the trader for his own rolling stock. That was a view upon which a good deal of the earlier legislation with reference to railway companies proceeded. That what was contemplated was the use of the railway by the trader is made quite clear by the final clause of the section. That clause provides that persons making or using the branch railways shall be subject to all bye-laws and regulations of the railway company from time to time made with respect to the passing upon or crossing the railway and otherwise. That has no application to the case now before us. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the applicants, *Neish, Howell, and Macfarlane*, for *B. T. Westwell*, Accrington.

Solicitors for the railway company, *Woodcock, Ryland, and Parker*, for *C. Moorhouse*, Manchester.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Jan. 17.

(Before KEKEWICH, J.)

Re OSBORNE AND BRIGHT'S LIMITED. (a)

Vendor and purchaser—Settlement—Power of sale given by settlement to trustees—Power of sale under Settled Land Acts to tenant for life—Conflict between powers—Persons having powers of tenant for life—Settlement of separate undivided shares—Persons together constituting tenant for life—Settled Land Act 1882 (45 & 46 Vict. c. 38), s. 2 (5) (6); s. 56 (2)—Settled Land Act 1884 (47 & 48 Vict. c. 18), s. 6 (2).

A testator, who died in 1886, by his will gave all his real and residuary personal estate to trustees upon trust to stand possessed thereof as to one-fifth part for each of his four married daughters and for the children of a deceased daughter, the share of each daughter to be retained upon trust for her for her life for her separate use without power of anticipation, and after her decease as she should appoint, with a gift over, probably, void for remoteness. By his will the testator empowered his trustees to sell all or any part of his real and personal estate. The trustees proposed to sell leaseholds forming part of his estate. Upon summons to determine whether the exercise of their power of sale by the trustees required the consent of any person:

Held, (1) that there was a direct conflict between the power given by the will to the trustees to sell the entirety and the powers of the tenants for life or the persons having the powers of a tenant for life to sell their shares under the Settled Land Acts within the meaning of sect. 56 (2) of the Settled Land Act 1882; (2) that that section was applicable not only to tenants for life, but also to persons having the powers of tenants for life; and (3) that the tenants for life of the separate undivided

shares did not together constitute the tenant for life for the purposes of the Settled Land Act 1882 within the meaning of sect. 6 (2) of the Settled Land Act 1884, and that consequently the exercise of the power of sale given to the trustees by the will required the consent of every person beneficially interested under the will who was tenant for life or entitled to exercise the powers of tenant for life, within the meaning of the Settled Land Acts, of any shares of the testator's estate.

EDWARD COM OSBORNE, who died on the 27th May 1886, by his will, dated the 22nd Dec. 1885, gave, devised, and bequeathed all his real estate and all the residue of his personal estate to the trustees of the will upon trust to stand possessed thereof in the following manner, namely, as to one-fifth part or share for each of the testator's four married daughters, Mrs. Vero, Mrs. Williams, Mrs. Tusker, and Mrs. Lee, and as to the remaining one-fifth part or share for the children of a deceased daughter who being sons should attain the age of twenty-five, or being daughters should attain that age or marry, in equal shares. And the testator directed his trustees to retain the share of each of his four married daughters upon trust to pay the interest of each share to her during her life without power of alienation or anticipation and for her sole and separate use and after her decease as she should by deed or will appoint, and in default of appointment upon trust for such of her children or other issue as being sons should attain twenty-five years, or being daughters should attain that age or marry, in equal shares; and that if any of the four married daughters should die without issue or without having exercised their power of appointment her share should be equally divided between the other persons taking the shares under the will. And the testator authorised his trustees to sell and dispose of all or any portion of his real and personal estate.

It appeared that at the present time Mrs. Vero, Mrs. Tusker (now Mrs. Ross), and Mrs. Lee and their husbands were still living. Mrs. Williams was dead, intestate and without having exercised her power of appointment, leaving her husband and a son surviving her. Three of the children of the daughter who predeceased the testator had attained vested interests, and two of them were contingently entitled.

On the 26th June 1901 the trustees, in the exercise of the power of sale given them by the will, put up for sale by auction certain leasehold property in Birmingham which formed part of the residuary personal estate of the testator.

At the sale Bright's Limited contracted to purchase the property.

The purchasers required the consent to the sale of all the persons who were tenants for life or had the powers of tenant for life under the Settled Land Acts.

The vendors, however, were only able and willing to procure the consent of one of them, Mrs. Vero.

The purchasers thereupon took out this summons asking whether or not the power of sale given by the will to the trustees was exercisable without the consent of any person, and, if such consent was requisite, then of whom it ought to be required.

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

The question turned upon the consideration of the following sections of the Settled Land Acts 1882 and 1884.

Settled Land Act 1882 (45 & 46 Vict. c. 38):

Sect. 2 (5). The person who is for the time being, under a settlement, beneficially entitled to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement. (6) If, in any case there are two or more persons so entitled as tenants in common or as joint tenants or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

Sect. 56 (2). But, in case of conflict between the provisions of a settlement and the provisions of the Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

The Settled Land Act 1884 (47 & 48 Vict. c. 18):

Sect. 6 (2). In the case of every other settlement not within the meaning of sect. 63 of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-sect. (3) of sect. 56 of that Act, requiring the consent of all those persons, the consent of only one of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act.

J. T. Prior for the purchasers.—We require the consent of all the tenants for life. There is a conflict between them and the trustees as regards the execution of their power, so the consent of the tenants for life is necessary under sect. 56 (2) of the Act of 1882 (*ubi sup.*):

Cooper v. Belsey, 80 L. T. Rep. 69; (1899) 1 Ch. 639;
Lonsdale v. Lowther, 83 L. T. Rep. 312; (1900) 2 Ch. 687.

The consent of one is not sufficient, for, being each tenant for life of a separate share, they cannot together constitute the tenant for life under sect. 2 (6) of the Act of 1882. Mrs. Vero and the other married daughters whose shares still remain in settlement are persons having the powers of a tenant for life with respect to their shares within the Settled Land Acts:

Re Pocock and Pranker's Contract, 73 L. T. Rep. 706; (1896) 1 Ch. 302;
Sect. 2 (5) of the Act of 1882.

E. P. Hewitt for the vendors.—This case is not within the Settled Land Acts at all, and no consent is necessary. There is no conflict between the power of the trustees to sell the entirety and the power of the tenants for life to sell their shares within the meaning of sect. 56 (2) of the Act of 1882. That section only speaks of the tenant for life, not of persons having the powers of tenant for life. If any consent at all is necessary, that of one tenant for life is sufficient under sect. 6 (2) of the Act of 1884, and that we are prepared to give.

KEKEWICH, J.—By the testator's will all his real estate and his residuary personal estate was

vested in trustees upon trust to be divided into five equal shares, and each fifth share was settled by the will. I will take the case of Mrs. Vero, who is entitled to one-fifth share for her life and who subject to that life interest has an absolute power of appointment by deed or will subject to which her children take in accordance with the limitations of the settlement, with which limitations we are not now dealing, but which probably ought to be considered void as offending the rule against perpetuities. It is sufficient to notice that Mrs. Vero is tenant for life in possession with an absolute power of appointment over her one-fifth share. Now, the testator has also given his trustees a power of sale over the whole or any part of his real and personal estate, and they have proposed to exercise that power. The difficulty is, Can they by themselves exercise that power or are they, by force of the provisions of the Settled Land Act 1882, bound to get the consent of certain persons to the proposed sale? It has seemed good to the Legislature, in introducing this new code, to say in sect. 56 (2) of the Settled Land Act 1882 that, in case of conflict between the provisions of a settlement and the provisions of the Act in respect to any matter whereof the tenant for life exercises or intends to exercise any power under the Act, the provisions of the Act are to prevail, and that accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall by virtue of the Act be necessary to the exercise by the trustees of the settlement of any power conferred by the settlement exercisable for any purpose provided for in the Act. If, therefore, these trustees were proposing to sell property settled by the will upon trust for Mrs. Vero only for her life, no doubt Mrs. Vero's consent would be necessary. Sect. 56 (2) is somewhat strangely worded, and the first and second branches of that sub-section do not exactly fit in with one another; yet their object is clearly to maintain the code of the Act and to take care that no exercise of any power under a settlement shall in any way interfere with the exercise of the powers given by the statute itself to persons beneficially entitled under such settlement. The vendors' argument with respect to that is that in this case there can be no conflict between the power of the trustees to sell the whole of the estate and the power of each tenant for life to sell his or her share thereof. That there really is a conflict in the execution of the powers so far as relates to each particular share can hardly be denied, and if authority were required for that proposition it could be found in the case of *Lonsdale v. Lowther* (*ubi sup.*). The vendors' main point is, then, that there is no conflict between the power of sale by the trustees over the entirety and the power of sale by the tenant for life over her share. I assume for a moment that Mrs. Vero is tenant for life, and proceed upon that footing. To my mind the vendors' contention is not well founded. This lady is tenant for life of a share of the estate, and that share is being sold, and that share she could no doubt herself alienate by deed under the Settled Land Act, and therefore if the trustees sell the entirety under their power of sale they must deprive her of her power of sale under the Act. That raises a conflict between them and makes it necessary under the provisions of sect. 56 (2) of the Act of 1882 that she should be a consenting party to the sale.

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But it has been argued that that section applies only where there is a tenant for life, and that this lady, her estate being limited as it is, is not a tenant for life, but that she has only the powers of a tenant for life. That she has the powers of a tenant for life has been settled by the case of *Pocock and Prankerd* (*ubi sup.*), before Stirling, J. Does that section, then, apply to the case of a person having the powers of a tenant for life as well as to a tenant for life? It is true that it speaks of the tenant for life, and not of "persons having the powers of a tenant for life," but "accordingly" in the section does not mean that in the particular instance only thereafter mentioned—which, as I understand it, is only by way of illustration—in case of conflict the powers of the Act are to prevail; the particular instance given is only an illustration, and the first branch or part of that sub-section is applicable to the case of a person having the power of a tenant for life. Then it is said only a tenant for life is mentioned there. But I think that there is no difficulty in the language of the sub-section; its object is to provide against a conflict between two different powers side by side, and it says in case of conflict the provisions of the Act are to prevail. The intention of the Legislature was that where there is a power *dehors* the Act, the power under the Act should be employed, and that the power under the settlement should not be exercised without consent. There is one further difficulty. I have dealt with the case of Mrs. Vero, and I have said that her consent is necessary. But there are other persons who hold shares in the estate, and I have not yet considered how they stand. Now, sect. 6 (2) of the Settled Land Act 1884 says that where two or more persons together constitute the tenant for life for the purposes of the Settled Land Act 1882, then, notwithstanding sect. 56 (2) of the Act of 1882, requiring the consent of all those persons, the consent of only one of those persons is by force of this section to be deemed necessary to the exercise by the trustees of any power conferred by the settlement exercisable for any purpose provided for in that Act. It is said that Mrs. Vero, together with the other persons holding shares of the estate, are tenants in common, and together constitute the tenant for life, and that the consent of one of them only is therefore necessary. But Mrs. Vero is not one of several persons who together make up the tenant for life of the entirety; she is simply tenant for life of a separate undivided one-fifth of the entirety, and no other person is entitled as tenant for life as tenant in common of that one-fifth share together with her. As regards the exercise by the trustees of their power of sale, her consent is necessary for her one-fifth, and therefore I think that as regards the entirety not only her consent, but the consent of the other persons holding shares is also required. Who those persons may be I am not at present prepared to say, as I have not now all the facts before me.

[His Lordship then declared that the power of sale given by the will was not exercisable without the consent of every person beneficially interested under the will who was tenant for life or entitled to exercise the powers of a tenant for life within the meaning of the Settled Land Acts of any shares of the testator's estate.]

Solicitors: *Vallance and Vallance*, for *Herd and Nutt*, Birmingham; *Sanders and Harding*, for *J. C. Fowke and Son*, Birmingham.

Saturday, Jan. 25.

(Before KEKEWICH, J.)

Re HOWGATE AND OSBORN. (a)

Vendor and purchaser—Misdescription—Erasure of name in mortgage deed—Married woman mortgagees—Reconveyance—Bare trustees—Trustee Act 1893 (56 & 57 Vict. c. 53), s. 16.

In a mortgage deed of freehold property executed only by the mortgagees the Christian name of one of the mortgagees was incorrect. After execution the incorrect name was erased and the correct names substituted therefor. The consideration for the mortgage, being moneys advanced by trustees, was, subsequently to 1893, repaid to the sole surviving trustee, a married woman, who reconveyed the property to the mortgagors.

Upon a vendor and purchaser summons for a declaration that a good title had been shown to the property in question:

Held, (1) that the alteration was not material and did not avoid the deed; and (2) that the married woman on payment of the mortgage money become a bare trustee for the mortgagors, and could therefore convey as a feme sole under sect. 16 of the Trustee Act 1893.

THIS was a vendor and purchaser summons taken out by the vendor asking for a declaration that the requisitions and objections taken by the purchaser in respect of the title to a certain plot of land and the buildings thereon, situate in the township of Leeds, had been sufficiently answered, and that a good title had been shown thereto.

One of the objections taken by the purchaser was that, whereas in a certain deed of mortgage dated the 1st Jan. 1878 the name "Edward Thomas" Gray appeared, in the registered memorial of the deed and in subsequent muniments of title the name "William" Gray appeared.

The deed of mortgage of the 1st Jan. 1878 was made between Charles Bulmer of the first part, George Lax of the second part, and Martha Milner, Mrs. Ann Booth, and "Edward Thomas Gray, of Morwick Hall, in the parish of Barwick-on-Elmet, in the county of York, gentleman," of the third part, and by it the piece of land in question was conveyed by Charles Bulmer and George Lax by way of mortgage to "the said parties hereto of the third part," which parties were only once mentioned in the deed by name for the consideration therein stated.

The deed was executed only by Charles Bulmer and George Lax.

Upon examination of this deed some word or words appeared to have been erased before the name "Gray" and the words "Edward Thomas" substituted therefor. A memorial of this deed registered in the Wakefield District Registry instead of Edward Thomas Gray had the name William Gray, and in all subsequent muniments of title the name William Gray appeared instead of Edward Thomas Gray.

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From statutory declarations made by the solicitor who prepared the deed of mortgage and by Mrs. Ann Booth it appeared that the former, not then knowing the Christian names of Mr. Gray, in preparing the draft of the deed left a blank for Mr. Gray's Christian name, that he then, being wrongly informed, inserted in the draft the name "William," and that the deed was so engrossed, executed, and registered; and that some person unknown had subsequently erased "William," and inserted the correct names, Edward Thomas. It also appeared that no person of the name of William Gray, living at Morwick Hall, was known, and that no person other than Edward Thomas Gray had resided there for forty years previous to his death in 1896.

The consideration for the conveyance on mortgage consisted of moneys of which Edward Thomas Gray was trustee jointly with the other parties to the deed of the third part.

Since 1893 these moneys had been repaid to Mrs. Ann Booth, then the sole surviving trustee who had reconveyed the property to the mortgagors.

The purchaser further objected that Mrs. Ann Booth had no power to reconvey without the concurrence of her husband and a separately acknowledged deed under the Fines and Recoveries Act 1833.

P. O. Lawrence, K.C. and B. J. Parker for the vendor.—The alteration is not material, for the deed took effect from the date of its execution. Evidence is therefore admissible to explain the alteration:

Suffell v. Bank of England, 47 L. T. Rep. 146; 9 Q. B. Div. 555.

On the second point, Mrs. Booth, directly the money was repaid to her, became a bare trustee of the legal estate, and she could therefore reconvey without an acknowledged deed or her husband's concurrence under sect. 16 of the Trustee Act 1893 (56 & 57 Vict. c. 53). They referred to

Re Brooks and Fremlin's Contract, 78 L. T. Rep. 416; (1898) 1 Ch. 647;

Re Harkness and Allsopp's Contract, 74 L. T. Rep. 652; (1896) 2 Ch. 358.

H. Greenwood for the purchaser.—The legal estate passed to William, not to "Edward Thomas" Gray, which is a material alteration affecting the relationship between the parties. The contract is varied, being altered in an essential part:

Suffell v. Bank of England (*ubi sup.*);

Ellesmere Brewery Company v. Cooper, 73 L. T. Rep. 567; (1896) 1 Q. B. 75.

On the second point I cannot say that Mrs. Booth was not a bare trustee as soon as the money had been repaid to her.

KEKEWICH, J.—It is established that a material alteration in a written instrument does and an immaterial alteration does not avoid it. The rule was first laid down, though not precisely in these words, with reference to deeds conveying freehold property, but it has been discussed in many cases, with the result that the rule as now established is held to be applicable to all written instruments, and is not confined to deeds of purchase and sale of land. It must be taken, however, with this qualification, that in considering whether an alteration is material or not

you must have regard to the particular instrument to see what its purport is, and what its office is. That is the obvious conclusion from the case of *Suffell v. Bank of England* (*ubi sup.*), where the Master of the Rolls (Sir George Jessel) and the Lords Justices who took part in the decision, and particularly Cotton, L.J., went into the particular nature of a Bank of England note to show that the alteration there complained of was material, though that particular alteration might not have been material in another instrument. Now, what I have to consider here is a deed of conveyance—a conveyance by way of mortgage, but still a deed of conveyance. The conveyance was purported to be made to three persons, one of them being William Gray. He ought to have been described as Edward Thomas Gray, but he was described as William Gray. He and the other two persons named were parties of the third part, and throughout the deed those parties are always referred to as the parties of the third part, and William Gray is never mentioned again. But later, without any intention of fraud or anything of that kind, William was erased and Edward Thomas was substituted. Now, is that a material alteration? In one view it can hardly be said to be otherwise than essentially material. The conveyance was to two persons and William Gray. A conveyance to two persons and Edward Thomas Gray is an entirely different conveyance. Whether William Gray was non-existent or not is certainly immaterial because at any rate you have a conveyance to two as joint tenants instead of to three, which would alter the legal estate. Then, again, as to the whole deed. I do not dwell upon all the details, but take the covenant for payment. The covenant is for payment to two persons and William Gray, which is obviously a different thing from a covenant for payment to two persons and Edward Thomas Gray. As to the proviso for redemption a similar remark applies, and so throughout as to the other provisions. Now, that shows that if Edward Thomas Gray had been put in in the first instance it would have been a very different deed from a conveyance to William Gray, and it may well be argued, and, indeed, it has been argued, on that that when you substitute Edward Thomas Gray for William Gray you are making an alteration in the deed which is and must be material. I think there is an answer to that consisting in this, that the deed took effect from the moment of its execution. The conveyance was to two persons and William Gray. William Gray might have been a misdescription; William Gray might have been a non-existent person, but, whatever was its effect, was its effect from the moment of its execution by the conveying parties, and it could not have been altered from that time forward. There may be difficulty—in fact there is difficulty—in finding out in whom the legal estate is vested. There is difficulty in ascertaining who are bound to convey when the mortgagor insists upon his equity of redemption. There is difficulty in saying who are entitled as the parties of the third part to sue upon the covenant. But the difficulty is not caused by the alterations except in this—that you have to find out who the parties were. When once you have ascertained that, there is no alteration of the deed. When from the very frame of it the

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difficulty is reduced to one of evidence, I have to inquire who was William Gray. Of course, however easy it may be, you always have to inquire when you take the deed to whom the property is conveyed. If you do not find a man properly described, or if you find an inconsistency, you have to inquire into it, and it is a matter which can be removed by evidence. Now, one of two things seems to me to have happened. Either William Gray was non-existent or it was a misdescription. I have no doubt myself it was a misdescription, and there is no reason why you should not prove by parol evidence that the person described as William Gray was really Edward Thomas Gray; it is only the name, and it seems to me that the statutory declarations cleared that up completely. If that is the right view the deed has always been a conveyance to the two persons and Edward Thomas Gray. Somebody by erasure and by a written insertion has made a physical alteration in the parchment. But the deed stands as it was at the moment of execution. In one sense there is an alteration, in another sense there is none. It seems to me that the vendor has sufficiently made out his right, assuming that he claims properly through these two persons and Edward Thomas Gray, and that he has a right to insist upon his title.

[On the second objection raised by the purchaser, his Lordship further held that Mrs. Booth, being a bare trustee for the mortgagors, could reconvey without the concurrence of her husband or a deed separately acknowledged.]

Solicitors: *Few and Co.*, for Carr and Coverdale, Leeds; *Hamlin, Grammar, and Hamlin*, for H. B. Cousins, Leeds.

Friday, Jan. 17.

(Before KEKEWICH, J.)

Re LEAS HOTEL COMPANY LIMITED; SALTER v. LEAS HOTEL COMPANY LIMITED. (a)

Company—Debentures—Charge on "all property and effects"—Goodwill—Appointment of receiver and manager—Jurisdiction.

Debentures issued by a limited company charged "all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever both present and future." There was no express mention of goodwill or business in the charge.

Upon motion to appoint a receiver and manager of the business and undertaking of the company: Held, that the words "property and effects" were sufficient to cover goodwill and that the court had therefore jurisdiction to appoint a receiver and manager of the business.

THIS was a motion by the plaintiff in a debenture-holders' action brought by him on behalf of himself and all other holders of debentures in the Leas Hotel Company Limited, Folkestone, against the company for the appointment of a receiver and manager of the property and undertaking of the company. The debentures issued by the defendant company charged "all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever both present and future." It was admitted that this was a proper case for the appointment of a receiver, but the

question was raised whether the court had jurisdiction to appoint a receiver and manager of the business of the company, there being no express mention of the goodwill or business of the company in the charge given by the debentures.

P. S. Stokes for the motion.—The charge by a trading company of its "property and effects" includes goodwill, and the court has therefore jurisdiction to appoint a receiver of the business. He referred to

Peck v. Trimearan Coal and Iron Company, 2 Ch. Div. 115;

Makins v. Ibbotson and Sons, 63 L. T. Rep. 515; (1891) 1 Ch. 133;

Whitley v. Challis, 65 L. T. Rep. 838; (1892) 1 Ch. 64;

County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company, 72 L. T. Rep. 375; (1895) 1 Ch. 629;

Jennings v. Jennings, 77 L. T. Rep. 786; (1898) 1 Ch. 378;

Re David and Matthews, 80 L. T. Rep. 75; (1899) 1 Ch. 378;

F. Russell, for the company, assented to the application.

KEKEWICH, J.—If I were to refuse to assent to this application, it would in all probability be taken to the Court of Appeal, and the public would have the advantage of hearing the discussion which would take place there and the decision which would be given by that tribunal; but still that ought not to prevent me from giving my own decision, even if the effect of such decision would be to deprive the parties of that inestimable advantage. On the whole, I am of opinion that I have jurisdiction to appoint a manager, and if that is so, I have no doubt but that this is a proper case for the appointment of a manager. Now, the question as to whether or not I have jurisdiction to appoint a manager depends upon whether the goodwill of the business is charged by the debentures. The words of the debentures are. [His Lordship read the words above set out, and continued:] Now, this company is an hotel company carrying on business in Folkestone, and the question is whether those words include the business which it is carrying on. The test in all these cases is whether, in the event of a winding-up, upon a proper account being taken at a proper time, the business and goodwill can be sold under the order of the court. That is to say, can a plaintiff in a debenture-holders' action make under an order of the court a good title to a purchaser of the business, and that depends upon whether the goodwill of the business is included in the property charged by the debentures, so as to make it a subject of conveyance. That has been clearly pointed out in *Whitley v. Challis* (*ubi sup.*) by Bowen, L.J., and by many other judges also, but it is often forgotten. Now a manager is appointed by the court only for purposes of realisation, but, notwithstanding that, I have frequent applications made for leave for the manager so appointed to be continued in his management for the purpose of making a profit, applications which I always refuse, insisting upon realisation at the earliest possible moment. Now *Whitley v. Challis* (*ubi sup.*) was a peculiar case. It was like an ordinary mortgage and quite distinct from the usual debenture charge. The charge was on "the said building agreement and all the premises comprised therein, and the hotel

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

and buildings to be thereafter erected as aforesaid and the lease so to be granted as aforesaid," but to that were not added any words passing the business carried on, and for that reason, because the business could not be sold by the mortgagee, the Court of Appeal refused to appoint a manager. On the other hand, there are two cases, one before Stirling, J. and the other before Romer, J. In the second case, Romer, J., having the decision of Stirling, J. before him, followed it. Of those cases, the first was that of *Jennings v. Jennings* (*ubi sup.*). It was a partnership case, and the learned judge had to consider whether goodwill was comprised in the assets of the partnership, and he said it was. His words are as follows: "It was not disputed that the word 'assets' includes the goodwill so far as it constitutes property," and he treated goodwill as being property of the partnership, and if of a partnership it would equally be property of a company, and he says that it is included in the word "assets." Then in the case of *Re David and Matthews* (*ubi sup.*) Romer, J. had to construe different words; they are "all effects and securities." That again was a partnership, and there, too, Romer, J. thought those words covered goodwill. Now I have here the words "all its property, stock-in-trade, furniture, chattels, and effects whatsoever," and if the words "assets" and "effects" have been held to cover goodwill, I think the words "property and effects" also cover goodwill, the case of a company being, as it seems to me, the same as that of a partnership, for a company is only a special partnership authorised by the legislature, and it seems to me that what is true of a partnership is equally true of a company. I think, therefore, that the goodwill of this business was charged by the debentures and did pass to the debenture-holders, and that I can therefore appoint a manager, and, this being a proper case for such appointment, I will make the order asked.

Solicitors: Dod, Langstaffe, Sons, and Fenwick; F. G. Lewis.

Thursday, Jan. 30.

(Before KEKEWICH, J.)

Re CHISHOLM; GODDARD v. BRODIE. (a)

Practice—Costs—Duties—Will—Power of Appointment—Specific Appointments—Appointment of residue.

By their marriage settlement a testator and his wife (now deceased) were empowered, subject to their life interests, to exercise a joint power of appointment over the whole of the funds settled by them among the children of their marriage. In the exercise of this power they appointed three sums of 10,000*l.* each to three of their daughters upon their respective marriages. They also appointed the residue of the settled funds, after satisfying the previous appointments, up to the sum of 10,000*l.* to a fourth daughter upon her marriage, and the testator covenanted with the trustees of her marriage settlement to make good any deficiency in her 10,000*l.* out of his own estate. The settled funds now amounted to about 38,000*l.* Upon summons to determine how

in the distribution of the settled funds the duties and the costs ought to be borne:

Held, that (1) the estate duties payable on the death of the testator and his wife; (2) the costs of raising and paying the same; (3) the costs of raising and paying the three first appointed sums of 10,000*l.*; and (4) the general costs of administering the fund ought to be borne by all the appointed funds rateably. The general rule as to the incidence of costs established by *Moore v. Dixon* (15 Ch. Div. 566); *Re Shaw* (71 L. T. Rep. 873; (1895) 1 Ch. 343); and *Re Saunders* (77 L. T. Rep. 450; (1898) 1 Ch. 17) followed.

By a marriage settlement, dated the 9th April 1851, personalty was settled both by the husband James Chisholm Gooden Chisholm and his wife upon trusts in favour of themselves for their lives, and subject thereto a joint power of appointment was given to them over the whole of the capital among the children of their marriage.

Among the children of their marriage were four daughters—Katherine, Annie, Henrietta, and Hannah. In 1871, upon the marriage of their daughter Katherine to F. J. L. Blackwood, James Chisholm and his wife, in exercise of the powers given them by their marriage settlement, by a deed poll dated the 18th April 1871 jointly appointed that the trustees of their marriage settlement should, after the death of the survivor of them, stand possessed of 10,000*l.*, part of and to be by the trustees raised out of the settled funds, upon trust for Katherine, her executors, administrators, and assigns. In 1879 Katherine married H. V. Corrie, and thereupon assigned the said 10,000*l.*, to which she was then absolutely entitled, to the trustees of the settlement made on that marriage upon trusts under which in the events which happened, Corrie having died, and there being no issue of the marriage, she became absolutely entitled to the said 10,000*l.*

In 1877, upon the marriage of their daughter Annie to A. Trinder, James Chisholm and his wife, by a deed poll dated the 5th Sept. 1877, jointly appointed another 10,000*l.*, part of the settled funds, to Annie in precisely the same manner as they had made the appointment to Katherine, and Annie assigned it to the trustees of her marriage settlement.

In 1886, upon the marriage of their daughter Henrietta to R. M. Middleton, James Chisholm and his wife, by a deed poll dated the 6th Oct. 1886, jointly appointed another 10,000*l.* to Henrietta in precisely the same manner, and she assigned it to the trustees of her marriage settlement.

In 1891, upon the marriage of their daughter Hannah to S. Baker, James Chisholm and his wife, by a deed poll dated the 21st Nov. 1891, jointly appointed that the trustees of their marriage settlement should after the death of the survivor of them stand possessed of all the trust funds then comprised in their marriage settlement or which should at any time thereafter be brought into settlement and which should remain after satisfying the three previous appointments in trust for Hannah, her executors, administrators, and assigns, provided that not more than 10,000*l.* was to be so appointed. Hannah assigned the fund so appointed to the trustees of her marriage settlement and James Chisholm covenanted with the trustees of that settlement and with Hannah

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

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that if the fund so appointed did not amount to 10,000*l.* then his executors should make good any deficiency. S. Baker died in 1895 and there was no issue of this marriage. In 1899 Hannah married F. F. Goddard. No settlement was made on this marriage affecting Hannah's property. James Chisholm died on the 31st Sept. 1899 and his wife on the 24th Sept. 1901. On their respective deaths estate duty on the settled funds was paid by the trustees of the settlement, and there still remained to be paid the costs of raising them and also the costs of raising the appointed portions and the general costs. The amount of the settled funds at their decease was about 38,000*l.*

This was a summons taken out in the matter of the marriage settlement of 1851 and in the administration of the estate of James Chisholm by Hannah and the trustees of her marriage settlement against the trustees of James Chisholm's marriage settlement and his executors, and also against Katherine and Annie and Henrietta's trustees, to determine (*inter alia*) whether in the distribution of the trust funds comprised in James Chisholm's marriage settlement the three sums of 10,000*l.* first appointed ought to bear any and, if so, what proportion of the following: (a) The estate duties payable on the death of James Chisholm and also on the death of his wife in respect of the settled funds; (b) the costs and expenses of assessing, raising, and paying the same; (c) the costs of raising and paying the three first appointed portions of 10,000*l.*; and (d) the general costs and expenses of winding-up the trusts of James Chisholm's marriage settlement.

Warrington, K.C. and Ashworth James for the plaintiffs.—As to the duties, it is admitted they must be payable rateably out of each of the appointed funds:

Re Countess of Orford; Cartwright v. Duc del Balzo, (1896) 1 Ch. 257.

It is to our interest that all the costs should come out of the residue.

P. O. Lawrence, K.C. and Dunham for the executors of James Chisholm.—The general rule is that all these costs ought to be borne rateably by the several appointed funds:

Re Saunders; Saunders v. Gore, 77 L. T. Rep. 450; (1898) 1 Ch. 17, 23;

Re Countess of Orford (ubi sup.);

Trollope v. Routledge, 1 De G. & Sm. 662;

Moors v. Dixon, 15 Ch. Div. 566;

Re Shaw; Tuckat v. Shaw, 71 L. T. Rep. 873; (1896) 1 Ch. 343.

The first three appointments are not given "clear," and therefore must pay their share:

Re Currie; Bjorkman v. Kimberley, 36 W. R. 752.

Renshaw, K.C. and Hatfield Green for the first three appointees and their trustees.—The costs of raising the appointed funds ought to come out of the residue. The cases cited relate to general costs, not to those of raising specific funds. Although there is no word "clear," yet the residue is only appointed "after satisfying" the previous three appointments.

Warrington, K.C. in reply.—The cases cited, with the exception of *Re Saunders (ubi sup.)*, lay down no general rule, only dealing with costs over which the court had control. In that case there is merely a dictum of Chitty, J. which is at all in point.

KEKEWICH, J.—It is singular that there should be so little direct authority on this point—certainly there is little. I say "direct" authority because I think there are some cases that assist me. The point arises in this way. Donees of an ordinary power of appointment directed on three several occasions the trustees to stand possessed of 10,000*l.* (I am not quoting the exact language), raised, if necessary, out of the fund in their hands, in trust for three of their daughters. Then there was a fourth daughter about to be married, and they were not sure that the fund would allow them to appoint 10,000*l.* to that daughter as they desired to do, and therefore (again not quoting the exact language) they directed the trustees to stand possessed of the remaining fund, after satisfying the three previous appointments, in trust for that daughter, indicating that they intended her to have 10,000*l.*, because there is a proviso that she is not to have more. Equality of course was intended. It is perfectly clear on principle and on authority that if they had expressed their intention that either of the sums of 10,000*l.* should be raised "without any deduction" or "clear," which was the word used in *Re Currie (ubi sup.)*, then the case which I am considering would have been different, and would have been settled by the express language of the deed. I have nothing of that kind to consider. If the word "clear" had been used, then, as Kay, J. said, and as Chitty, L.J. agreed, 10,000*l.* would have had to have been raised, and the question I am now considering could not have arisen at all. They said nothing of that kind. The only indication that they have given at all, which can be relied upon in arguing as to whether these sums are to be raised clear or not, is that in the ultimate deed they appointed the funds remaining "after satisfying" the previous appointments. That really amounts to nothing; it only brings it back to this—What is "satisfying" the previous appointments? The last appointee can only get what is left after those previous appointments have been satisfied, and it does not in the least assist me to determine what will be satisfying, and the deeds themselves are quite silent. They only say that the trustees are to hold 10,000*l.* in their hands or to be raised in trust for the particular appointee. Now comes the time for distribution, and the question is how the costs of the trustees are to be borne. There is no inconvenience in postponing that question until the time of distribution. The trustees can from time to time help themselves to pay costs out of pocket (if any) and the costs which are chargeable against them by their solicitors. They take them out of the entirety or out of any convenient fund that may be available, cash or invested funds, and entirely without prejudice to the question on whom the burden is ultimately to fall. It arises on the distribution of the fund, and properly arises then, and what is done in the interval cannot at all affect the question. Now the time for distribution has arrived, and one has to consider it. It may be necessary to raise, we will say, the first 10,000*l.* If so, the trustees will incur some expense with reference to that particular fund. For instance, there might be 10,000*l.* invested on mortgage, or part of it, and the trustees might think it necessary to call it in. That might give some trouble; there might be a transfer of the mortgage, some costs might not be paid by the

mortgagor, and there might be expenses incurred in that way. There is a certain amount of distinction between costs of that kind, which might be looked upon as costs of raising the first 10,000*l.*, and the general costs of the trustees, but I do not think that there is any distinction in substance. If they are costs which generally ought to be paid out of the fund rateably, then I do not think there is any distinction as regards those costs. They are costs incurred no doubt in reference to one particular appointment; they are costs incurred in reference to the fund the subject of that appointment of 10,000*l.*, but they are costs incurred with reference to the whole fund in severing that particular 10,000*l.* that has to be severed and appropriated in some way from the rest, and I cannot myself see that any of those costs can be distinguished from the general costs of administering the fund. Now, how am I to deal with the general costs of administering the fund? There have been several cases cited; I will first mention two which seem to be but of little assistance. The first is *Trollope v. Routledge* (*ubi sup.*), before Knight-Bruce, V.C. There there had been considerable argument and many points raised respecting appointments, and when they were all settled counsel of one of the incumbancers contended that, as there was a fair question occasioned by the language of the deeds, the costs ought to come out of the unappointed part of the fund, by analogy to the case of a will, where the costs arising from difficulties of construction fall upon the residuary estate. That was the sole point raised. The Vice-Chancellor said that, as he believed, the rule had not been applied to appointments, and directed the costs to be apportioned according to the amounts of the appointed and unappointed parts of the fund, and to be borne by those parts respectively, according to their amounts. He simply did not apply the rule on the administration of estates which he was asked to apply, and he said he thought the costs ought to be borne differently, he being perfectly free to give that direction if he thought fit. That helps me very little. The Vice-Chancellor considered that that was an equitable way of distributing the costs, but I do not think that he lays down any rule. Then the case of *Re Countess of Orford* (*ubi sup.*), before North, J. as reported, gives me very little assistance. There the donee of a power had appointed 35,000*l.* to one person and the residue otherwise. Then the question arose as to the incidence of costs, amongst other things, and North, J. said: "In this case two questions arise—first about the estate duty, and secondly as to the costs." Then he gives an elaborate judgment as regards estate duty, saying nothing whatever, as far as I can see, about the costs, but the reporter puts this note: "His Lordship also held that the costs of the application were to be borne rateably." Now, as regards that, there are two remarks to be made. First, it is not attempted to be put on principle. It is the decision of the learned judge on a question which he might have been treating as quite within his discretion, and it is only referring to the costs of the application, and probably he did consider that those were entirely in his discretion. There is no rule given in any way, and notwithstanding the way in which he states it at the commencement of his judgment, he does not discuss the question

at all. I think that is of very little assistance also. There are other cases which, I think, do help me more or less. The first of the other cases is *Moore v. Dixon* (*ubi sup.*), a decision of Malins, V.C. There there was a usual power of appointment and exercise in favour of children unequally, but the hotchpot clause came in, and so there was not very much difference in the result. Then there was an action to administer the trusts of the settlement—that was an administration expense purely—and the Vice-Chancellor was asked to determine, and he gave some care to the determination of the question of how those costs were to be borne, and he decided that they were to be borne rateably by all the funds. He not only decides it, but he certainly treats himself as deciding it on authority, including the case of *Trollope v. Routledge* (*ubi sup.*). He is referring to that case when he says: "That is, therefore, a clear decision on the subject, and it seems to have been followed ever since and to have become an established rule." I have reasons for doubting whether it can be regarded as a clear decision on the subject, but Malins, V.C. treated it so, and said—which is extremely valuable—"And to have become an established rule." So that he regarded it as a settled rule of the court, whether settled by that case or otherwise is immaterial, of course. Then the matter came before North, J. in another form in *Re Shaw; Tuckett v. Shaw* (*ubi sup.*). There the estate duty, or rather the account duty, came in, and there were successive appointments by deed of specific amounts, and then the residue was appointed by will. Questions arose there as to the account duty. The learned judge decided that the costs should be borne rateably. There again he did not decide it as a question in his discretion at all. *Trollope v. Routledge* (*ubi sup.*) was cited to him, and, although not referred to in his judgment, he says at the end: "But I am very glad to find that there is authority that the costs should be borne rateably." He therefore seems to have agreed with Malins, V.C. that that was an authority on the point, and notwithstanding what occurs to me looking at the case of *Trollope v. Routledge* (*ubi sup.*), when I find two learned judges saying that it is an authority I think it must be regarded as such, and if it were not an authority at the moment, it was made so by their adoption. Then in the case of *Re Saunders* (*ubi sup.*) Chitty, L.J. certainly states the general rule in perfectly clear terms: "In the case of an appointment, if there are no words to the contrary"—he is distinguishing appointment from legacy—"all the appointees have, according to the general rule, to bear rateably the expenses of the trustees in relation to the administration of the fund, including its distribution." Now, though it was not necessary perhaps for his decision, there is a clear enunciation of the rule by not only a Lord Justice, but by a Lord Justice of very great experience, not only at the Bar, but as a judge of first instance in administration cases—cases of the kind that I am now dealing with, and it seems to me to have exceptionally high authority. He says that all the costs of administering the fund, including the distribution, are to fall upon the appointees rateably. Now, what are the costs of administering the fund? I have already said that I do not see that the costs of raising any particular fund can be distinguished from the other costs of the

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trustees. I will not say there may not be some distinction in a particular case, but generally I think it must be taken that all the costs properly incurred by the trustees are costs of administering the fund. It is for that reason that they are entitled to have them, because they are administering the fund, and in that fiduciary character they incur the costs. It is because they are so incurred that they are to be paid. They are more or less costs of administering the fund. Then why not the costs of raising a sufficient amount to pay the duty? They do not raise the duties in a case of this kind as the appointments are made, but they raise them when required by the Government—they raise them when the time comes for distribution. They raise them out of the whole of the fund, that is to say, any part of it that happens to be convenient for the purpose. The costs of raising those duties are costs incurred in discharge of their duty as administrators of the fund; they are the costs of administering the fund. I think that the rule is this, and it must be taken to be quite settled that all the costs must be borne by all the appointed funds rateably. His Lordship then declared that the duties and the whole of the costs, charges, and expenses of the trustees of the marriage settlement must be borne rateably by all the appointed funds.

Solicitors: Janson, Cobb, Pearson, and Co., Trinder, Capron, and Co.; Simpson and Bowen.

Nov. 25, 26, 27, and 28.

(Before KEKEWICH, J.)

BASS, RATCLIFF, AND GRETTON LIMITED v. DAVENPORT AND SONS BREWERY LIMITED AND *Re* TRADE MARKS OF BASS, RATCLIFF, AND GRETTON LIMITED. (a)

Trade mark—Infringement—Rectification of Register—Mark common to the trade—Improper use of words "Trade mark"—Deceptive mark.

In an action by the plaintiffs, a firm of brewers, the owners of two registered trade marks, each consisting solely of a plain diamond, to restrain the defendants, also a brewing firm, from using in their trade a plain rectilinear ten-sided figure:

Held, that the defendants' device did not so nearly resemble a diamond as to be calculated to deceive, and that the plaintiffs' trade marks had not been infringed.

Upon motion by the defendants to remove the above marks from the register, and also certain registered labels of the plaintiffs, all of which bore inter alia the device of a diamond with the words trade mark on the diamond, and all of which, as well as the two above-mentioned, had been registered as old marks:

Held, that all the marks must be removed from the register on the ground (a) that the device of a diamond was at their respective dates of registration common to the trade; and (b) as to the labels, that the words trade mark being on the diamond alone rendered them deceptive.

Re Apollinaris Company's Trade Marks (65 L. T. Rep. 6; (1891) 2 Ch. 186) followed.

There is no difference between marks used before

1875 and marks not used before 1875, where they are rendered deceptive by the improper insertion of the words "trade mark."

THIS was an action brought by Messrs. Bass, Ratcliff, and Gretton Limited, brewers, against John Davenport and Sons' Brewery Limited. The plaintiffs asked for an injunction to restrain the defendants from infringing the plaintiffs' trade marks Nos. 915 and 31,837, and from using in connection with their trade or business or upon any casks, labels, advertisements, show cards, invoices, or other trade documents the device of a diamond or any colourable imitation thereof, and from passing off beers not of the plaintiffs' brewing or bottling as and for such beers by the use of a solid diamond or any colourable imitation thereof.

The trade mark No. 915 was registered by the plaintiffs on the 26th Jan. 1876 for Burton ales, brown beers, and stouts, and the trade mark No. 31,837 was registered by them on the 24th March 1883 for beer generally. Each mark consisted of the device of a plain diamond only, having on it the word trade mark, the former being coloured red and the latter brown. Both were registered as old marks.

The alleged infringement by the defendants consisted in the use by them on show cards, in conjunction with their name, of a ten-sided figure coloured red, and bearing on it the word "Family." This the plaintiffs alleged was really equivalent to a diamond plus a rectangular bar at each lateral end.

The defendants denied that they had infringed the plaintiffs' marks or any of them, or that the device used by them was a diamond or any colourable imitation thereof, or was calculated to deceive or could deceive. At the same time the defendants moved to rectify the register of trade marks by the removal therefrom not only of the plaintiffs' marks Nos. 915 and 31,837, but also of seven other trade marks registered by the plaintiffs, each consisting of an oval label bearing the name or signature of "Bass and Co.," with the description of the particular kind of beer to which the label applied and a central device consisting of a diamond, coloured red, green, or black, bearing on it the words "trade mark." These seven marks were numbered 2, 27,781, 31,839, 31,840, 43,808, 43,809, and 53,995, all except No. 27,781 being registered as old marks, the earliest of them (No. 2) having been placed on the register on the 1st Jan. 1876 and the latest in 1887.

The grounds upon which the defendants relied in support of their motion to rectify the register were (1) that the device of a diamond, the most conspicuous and essential particular of each trade mark, was on the respective dates of application for registration common to the trade; (2) that the labels were calculated to deceive the public, as the word trade mark was printed only on the diamond and would induce the public to believe that that was the only part of the mark protected, and (3) that the marks were not registered as they had been used.

The action was heard first.

Moulton, K.O., Cutler, K.O., and Schiller for the plaintiffs.

Warmington, K.C., Ralph Neville, K.C., and Sebastian for the defendants.

(a) Reported by O. F. DUNCAN, Esq., Barrister-at-Law.

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KEKEWICH, J.—The plaintiffs sue the defendants for the infringement of their two registered trade marks, Nos. 915 and 31,837, being simply a blank diamond with the words “trade mark” upon it. But for my purpose it is simply a diamond. I have not the slightest evidence that the defendants have either used or have ever intended to use the mark complained of on their casks or as labels for the bottles of their beer. Therefore I may dismiss that from the case. But I have clear evidence that they have used and intended to use it upon show cards and advertisements. That is quite enough, of course, to enable me to try the question whether the design of the defendants as used by them is an infringement of the plaintiffs’ trade marks. Now, in the first place, I look at it from a narrow point of view, and one which is certainly not exhaustive of the case; but I think it necessary to be considered. The plaintiffs allege that it is a diamond. The pleader says: “It has a bar with rectangular corners at the lateral ends of the diamond and the word ‘Family’ printed upon it.” It is treated as a diamond with some addition or alteration. Now Mr. Moulton, with a slight assistance from myself, defined a diamond to be a quadrilateral figure with equal sides and unequal angles, and that no doubt is sufficiently, if not absolutely, mathematically correct, which I believe it to be. At any rate, it is correct enough for our purposes. I have the diamond as used by the plaintiffs before me. I have also before me, not a show card, or advertisement of the defendants, but only the design itself as intended to be used by them, it being incorporated into show cards or advertisements. I repeat, I have no evidence before me at all to show that this design—I omit the word “Family,” which appears to be printed on the one before me—was intended to be used simpliciter—that is to say, by itself, and the user up to the present time has not been of that character, but for the purpose of comparison it is convenient to take this device, standing by itself, and also the diamond of the plaintiffs, and to put the latter on the defendants’ design, when I see that there is no doubt at all, by producing the two long upper lines and the two long lower lines of the defendants’ design in the direction of their length, you can make the right-hand upper line and the right-hand lower line meet, and you can make the left-hand upper and the left-hand lower line meet, so that those lines together form a triangle, but with the result that you cut out a considerable portion of the defendants’ design. There is something left out both above and below the points of meeting. To say that the defendants’ device is a diamond seems to me extravagant. Far from being a quadrilateral figure, it has ten points and therefore ten angles. It is not a diamond with bars at the end, because you have not a diamond there at all. It is something of an entirely different character. It has no doubt unequal angles, and it has four sides of one equality; but, as a geometrical figure, it is as different as anything can possibly be. Therefore, the position that this is a diamond, taking the definition which I have, is to my mind pure extravagance. But, of course, that does not settle the question. The more important question is: Is it so nearly resembling a diamond that it is likely to deceive; that is to say (do not let us forget the test) so calculated to deceive as to induce persons to buy

the defendants’ beer in the belief that it is the beer of the plaintiffs? If it does not do that it is not calculated to deceive. Is it near enough for that? Now, on that I have a certain amount of evidence, which Mr. Moulton says is of great weight. I do not agree with that. I think it is of the slightest possible character. It is the evidence of several gentlemen in the trade, perfectly honest themselves, who say that they think that these showcards, specimens of which I have before me, placed or exhibited outside public-houses, will induce people to believe that Bass’s beer is being sold within. Well, as I have said, the defendants’ device is not a diamond. It is distinctly different from a diamond; and, to my mind, the difference is such as, quite apart from the criticisms which I have made upon it, would necessarily catch the eye of any intelligent person. I remember I am dealing with a person who fairly knows Bass’s diamond mark. I am not taking the case of a man who has never seen Bass and sees something of an angular red figure and thinks that may be what he has heard of as Bass’s diamond mark. That is not what I have to consider. I have to consider the case of a man who is fairly intelligent and fairly well acquainted with Bass’s diamond mark, and I am told that he looks up and sees this red block—it must be red—and then he is induced to think that that is Bass’s red mark. Now we must consider how it is used. The evidence shows that it is never used without Davenport’s name distinctly written, and it requires a very much greater credulity than mine to believe that a man can look up and see this other mark which has, as far as I am aware, no geometrical name—it is a pure invention—with Davenport’s name printed in large letters above it, and be forced to the conclusion, or brought to the conclusion, that it refers to Bass, and that the mark is Bass’s diamond mark; but what is really the gist of the evidence on the plaintiffs’ part is that it is a red block—that is the point. It has angles, no doubt, and has some distant similarity to the diamond; but the great similarity, and the one thing which is impressed upon a person’s mind is that there is a red block which catches the eye. Now, of course, counsel did not attempt to argue that Bass’s were entitled to the colour red, either in an outlined form or any other form; but that is really the point, and I am asked to believe that as long as you get something which an uneducated eye—a careless eye—might possibly mistake for a diamond because it had several angles; as long as it is red he is entitled to say: “I was induced to believe by that that it was Bass’s beer that that was an advertisement of and not Davenport’s.” Now, speaking for myself, I am extremely easily led into thinking that there is something like infringement of trade mark or get up, when I observe that there is evidence of a fraudulent design. But in this case I have nothing of that kind. Messrs. Davenport have acted in the most straightforward way. What they have done is to invent a mark of their own in which they take the colour red, which they are entitled to do. Taking a certain number of lines and angles, which are also common to everybody, they have not produced a diamond, but they have produced something, to my eye, of an entirely different character. I do not think the evidence which makes out that it is of a similar character is entitled to any weight whatever. To my mind,

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a more trumpety case of this class was never brought into court. There will be judgment for the defendants, with costs.

The motions by the defendants for the rectification of the register were then heard.

Warmington, K.C., Ralph Neville, K.C., and Sebastian for the motions (as to the marks Nos. 915 and 31,837).—The plaintiffs have claimed a monopoly of the device of a diamond, whether solid or in outline and in all colours, and whether vacant or filled up by a design, word, or letter, and the court has adopted the view that their registrations are in such a form as to give them this:

Re Worthington's Trade Mark, 42 L. T. Rep. 563; 14 Ch. Div. 8;

Re Hodson, Tessier, and Co.'s Trade Mark. (a)

Re Turney's Trade Mark, 11 Pat. Rep. 37.

(a) Nov. 10 and 14, 1881.

(Before CHITTY, J.)

Re HODSON, TESSIER, AND CO.'S TRADE MARK.

Trade mark—Old user—Concurrent rights—Three mark rule—Trade Marks Registration Act 1875 (38 & 39 Vict. c. 91), s. 6.

Where it is sought to register, by virtue of the "three mark rule," a trade mark alleged to have been used before the 13th Aug. 1875, notwithstanding that a similar old trade mark is already on the register for the same goods, it must be proved that there was a substantial public user of the mark tendered for registration sufficient to confer upon the owner a concurrent right with the owner of the trade mark already registered.

H., T., and Co., brewers, applied for leave to register a trade mark for beer, which they claimed to have used since 1872, and which consisted of a red diamond containing a representation of a lion with a fleur de lis. The application was opposed by B. and Co., brewers, who were the proprietors of a trade mark registered in 1876, which consisted of a red diamond, and had been very extensively used since several years prior to H., T., and Co.'s application. The evidence as to the applicants' user, though showing some sales under the mark, was not satisfactory as to its extent.

Held, (1) that the applicants' mark so nearly resembled the opponents' mark as to be calculated to deceive; (2) that the applicants had not shown a sufficient user of their mark to have acquired a concurrent right with the opponents; (3) that the opponents could have obtained an injunction against the applicants at the date of the passing of the Trade Marks Registration Act 1875, if the facts had been brought to their knowledge; (4) that registration must be refused with costs.

THIS was a summons by Hodson, Tessier, and Co., a firm of brewers at Portsmouth, asking the court to direct the registration of a trade mark for beer, which consisted of a diamond bearing within it the figure of a lion holding a fleur de lis. It was coloured red, and user since 1872 was claimed for it. Bass and Co., of Burton-on-Trent, opposed the registration of this device on the ground that it so nearly resembled a registered trade mark of theirs (No. 915, registered in 1876) consisting of a plain diamond simply coloured red, and which had been largely used since several years prior to 1872, as to be calculated to deceive, and that it infringed their trade mark.

Ince, Q.C. and Cosens-Hardy for the applicants.—We claim registration for our mark as an old mark. It does not so nearly resemble Messrs. Bass's mark as to be calculated to deceive. [CHITTY, J. referred to *Re Worthington's Trade Mark* (42 L. T. Rep. 563; 14 Ch.

Now, we submit that the device of a diamond was common to the trade at the time these marks were registered. The evidence shows that at the

Div. 8.) If it does, we are still entitled to registration as we have proved sufficient user to constitute it an old mark, and it is admitted that three concurrent similar marks may be registered. [CHITTY, J.—If it were shown that both parties started their marks together, each unknown to the other, the case would then be one of concurrent right, and would require, of course, no argument.] In case of proved right by user, no possibility of mistake or liability to deception would warrant the court in granting an injunction. [CHITTY, J.—But by the Act you are not entitled to register without the special leave of the court, where that which you propose to register so nearly resembles a trade mark already registered as to be calculated to deceive, and the resemblance is a question for the court, which, when asked to hold that there is a concurrent right to register, must have regard to what the effect of registration will be—namely, to give an absolute, exclusive, indisputable right.]

Romer, Q.C. (with him *J. Outler*) for Bass and Co.—The applicants' mark so nearly resembles ours as to be calculated to deceive. They have not established a concurrent right, for the evidence of many persons from the applicants' own neighbourhood is to the effect that the mark they claim is unknown there, so that if the mark has been used on beer, it can only have been in an insignificant and surreptitious way.

Ince, Q.C.—According to the evidence adduced by the applicants, no one in or near Portsmouth can have failed to know of their user.

CHITTY, J.—I think I can decide this case without hearing you, Mr. Romer. I have given the best attention I can to the evidence, and to some extent it is a matter of regret to me that the case has been tried on affidavits. I did make a suggestion at the beginning whether counsel desired to have it tried by evidence *visd voce*, and that was on both sides rejected; consequently, I have to go through the affidavits and make up my mind in the best way I can with regard to what I find there. The application is one by Hodson, Tessier, and Co. to register under the 6th section of the Trade Marks Registration Act 1875, and their case is that seven or eight years prior to the date of their application they were using a particular trade mark—namely, the trade mark which they produce. The application is simply to register a lozenge with a lion in the middle of it. Now, the first point that I have to consider with reference to the 6th section of the Act is, whether the trade mark of Messrs. Hodson is, or is not, one which so nearly resembles that of Messrs. Bass and Co. as to be calculated to deceive. I have come to the conclusion that it does so nearly resemble it as to be calculated to deceive; and though I agree that one decision, and even a decision of the Court of Appeal, does not bind a judge upon questions of fact, it seems to me to be impossible to come to any other conclusion than that I have arrived at, consistently with the view of the facts that was taken by the Court of Appeal in *Worthington's case* (*ubi sup.*). Messrs. Bass in that case showed that they were entitled to the triangle. Their registered trade mark was a triangle. The Master of the Rolls and the Court of Appeal held in that case that colour formed no part of the trade mark. What Messrs. Worthington and Co. desired to register was a double triangle with a church in the middle. The Master of the Rolls and the Court of Appeal both decided that, having regard to the purposes for which the trade mark could under the Trade Marks Registration Acts be used, that was on the part of Messrs. Worthington a trade mark which so nearly resembled Messrs. Bass' trade mark, already on the register, as to be calculated to deceive, and so decided. Now that case is absolutely

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date of the plaintiffs' registration there then were and had for years been in public use eleven or twelve marks, all consisting of or containing the device of a diamond, and all of which the plaintiffs are in a position to restrain if those marks remain on the register. These diamonds bear various devices, but all are improperly covered by the plaintiffs' registration, and the device of a diamond was and is common to the trade. This being so, the register should be

undistinguishable from this, except that, if possible, this is a stronger case, because, instead of taking two lozenges, they only take one. Then the second point on which I have heard a very considerable argument is this: It is said, on the part of Messrs. Hodson and Co., that they had at the date of the Act a concurrent right to that which they allege to be their trade mark. Whether they had or had not such a concurrent right is to some extent a question of fact. Now, having listened, as I say, carefully to the affidavits which have been read, and having read them myself, I think there was some user, but of a very slight kind, of the alleged trade mark with reference to beer. Most of the affidavits are of so vague and loose a character that I am not really able to grapple with any definite fact, or anything definite on which to form a judgment. [His Lordship then considered the evidence, and continued.] Now, I have come to the conclusion on the evidence that there was not enough user on the part of Messrs. Hodson and Co. to establish a concurrent user quite apart from registration, and I hold that as a matter of fact. But, assuming that there has been some user of a limited kind, then, having regard to the 6th section of the Act, there arises this question, whether before the Act, if the Act had not been passed, or if the whole case were free of the Act, Messrs. Bass could or could not have obtained an injunction against Messrs. Hodson and Co. It is proved and not questioned that Messrs. Bass and Co. have used this trade mark for several years (I do not care how many) prior to Messrs. Hodson and Co.; Mr. Ince suggested four, Mr. Romer puts it as high as ten or twelve. There was considerable user on Messrs. Bass' part before Messrs. Hodson used it. Then one has the fact that Messrs. Bass and Co. were not aware of Messrs. Hodson's user. That, of course, bears upon the question of the nature and extent of the user, but it also bears on the question I am now considering, which is one of law; could Messrs. Bass and Co., at the passing of this Act, have obtained an injunction against Messrs. Hodson and Co.? I am not sure that it is necessary for my judgment to come to a conclusion; but I think they could, and, if that be so, Messrs. Hodson and Co. had not a concurrent right. The precise object of the application is to register under the 6th section, and it was argued before me that, apart from the Registration Act, Messrs. Bass and Co. could not have got an injunction, because there was no identity, or because the resemblance was not so near as to be calculated to deceive. But the whole application here is to get the benefit of the Act, and register under the Act. It seems to me that I have disposed of this point when I disposed at the commencement of my judgment of the point whether the supposed trade mark of Messrs. Hodson and Co. does or does not so nearly resemble as to be calculated to deceive. The result, therefore, is that I refuse the application with the usual result as to costs. Perhaps I should say I do not consider it in any respect a case of fraud on the part of the applicants, against whom, so far as I can see, no suggestion of fraud could have been made, but I may add that there is no explanation why, until 1880, no one came forward to register this valuable trade mark, assuming it existed. That is an observation on the facts, and perhaps rather an important one with respect to the extent and nature of user.

Solicitors: *Jennings, Son, and Burton.*

rectified, notwithstanding such differences as there are between these marks and the plaintiffs' diamond:

Hyde and Co.'s Trade Marks, 38 L. T. Rep. 777; 7 Ch. Div. 724;

Re Wraggs' Trade Mark, 52 L. T. Rep. 467; 28 Ch. Div. 551.

We say also that these marks ought to have been registered exactly as they had been used, and that is not the case. As to the plaintiffs' labels, we say also that they are calculated to deceive, as the words "trade mark" are printed only on the diamond, so as to indicate that that is the trade mark and that the rest of the label is not:

Re Apollinaris Company's Trade Mark, 65 L. T. Rep. 6; (1891) 2 Ch. 186;

Re Wills' Trade Marks, 68 L. T. Rep. 793; (1893) 2 Ch. 262.

Moulton, K.C., J. Cutler, K.C., and F. P. M. Schiller for the respondents.—There is not sufficient evidence that any of our marks were common to the trade when registered, nor that any other marks now on the register could be confused with them. As to their allegation that some of our marks are calculated to deceive because trade mark appears only on the diamond, we were right to put it there, showing that we did claim that, while we also told the world that the rest of the label was peculiar to us as it bears our name or signature. It is really a question of fact whether or not it is calculated to deceive, and for twenty-five years no one has come forward to say so. The *Apollinaris* case (*ubi sup.*) does not apply to an old mark, only to a new one. See also

Hammond and Co. v. Malcolm Brunker and Co., 9 Pat. Rep. 302;

Re Wills' Trade Marks (ubi sup.).

We are on the register in respect of a claimed user admitted by the office. Our marks were registered as used; according to old practice, the essential part only had to be registered.

R. J. Parker for the comptroller.

KEKEWICH, J.—In this, as in every other case, it is of the first importance to define the issues to be decided. Speaking for myself, I think a case is always best tried, and best decided, when the issue is stated at the earliest possible moment. It is not always possible to do it in the opening sentences of the leading counsel; but still generally, with the loyal assistance of his opponents, he can do it more frequently than not. However, it is not my duty to read a lecture to leading counsel; but it is my duty—and more than my duty—it is put upon me as a necessity, to say what the point is which I consider is raised for decision, and which I am called upon to decide. If I define it wrongly, that of course will be a fundamental objection to my conclusion. For this purpose and for other reasons it is, I think, convenient to take separately and alone, in the first instance, the earliest trade mark of Messrs. Bass and Co., the trade mark No. 915, the single red diamond with the words "Trade Mark" on it (which I may discard for the moment), which was registered on the 17th Jan. 1876. To my mind the question is whether, at that date, a diamond in connection with beer—bottled beer, casks of beer, and beer generally—was common to the trade. In using that expression I intend to interpret it, as I interpreted it in the *Apollinaris* case;

CH.] **BASS, RATCLIFF, & GRETTON LIM. v. DAVENPORT & SONS BREWERY LIM., &C.** [CH.]

and, as far as I am aware, that is the interpretation which has been accepted. To prove that a particular mark—a distinguishing mark—has been used by many persons is not necessarily proving that it was common to the trade. User is evidence of its being common—that is to say, open to the trade; but it is not the user which itself establishes that the mark was common to the trade. I repeat, I consider the question which I have to decide is, whether a diamond used in connection with beer was common to the trade. Mr. Moulton said (and I will just deal with this in passing) that in order to make evidence useful for this purpose you must show that the mark was used on bottles or casks, and that I may disregard correspondence, memoranda, and so forth. I do not follow that; I think it is unnecessary to pursue the matter further, but in passing I say that I do not see that correspondence, memoranda, show cards, and other documents can be safely disregarded. But the point of Mr. Moulton's argument on this part of the case is, that what he has registered is a red diamond, and not a diamond; and if he is right upon that, then on this part of the case there is a great deal to be said in his favour. I have had evidence—the evidence of only one witness, it is true, but uncontradicted evidence—to show that these other users of a diamond are not calculated to deceive, that is to say, that there is not that conflict between them and the diamond mark of Messrs. Bass and Co., which is likely to mislead the public into thinking that what is sold by one is the beer of the other. To my mind that is immaterial. I think, if I were left to myself, without professing to decide it, because, of course, I have not gone narrowly into the question, I should be much disposed to adopt the view of Mr. Moulton's witness, and to say that many, if not all, of these different users are not calculated to deceive, as compared with Bass and Co.'s user; but I am not oblivious of the fact that that has not been the view put forward by Messrs. Bass and Co. in the past, and it is not the view which has been entertained by the courts before whom their applications have come. I am only noticing it now to say that to my mind the point is quite immaterial. I come back to this: Is the use of the diamond in connection with beer common to the trade? Now, why should I limit it to a red diamond? It is not pretended that Messrs. Bass and Co. have, or ever had, at any time, an exclusive right to the colour red. What they have registered is, no doubt, a red diamond; but to my mind the meaning of it is, and must be, that they have registered a diamond which they are pleased to colour red. There is a good body of evidence to show that others have from time to time used a red diamond—I mean before 1876; and in referring to one or two passages in the evidence directly, that can be illustrated, but for my purpose I am putting that aside. As far as I can see, they have no right whatever to appropriate the colour red. All they can claim, if they can claim anything at all, is the right to use the diamond. I remember that I am now only dealing with the mark 915. Now, was that common to the trade at the date of their registration on the 17th Jan. 1876? I select four passages from the evidence—not by any means saying that they are exhaustive, but saying distinctly that they are sufficient for the purpose of answering the question. I turn first to the

evidence of Mr. William Butler. He was a sign writer, and he remembers distinctly the device, on a signboard which he made for Messrs. Chandler, of a plain red diamond; and he puts that back to the year 1873 or thereabouts. The next one is Mr. William Francis Tippler. He was in the employ of Messrs. P. and R. Phipps, and he entered into that employment on the 8th July 1872. He tells us that there was a mark put on the casks and barrels of beer sold by them, and that it was an open white diamond for single diamond beer and two diamonds interlaced for double diamond beer. They sold beer under both descriptions, and the stencil plate itself was produced, and marks, taken by means of that stencil plate, were put in. The next is Mr. John William Clinch. He remembers the device of three clenched fists, surrounded by a diamond, and that was used in 1868 or very soon after—at any rate long before 1876. The fourth and last which I think it necessary to refer to is Mr. Alfred Bates; and he proves the mark which has been referred to this morning, and which is a very convenient one to refer to, because it gives me an opportunity of dealing with Mr. Moulton's argument on this part of the case. He refers to a diamond with an anchor in the centre. The anchor in the centre, I think, was a different colour, but the diamond itself was red. That was used on bottles and on show cards. Now, besides evidence of that character, I have evidence that there was a Diamond Brewery—a brewery which called itself the Diamond Brewery—which seems to me to point strongly to the fact that as one might almost have thought without evidence the diamond was in very common use. I have also the evidence given by one of the witnesses to whom I have referred, that the beer of one firm was ordered as diamond beer—single diamond, double diamond, treble diamond, and so forth—and the way of doing that was to order so many casks or a cask of beer with the diamond drawn in the order and also in the invoice, so as to show whether it was single diamond or double diamond or treble diamond beer, the difference being in quality and in price. The diamond was used not by the word "diamond" but by inserting in the order and invoice the figure of a diamond. I think that evidence is by no means to be disregarded, but at the same time, having mentioned it, I will pass away from it, and I go to the point which, as I understand it, is the main point of Mr. Moulton's argument. I will take as an example amongst others this blue anchor in the middle of a red diamond. As I understand the argument, it is that that is not the use of the same diamond as that used by Bass and Co. I must remind myself that I am only dealing with No. 915. Bass and Co. use only the plain diamond. Here you have something quite different with a distinguishing feature—a feature sufficiently distinguishing to avoid all liability to deceive, namely, the anchor in the centre. Now, of course there is no doubt about this, that you may have a combination trade mark, perfectly good. You may take, if you can ingeniously do so, any two or more common things—figures, words, or whatever it may be—quite common things—and interweave them in such a way as to make something novel of itself. What is true about patents is equally true about trade marks. As long as you have got an integral whole which

is a novelty, what it is made up of is immaterial. Of course, you must not take something which is common and put a common object in your trade mark, but you may use common things to make a novelty, and it is very frequently done; but it does not follow that you may take out of that whole one of the component parts and say that that is good by itself. If you take any figure—I will not suggest any one in particular—any figure you find in a trade mark, which is good because it is part of a combination, you cannot extract that and then put that on a label or otherwise as you may appropriate it, and say "That is good for me." That appears to me to be what Messrs. Bass and Co. wish to do. Here I have the use of a diamond, combined with many other things, with good trade marks or not. I am not dealing with that at all. It is likely enough that they are, or some of them, may be good. Of course, I am not considering that question at all. But Messrs. Bass and Co. could not, it seems to me, in 1876, notwithstanding that they used the diamond, it may be, twenty years before, take out the diamond which had been used in one way and another by Messrs. Ashby and many other people, with additions, and say: "We will appropriate the diamond and nobody else shall use the diamond." That seems to me to be a thing which cannot be done at all. The diamond itself, according to the evidence, was used before Jan. 1876 largely. It was regarded obviously by all the trade as a mark which they were at liberty to use as they pleased. It was, it seems to me, in the sense in which I construe the words, common to the trade at that date. Therefore it ought not to have been registered as the trade mark of Messrs. Bass and Co. Of course, in saying that, as it has been said in other cases by other judges, it does not mean that the comptroller was wrong in registering it. What he had to do was to register an old mark which was proved to be an old mark, and, in order to prevent too much of that sort of thing, there was a rule made that only three identical marks should be registered. That was only a rule of the office. It does not affect the court in the least. There might have been only one registered, there might have been all three; but if you find at this date (as I find as regards the diamond) the mark was common to the trade, then it was improperly registered—not in the sense that the comptroller ought not to have put it on, but that the applicants had no right to put it on, and it must come off. Now, if I am right about that, I need not say a word about the other mark No. 31,837, which is again a plain diamond—whether with "trade mark" on it or not I cannot say—according to the copy which has been furnished to me from the office I do not think it has it on, but for this purpose it is quite immaterial. That is a brown, or, as Mr. Moulton called it, a chocolate mark. Again, colour is immaterial. The only question is, whether that was common to the trade or not. If the diamond was common to the trade in 1876, when the first mark was registered, it was also common to the trade in 1883, because it was registered as an old mark, and one falls within the other. Now, besides those two simple marks, there are a large variety of others. In these Messrs. Bass and Co. have registered a label in which the diamond appears sometimes red, sometimes green, and sometimes black, and in three

cases there is some number or letters added. In each of them they have the words "trade mark" on the diamond. Now, it seems to me that that comes directly within the rule laid down by Fry, L.J., in delivering the judgment of the Court of Appeal in the *Apollinaris* case (*ubi sup.*). I will not read the whole passage, but simply three lines: "An owner of a registered trade mark may put it on a registered label, but not so as to mislead a reader of that label and induce him to believe the only thing registered is the distinctive mark." Now, it seems to me, as it seemed to Fry, L.J. in that case, speaking for himself, that by putting "trade mark" on the diamond, Messrs. Bass and Co. have stated to the public that what they claim as trade mark is the diamond and nothing else, and then they register the whole label. That seems to me deceptive. Mr. Moulton's answer is that in the *Apollinaris* case (*ubi sup.*) the court was dealing with a new mark and not with an old one, and that the words used by the learned Lord Justice cannot be construed as referring to an old mark. I cannot myself see any limitation of what he says. The principle appears to me to refer as much to an old mark as to a new; and as at present advised, if the rest of these labels depended on that point alone, I should think that they ought to come off the register. But I need not say anything more about that, because in each case you have the diamond, and the diamond is put forward at any rate as an essential part of the mark. They have put in and registered as an essential part of the mark that which was common to the trade, and made it impossible for others to use marks of the same character with the diamond in them, without of course running the risk of having an action brought against them by Messrs. Bass and Co., and therefore they are put to a disadvantage, when as a matter of fact they are entitled to use the diamond mark. From what I have said, I think they are entitled to use the diamond mark. It never has been properly registered and cannot be properly registered as a trade mark, because it was common to the trade in 1876. On that ground I think that the application succeeds, and that all these marks must come off the register, and that Messrs. Bass and Co. must pay the costs, including those of the comptroller.

Solicitors for plaintiffs, McKenna and Co.

Solicitors for defendants, J. Westcott, agent for Wright and Marshall, Northampton.

Tuesday, Jan. 14.

(Before KEKEWICH, J.)

BADHAM v. WILLIAMS. (a)

Partnership—Solicitors—Profits—How ascertained.

In ascertaining the "profits" of a partnership, in the absence of special agreement to the contrary, the net profits of each year must be ascertained upon the footing of the moneys actually received and paid in that year without reference to when the work is done in respect of which the moneys are received.

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

CHAN. DIV.]

BADHAM v. WILLIAMS.

[CHAN. DIV.]

By a partnership agreement, dated the 22nd July 1880, made between Mr. G. Badham and Mr. E. W. Williams, solicitors, it was (*inter alia*) agreed as follows:

1. Mr. Williams is to receive 300*l.* per annum up to the end of the year 1880, 350*l.* per annum for the following two years. From the first January 1885 (in lieu thereof) Mr. Williams is to receive one-fourth of the profits (if the business shall have realised a net profit of not less than 1800*l.* per annum in the meantime) for the next five years, and after that one-third of the profits.

This partnership was dissolved in Aug. 1899.

It appeared that no division of the profits had ever been made, and in taking the partnership accounts the question was raised whether the actual receipts and payments for each year were to be taken for the purpose of ascertaining the profits of the firm for that year, or whether moneys received subsequently to the year 1885 for work done previous to that year, when Mr. Williams first commenced to be entitled to a fixed share of the profits, should be considered as belonging to Mr. Badham and not as profits of the firm.

This was a summons taken out by Mr. Badham for the decision of the above question.

Renshaw, K.C. and Stewart Smith for Mr. Badham.—Mr. Williams was only a salaried partner before the year 1885. He ought not to be entitled to share in profits made in previous years in addition to having drawn his fixed salaries in those years.

Warrington, K.C. and Ashworth James for Mr. Williams.

KKEWICH, J.—This is a short question to be shortly disposed of, but it is one of considerable importance. Mr. Renshaw has just now put it in the very strongest possible way. He says draw the line at the end of the year 1884, and start entirely afresh—that is to say, treat it as a new partnership commencing from the 1st Jan. 1885, and then as to what would have been done by Mr. Badham in 1884 the profits arising from that must belong to Mr. Badham. That is so according to my view. That must be so; but the fallacy is that it is not a new partnership. The partnership commenced many years before then, and what we are dealing with is merely a rearrangement of the division of profits from the 1st Jan. 1885, when Mr. Williams receives his one-fourth share of the profits. It could not be contended that he was then still a mere salaried partner. I daresay it would be put so by Mr. Badham whether any profits were earned or not; but even if that were the proper construction of the agreement, what he is to receive at the end of the year from Mr. Badham is a certain amount. It is a partnership commencing with the written agreement and continuing into 1885. If I could adopt the view which Mr. Renshaw has put before me on behalf of the plaintiff, that you should draw the line entirely at that date and start afresh, not only should I take a different view from what I now take, but I should take it from the very reasons which urge me to take the view which I am about to express. It is quite true that a solicitor's business differs from the business of any trading concern. It is a business which we need not describe, and which we all know stands quite alone. But for the division of profits a solicitor's

business must be regarded just as any other business concern, and it must stand on the same lines (so it seems to me) as any ordinary trade or business. There are no doubt many ways of testing it. You may test it with regard to the returns made for income tax, or you may test it for the purpose of division of profits between partners, and you may test it in many ways. But one must not decide too hastily, and consider the returns of income tax, because those are governed by law independent of the partners, whereas the division of profits between themselves is a matter entirely of agreement between the partners, and if they please they can consider as profit made in any given year, profit which is not really attributable to that year. Take the hypothetical case of the first year of a partnership, which, of course, cannot, as a rule, be a profitable one in the sense that there is something coming in representing profit in that year. The system of credit which prevails in all businesses and trades prevents the possibility of a large proportion of profit being made in the first year of any concern. Supposing at the end of the first year the two partners, whether solicitors or traders, say: "We have had a very good year, we have not got much money at the bank, but it is coming in, and most of it will come in in the next three months—there is no reason why we should not divide as profits a considerable sum, and, in order to divide it as profits, why should not we draw upon our bankers?" There is nothing dishonest in that, and nothing contrary to ordinary commercial morality, and certainly nothing contrary to ordinary commercial practice. A man might consider that he was fairly entitled to divide profits and put into his own pocket a sum formed upon an estimate of business done—the money coming from the business done in the year first closed. But would that be properly the profits of the year? It seems to me that in the absence of special agreement the profits of the year must necessarily be the receipts of that given year after the expenditure and whatever else in the way of depreciation fund and so on applicable to the particular case is set against it. In the absence of a special agreement, I do not see how any accounts could otherwise properly be taken on a real footing, and, in the absence of special agreement, I venture to say that no accountant would audit accounts so as to show a profit on that mere footing; you may provide by estimate for it, but of course that requires, to my thinking, a special agreement. If you have no provision for an estimate, then you must take the actual facts. What is true of a trading concern is true of businesses which are not business institutions. Take haphazard such an institution as the Zoological Society of London, which, of course, cannot earn profit. Would it be possible for them to make out an account for the year 1901 on the footing that many subscribers had failed to pay, and that therefore the moneys which they ought to have paid in 1901 should be treated as receipts for that year? The total assets which you might have made you may estimate, but you cannot treat as received for the purposes of ascertaining the balance due, moneys which ought to have been paid in 1901, but which have not been paid. Although in the example I have taken there could be no question of profits, yet the same principle applies to the accounts

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here in the absence of special agreement. There are several cases of recent date in which the question has arisen of what a company ought to divide as profits, and that is because there is a power which sometimes exists or generally exists to estimate the profits earned for the purposes of giving the shareholders immediately a proportion of that which according to a fair estimate would otherwise come into the accounts of the next year. There have been many learned discussions lately, and I suppose there are likely to be more, as to what may fairly be brought into account in that way for the purpose of division of profits, but, in the absence of anything of that kind, if it is a mere question what were the profits made in a particular year, it seems to me that the duty is to ascertain what cash has been received and what cash has been expended, and, if that is fairly done, you know the profits of the year. If there is a large outstanding liability which cannot be settled, the partners will estimate that, and it will not be considered as part of the profits. If there is a large outstanding possible loss, and there is a large sum due to a client, then you would provide for that. But in ascertaining what is really actually divisible for the year fairly, you take the cash account as it stands, and really that is the principle, of course, of income tax returns. The income tax return is a return of the actual receipts less such expenditure as is properly chargeable against those receipts. Putting it in a concrete sense, you may ask a man whether he has had a good year. He says "Yes. I have had an excellent year, but unfortunately those with whom I have been dealing have not paid up, and consequently I find a little difficulty in meeting my Christmas bills." But that does not prevent your having had a good year in the sense of having done a large amount of business. But of course it makes a great deal of difference if you consider it with a view to the money he has available, and if he is asked what he has to divide he would be bound to say: "I have very little to divide. I have very little wherewith to pay, but next year I have every reason to hope from the business done that it will be better." Now, taking another example. A merchant in London consigns a cargo to some foreign port for sale in 1901. Suppose the payment is made by bills perhaps at six or three months, it may run into 1902. Now, are they to treat that as concluded in 1901, and consider that business as attributable entirely to 1901 when the bills may not be met at maturity? Are they to consider those as so much cash for the purposes of that business? It seems to me that that would be entirely wrong in the absence of a special agreement. For the purposes of the balance-sheet, no doubt, they would estimate that there is an outstanding asset which they hope to realise; but for the purpose of ascertaining the profit and loss—that is to say, what is to be divided—it seems to me that they must consider only what they have received, because those bills will only come in when met at maturity in 1902. I am bound to consider this simply apart from any special agreement, because here all I have is that Mr. Williams is to receive a fourth part of the profits and nothing more. Is there any special agreement about that in the plaintiff's favour? There is certainly none. I do not think myself there is anything on the evidence to show that a

special agreement establishing the practice would help the defendant. There is certainly nothing to help the plaintiff. That fact being so, I must decide the question quite apart from any practice which prevails, supposing practice could affect it. It seems to me on that, that although I quite see that it introduces difficulties, and that a line has to be drawn for certain purposes, and that the result of drawing that line in the way I do gives Mr. Williams a share of the profits in the business really transacted by Mr. Badham alone, he being the only responsible partner in the firm, nevertheless, treating it as a partnership which commenced as it did from the date of the written agreement, I think the general principle must apply. I shall give directions to the master that in taking the accounts he must consider the sums received and the sums expended in each year only for the purpose of ascertaining the profits of that year.

Solicitors: *Goldring and Phillips; Davidson and Morris.*

Tuesday, Feb. 11.

(Before BUCKLEY, J.)

Re FENWICK, STOBART, AND CO. LIMITED; DEEP SEA FISHERY COMPANY LIMITED'S CLAIM. (a)

Bill of exchange—Notice of dishonour—Waiver—Two companies with same secretary—Presumption of notice—Duty to communicate—Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), ss. 48, 49, 50.

Notice given to a secretary of one company is not notice to another company of which he is also secretary, unless it comes to him under circumstances which make it his duty to communicate it.

THIS was a claim in the voluntary liquidation of Fenwick, Stobart, and Co. Limited, that the voluntary liquidator of the Deep Sea Fishery Company Limited might be admitted as a creditor, and is reported on the question how far knowledge which comes to an official of a company in one capacity will be imputed to him in another capacity.

Fenwick, Stobart, and Co. Limited were ship-owners and ship brokers, and were interested in the Deep Sea Fishery Company Limited and in an Icelandic company called the Fiskeri Aktieselskabet Gardar (hereinafter called the Gardar Company), which were both engaged in the business of deep sea fishing. The two English companies had several directors in common, and all three occupied the same office, and used the services of a Mr. Higgins as their common secretary.

In Aug. 1900 the Gardar Company were indebted to Fenwick, Stobart, and Co. Limited for 3525*l.*, and were being pressed for payment. They were, however, unable to fulfil their obligations, but the Deep Sea Fishery Company were unwilling that they should be forced into liquidation, and decided to help them over their difficulties. Accordingly, on the 13th Aug. 1900, the Deep Sea Fishery Company held a meeting at which it was resolved to make an advance to

(a) Reported by A. L. MORRIS, Esq., Barrister-at-Law.

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Re PARTINGTON; REIGH v. KANE.

[CHAN. DIV.]

the Gardar Company upon debentures, and it was also resolved that the company

Do purchase from Fenwick, Stobart, and Co. the acceptance of the Gardar Company at seven days' sight for the amount of 3525*l.* so soon as the Gardar Company has passed the necessary resolutions to create mortgage debentures for 17,000*l.* as stated in the former resolutions and has agreed to allot them to the Deep Sea Fishery Company or its nominees, as security for an advance of 8500*l.*, of which the amount of the acceptance to be purchased as above is to be treated as forming a part.

In pursuance of this arrangement, Fenwick, Stobart, and Co. on the same day drew a bill payable at seven days' sight to their own order for the 3525*l.* upon the Gardar Company, who duly accepted it; and the bill was then indorsed over by Fenwick, Stobart, and Co. to the Deep Sea Fishery Company as against their cheque for the amount. The bill was presented on the due date, and was dishonoured.

According to the evidence of Mr. Higgins, the joint secretary of the three companies, which was accepted by the learned judge, it was within the knowledge of all parties concerned that the bill would be dishonoured, and Mr. Higgins also swore that

Fenwick, Stobart, and Co. Limited never received notice of dishonour of the bill from anyone. I never gave any notice of the dishonour of the bill to them, as I was fully aware that it had never been the intention of anyone connected with the transaction that they should be liable, and that the bill was as above stated merely drawn by them at the request of and for the purposes of the Deep Sea Fishery Company.

The Deep Sea Fishery Company ultimately took proceedings upon the bill against the Gardar Company, and recovered 3166*l.*, leaving a balance due of 359*l.*

The companies subsequently went into voluntary liquidation, and the liquidator of the Deep Sea Fishery Company took out this summons claiming to be admitted as a creditor in the winding-up of Fenwick, Stobart, and Co. for the 359*l.*

Levett, K.C. and *E. Ford* for the claimant.—Fenwick, Stobart, and Co. are liable as drawers of the bill.

English Harrison, K.C. and *D. C. Leck* for Fenwick, Stobart, and Co.—We say, first, that under the circumstances there was no intention by any party to this transaction that we should be liable; it was an out and out purchase of the debt without recourse against the original creditor. Secondly, we are discharged under the Bills of Exchange Act 1882, s. 48, for want of notice of dishonour. Higgins, as secretary of the Deep Sea Fishery Company, no doubt knew of the dishonour; but that does not give notice to Fenwick, Stobart, and Co., because he never communicated it to the board of that company, and it was not his duty to do so.

E. Ford in reply.—There is nothing in the facts in this case to oust the ordinary liability of the drawer of a bill. The secretary of a company is the proper person to give and receive notices on its behalf. Higgins did in fact know of the dishonour, and he cannot be treated as two persons; it was not necessary for him to give notice to himself. Moreover, notice may be considered here to have been impliedly waived within the

meaning of the Bills of Exchange Act 1882, s. 50 (b). He referred to

Caunt v. Thompson, 7 C. B. 400.

BUCKLEY, J. stated the facts, and held that the true transaction was a purchase of the debt, without any intention to create a liability on Fenwick, Stobart, and Co. in the event of the debtor not paying, and that the Deep Sea Fishery Company did not in the circumstances acquire any rights under the bill as against Fenwick, Stobart, and Co. His Lordship continued: But there is another point which involves considerations of some general importance, and it is this: Mr. Higgins was secretary of the Deep Sea Fishery Company, the holders of the bill, and he was also secretary of Fenwick, Stobart, and Co., the drawers of the bill. In the one character he knew that the bill was dishonoured. Was that fact notice of dishonour to himself as secretary of Fenwick, Stobart, and Co.? In other words, is it true as a general proposition that a fact which comes to the knowledge of a man as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship? In my opinion, it is not. [His Lordship read Mr. Higgins' evidence, and continued:] So that here the secretary of the Deep Sea Fishery Company knows the fact under circumstances such as that it was not his duty to communicate it to himself as secretary of Fenwick, Stobart, and Co. I think that the true test is this. Where a man holds a double character it is not necessary that he should write a letter from himself to himself to inform himself in another character. What you have to see is whether the information he gets, as secretary of the one company, comes to him under such circumstances as that it is his duty to communicate it to the other company. Suppose, for instance, as secretary of the first company, he learns something which it would be a breach of his duty to that company to communicate to the other company, I should say certainly that is not notice to the other company. It depends upon the circumstances relating to the particular case. Here he knew of the dishonour of the bill by the Gardar Company under circumstances under which it was not his duty to communicate it to Fenwick, Stobart, and Co. Therefore I think there was no notice of dishonour to Fenwick, Stobart, and Co. The result is, upon that ground also, that the drawer, if even, he was ever liable, would be discharged. I therefore dismiss the claim, and order the claimant to pay the costs.

Solicitors for claimant, *Stokes and Stokes*.

Solicitors for Fenwick, Stobart, and Co., *Lowless and Co.*

Feb. 24 and March 3.

(Before BUCKLEY, J.)

Re PARTINGTON; REIGH v. KANE. (a)

Settled Land—Leasehold houses—Defective drainage—Requirements of sanitary authorities—Improvements—Repairs—Tenant for life and remaindermen—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 25, 56—Settled Land Act 1890 (53 & 54 Vict. c. 69), ss. 13, 15.

Leasehold houses were settled upon trust out of the rents and profits to pay the head rents and per-

(a) Reported by A. L. MORRIS, Esq., Barrister-at-Law.

form the covenants reserved by and contained in the respective leases, and subject thereto upon trust for A. for life with remainder over.

Held, that the tenant for life was only entitled to the balance of income remaining after the discharge of all the obligations imposed by the leases, and consequently that the expense of complying with notices to repair defective drainage, which under the covenants of the leases would be payable by the lessee, must be borne by the tenant for life, and not by the capital of the settled property.

Clarke v. Thornton (56 L. T. Rep. 294; 35 Ch. Div. 307) explained.

THIS was an originating summons to determine how the cost of repairs and improvements of drainage required by the sanitary authorities in certain leasehold houses ought to be borne as between tenant for life and remaindermen.

Charles John Partington, by his will dated the 4th April 1888, gave all his leasehold hereditaments to trustees upon trust that they "shall by and out of the rents and profits thereof pay the rents and annual sums reserved by the leases thereof respectively, and perform and observe the lessee's covenants and conditions in the said leases respectively contained, and subject thereto shall hold the same premises" upon certain trusts, under which Maud Legh Kane was tenant for life, with remainders over.

The testator died in Aug. 1889 possessed of leasehold houses in various parts of the county of London, which were held for long terms of years. At the time of his death, the unexpired residues of these terms were respectively about eighteen, forty-eight, fifty-six, and sixty-one years. The majority of the houses were old, and with a defective system of drainage, which was from time to time condemned by the various local authorities. Notices were ultimately served, and it became necessary to expend considerable sums in putting the houses into proper sanitary repair. The expense thus incurred amounted to 415l. 10s. 1d., including 20l. 2s. 6d. for surveyors' fees.

The trustees took out this summons to determine whether the cost of the repairs should be borne by the tenant for life or paid out of capital moneys.

H. Greenwood for the trustees.

H. S. Preston for Mrs. Kane, the tenant for life.—I admit that under the covenants in the various leases the cost of these repairs must, as between lessor and lessee, be borne by the tenant; but that does not conclude the question as between tenant for life and remaindermen. The repairs are an improvement within the meaning of the Settled Land Acts, and ought to be paid for out of capital moneys:

Clarke v. Thornton, 56 L. T. Rep. 294; 35 Ch. Div. 307;

Re Lever; Cordwell v. Lever, 75 L. T. Rep. 383; (1897) 1 Ch. 32;

Re Thomas; Weatherall v. Thomas (1900) 1 Ch. 319.

If there is any conflict between the provisions of the will and the Acts, the latter must prevail: Settled Land Act 1882, s. 56. It makes no difference that the work has been executed without first submitting a scheme, for the court can authorise payment out of capital moneys under

the Settled Land Act 1890, s. 15. He also referred to

Re Richardson; Richardson v. Richardson (1900) 2 Ch. 778.

Underhill for remaindermen.—The expense should be borne by the tenant for life. The lessee is bound under the covenants in the leases to keep the houses in repair, and the first trust of the will is to perform the obligations of the leases; the tenant for life is only entitled to what remains of the rents and profits after these obligations have been discharged. The drainage works do not constitute an "improvement" within the meaning of the Settled Land Acts, but are rather "repairs," which must be paid out of income: (Clarke v. Thornton, *ubi sup.*). No scheme has been submitted, and if the cost is to be paid out of "capital moneys," the order can only be made under the Settled Land Act 1890, s. 15, but that section gives a discretion, and, having regard to the terms of the will, the discretion ought to be exercised by throwing the expense on the tenant for life.

Cardigan v. Curzon-Howe, 9 Times L. Rep. 234.

Baden-Fuller, for another remainderman, relied on the terms of the will.

Cur. adv. vult.

March 3.—BUCKLEY, J. referred to the will, and stated the facts, and continued: The question I have to determine is whether this sum ought to be paid out of capital of the settled property, or whether the same or any part thereof ought to be paid out of income. For the purposes of this decision it may be assumed that some part of the work is not mere repair, but would be an "improvement" within the Settled Land Acts. Under the disposition in the testator's will the tenant for life is not entitled to the rents of these premises. The trusts are, out of the rents and profits, to pay the rents reserved by, and perform the covenants contained in, the leases, and it is only "subject thereto" that the defendant is entitled as tenant for life. In other words, she is tenant for life, not of the rents of these leaseholds, but of the balance of such rents after first paying, amongst other things, this sum of 415l. 10s. 1d. It has, however, been argued before me, on her behalf, that the provisions of the Settled Land Acts override the trusts of the will, and that I ought to deal with the matter as if she were not tenant for life of this balance, but were tenant for life entitled to have the provisions of the Settled Land Acts so applied as to throw the expense of so much as falls within "improvements" upon capital, and thus increase the balance to come to her under the trusts as income. For this proposition the authority relied upon is the decision of Chitty, J. in Clarke v. Thornton (*ubi sup.*). I do not think that authority supports the contention. The facts there were that the trustees were to enter into possession or receipt of the rents, and to manage the estate, with powers of management sufficient to include the making of improvements, and a trust out of the rents to pay the expenses incurred in management or in exercise of any of their powers. An outlay of 4398l. was required for repairs and improvements. The trustees had not done, or determined to do, the works under their power. There were two applications before the court—the one by the tenant for life in

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remainder to have these works done at the expense of income, and the other by the tenant for life in possession to have them, or such of them as were not ordinary repairs, done at the expense of certain accumulated rents which were capital. The applications were made in an action which had been instituted for the administration of the trusts of the will. Under these circumstances there were two powers available—that is to say, first, the court might direct the trustees to proceed under their power in the will, in which case there would have been a trust to pay the expenses out of income, or, secondly, the court might not direct the trustees to proceed under that power, but might, under the Settled Land Acts, provide for such as were improvements at the expense of capital. The court took the latter course. There was not in *Clarke v. Thornton*, as there is here, a trust coming before the trust for the tenant for life, and providing for payment of improvements out of income. There would have been such a trust if the trustees had proceeded, or the court had directed them to proceed, in exercise of their power, an event which did not happen. That decision was followed by Stirling, J. in *Lord Stamford's Settled Estates* (61 L. T. Rep. 504; 43 Ch. Div. 84), and, again, in that case there was no trust for payment of improvements out of income before arriving at the amount payable to the tenant for life. The learned judge, at p. 96, says that in *Clarke v. Thornton* "the will had thrown the improvements on the income." By this he meant, I think, that if they were provided for, not under the Settled Land Acts, but by the exercise of the power in the will, they were thrown upon income—not that they were thrown by the will upon income in any event. I think, therefore, that income and not capital ought to bear the 41*st*. 10*s.* 1*d.* There is another ground upon which I think this case ought again to be decided in the same way. These repairs and improvements cannot be provided for out of capital under the Settled Land Act 1882, because they have been executed without first carrying in a scheme for their execution. The application must be made under sect. 15 of the Settled Land Act 1890. Under that section there is a discretion in the court—*Cardigan v. Curzon-Howe* (9 Times L. Rep. 234). How ought I to exercise this discretion when the testator has expressly provided that these expenses shall be borne by income? It seems to me that I ought to throw them where the testator throws them, and direct the trustees to pay these expenses out of income, inasmuch as the works fall within the obligation to perform and observe the lessee's covenants in the leases. It is said that the tenant for life is restrained from anticipation. I do not see that any difficulty arises from this fact. There will be no further income coming to her under the trust in the will until there shall have been discharged this amount, the payment of which under the trust has priority over the payment to her. I therefore hold that the 41*st*. 10*s.* 1*d.* is to be borne by income.

Solicitors for the trustees, *Mott and Son*.

Solicitors for the tenant for life, *Stow, Preston, and Lyttleton*.

Solicitors for persons interested in remainder, *Stow, Preston, and Lyttleton; Bannister, Williams, and Ram*.

Nov. 8 and 9, 1901, and Jan. 21, 1902.

(Before BUCKLEY, J.)

Re TRENCHARD; TRENCHARD v. TRENCHARD. (a)

Trustees—Settled land—Compromise with tenant for life—Condition of residence—Validity—Settled Land Act 1882 (45 & 46 Vict. c. 38) s. 51.

A testator gave his widow the use of his residence so long as she desired to make it her permanent place of residence and remained his widow, his estate to pay all rates, taxes and outgoings in respect thereof, and to keep the house and grounds in tenantable repair.

Held, that, although the widow would forfeit her interest by voluntarily ceasing to reside apart from selling as tenant for life under the Settled Land Acts, the trustees of the will had power, by way of compromise, to enter into an agreement whereby they agreed to pay the widow out of the estate a fixed annual sum during widowhood, being less than the estimated value of the yearly benefits conferred upon her by the will, she also agreeing to give up such benefits including her right of residence.

EDWARD PENNY TRENCHARD, who died on the 3rd April 1899, by clause 3 of his will, dated the 20th Nov. 1897, after appointing executors and trustees, gave to his wife Matilda the use of his residence Woodville, Honor Oak, in the county of Surrey, so long as she should desire to make it her permanent place of residence and should remain his widow, his estate to pay all rates, taxes, and outgoings in respect thereof, and to keep the house and grounds in tenantable repair. The testator also devised and bequeathed all his real and personal estate, not thereby otherwise disposed of, unto his trustees upon trust for sale and conversion, but directed his trustees to postpone the sale and conversion of his Honor Oak estate until after the death or marriage again of his wife, which should first happen, and empowered them from time to time, as they should think fit, to develop the same estate, and for that purpose to use all or such parts of his estate as they should deem advisable, and to raise, by way of mortgage of any part of his estate, any sum they might think necessary for such development. The residuary estate was to be held upon trust for all his children equally, each daughter's share being settled upon trust for her for life without power of anticipation during any coverture, with remainder to her children equally.

After the testator's death the widow continued to reside at Woodville.

On the 26th July 1900 Byrne, J. declared that she had the powers of a tenant for life of Woodville under the Settled Land Acts, and that she would not forfeit the benefits conferred upon her by the direction in the will as to the payment of rates, taxes, and expenses by selling or leasing the residence under such powers.

It was estimated that the benefits given to the widow by clause 3 of the will, measured by the rental value of the residence, and rates, taxes, and outgoings in respect thereof, were worth 320*l.* a year.

The widow, who found the residence too large for her, was willing, in consideration of the pay-

(a) Reported by H. PROCTOR, Esq., Barrister-at-Law.

ment to her of the sum of 275*l.* per annum, during widowhood, to release the trustees and the estate from all her rights, claims, and demands under clause 3 of the will, and under Byrne, J.'s order so far as it related to clause 3.

This was the hearing of an application by originating summons by the widow that it might be determined whether the trustees had power with the sanction of the court to enter into such an arrangement, and, if so, that it might be approved by the court, or that the house and grounds might be let or sold, for the benefit of the plaintiff and all other persons interested therein.

Astbury, K.C. and *J. Bradford* for the widow.—The condition as to residence is void:

Sect. 51 of the Settled Land Act 1882;
Re Paget's Settled Estates, 53 L. T. Rep. 90; 30 Ch. Div. 161;
Re Ames; Ames v. Ames, 68 L. T. Rep. 787; (1893) 2 Ch. 479;
Re Smith; Grose-Smith v. Bridges, 80 L. T. Rep. 218; (1899) 1 Ch. 331;
Re Carno's Settled Estates, 79 L. T. Rep. 542; (1899) 1 Ch. 324;
Re Haynes; Kemp v. Haynes, 58 L. T. Rep. 14; 37 Ch. Div. 306;
Re Eastman's Settled Estates, (1898) W. N. 170.

If it is not void there is jurisdiction to sanction this agreement on behalf of the infants:

Re New's Settlement; Langham v. Langham, 85 L. T. Rep. 174; (1901) 2 Ch. 534.

It is one which the trustees can enter into by way of compromise: (Trustee Act 1893, s. 21). They also referred to Settled Land Act 1882, s. 50.

W. M. Hunt, for the testator's daughters and their infant children, did not oppose.

E. Clayton, for the four trustees, three of whom were the testator's sons, agreed that the compromise should be for the benefit of the estate generally, but submitted that the trustees had no power to make the proposed payments.

BUCKLEY, J.—The testator in this case, by the third clause of his will dated the 20th Nov. 1897, gave his widow the use of a certain residence so long as she should desire to make it her residence and should remain his widow. The applicant upon this summons, who is his widow, has argued that the provision as to residence contained in this gift is, by sect. 51 of the Settled Land Act 1882, to be deemed void, and that she is entitled during widowhood whether she reside or not. In my opinion this is not so. Sect. 51 of the Settled Land Act 1882 does not provide that a provision such as this shall be void, but that as far as it tends to induce the tenant for life not to exercise the power under the Act it shall be void. It is in the words "as far as" that, in my opinion, the solution of the question lies. Residence may cease upon sale and consequent delivery of possession to a purchaser, or may cease upon cesser of residence irrespective of sale. Complete effect is given to sect. 51 if the provision be deemed to be void in the first case but not in the second. Suppose a disposition of property in favour of A. B. during life or widowhood with a gift over in case of failing to reside, followed by a proviso that for the purposes of the gift over cesser of residence upon sale shall not be deemed a cesser of residence, and suppose a power of sale given to A. B. with an interest for life or widowhood in the proceeds of sale. Such a provision would not

tend to induce the tenant for life not to sell. On the contrary, it would rather induce a sale. If she sold, she would be entitled to the income of the proceeds of sale discharged from the obligation of residence. I see no reason why there should not, consistently with the Act, co-exist a valid gift over in the event of ceasing to reside voluntarily and not upon a sale. It seems to me that that is the joint effect of this will and of the Act. In the present case Byrne, J., by an order of the 26th July 1900, has declared that the widow has the power of a tenant for life under the Settled Land Act, and that she will not forfeit the benefits given her by the will by selling under such power. In other words she can sell, and if she sells she will be entitled as against the proceeds of sale to the same annual benefits (which must then be represented by money) as if she had not sold. This follows the decisions of Pearson, J. in *Re Paget's Settled Estates* (*ubi sup.*); of North, J. in *Re Ames; Ames v. Ames* (*ubi sup.*); and of North, J. again in *Re Smith; Grose-Smith v. Bridges* (*ubi sup.*). The result of sect. 51 is that the provision, as far as it is a fetter upon the power of sale, is void, and under sub-sect. 2 of that section a new estate is given to the beneficiary by virtue of the statute extending to a like interest in the proceeds of sale. But this having been insured, the words "as far as" in sect. 51 are satisfied, and if there be a voluntary cesser of residence apart from sale, there is no reason why the testator's disposition should not have effect, inasmuch as that provision does not tend to induce the tenant for life not to sell. This was the decision of North, J. in *Re Haynes; Kemp v. Haynes* (*ubi sup.*). It was argued that the decision of Romer, J. in *Re Eastman's Settled Estates* (*ubi sup.*) is inconsistent with this view. In my opinion that is not so. The form of the summons is stated in 43 *Solicitors' Journal*, 114—it did not go to the question of what the rights of the widow would be if she voluntarily ceased to reside apart from sale. The question whether the provision for the reduction of the annuity was void under sect. 51 was raised in connection with the question whether the applicant was entitled during widowhood to the income arising from the proceeds of sale. That question, as it seems to me, is the only question which the learned judge answered. He did not decide that, if she voluntarily ceased to reside, the reduction of the annuity would not take effect. In my judgment, therefore, the applicant in this case is not entitled to an interest during the widowhood discharged from the provision as to residence. But if she sells, and, therefore, ceases to reside, she will, by virtue of sect. 51 of the Act of 1882, be entitled as against the income of the proceeds of sale to the same benefits as if she had not sold. Under these circumstances the question is whether the trustees can compromise her rights in the manner proposed. The summons asks first as to compromise, and, secondly, in default of a compromise, that the house may be let or sold. The attitude of the applicant, as I understand it, is this. She says: "I have a beneficial interest in this house, and I propose to keep it either by continuing to reside in it or by exercising my right of selling it under the Act of Parliament, and, therefore, having a beneficial interest in the proceeds of sale measured by the benefit given to me by the will." Under sect. 50

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of the Settled Land Act 1882 she cannot assign or release her powers as tenant for life to sell, but there is nothing in the Act to prevent her from making any arrangement as to a disposition by her of her rights in the house. The nature of the compromise is this: The pecuniary benefit given to her by clause 3 of the will is at present about 320l. a year, which is measured by the rental value of the house and the rates and taxes and other outgoings which the trustees are bound to pay. She says: "I am willing to take in exchange for that 275l. a year. Pay me something less than the amount I am entitled to under the will, and I will give up my right to reside in the house." If that offer is accepted and she goes out of residence, her estate ceases, but she has been paid for it by a sum payable annually. The sale must be either good or bad. If it is good, she loses her interest in the property, but she keeps the purchase money. If it is bad, there is no forfeiture, and she resumes her right of residence and her powers of sale. She only goes out of residence because she is paid the value of the right. She sells something of which she is the owner, and gets its value. It is argued for the trustees that this is a sort of investment of money belonging to married women and infants, and is a misapplication of their funds. That argument seems to me to be fallacious. This is not an investment of their funds; at present the estate is subject to a payment of 320l. a year, and in future it will be liable to pay 275l. In fact they are receiving something; they are not paying anything. They pay something less than before, and to that extent get a benefit. The widow gives up something, but she obtains this benefit, that she is no longer obliged to reside in a certain house. The trustees get this benefit, that they are relieved from the difficulty in which they have been placed that the widow might have continued to reside, and thus prevented the development of the estate, or she might have sold the house under the statutory powers and yet have retained her interest in the proceeds of sale. It seems to me that the rights which she gives up are for the benefit of the estate, and that the compromise is a proper one and within the power of the trustees, and I sanction it accordingly.

Solicitors: *Harston and Bennett; Wards, Perks, and McKay.*

KING'S BENCH DIVISION.

Nov. 22 and Dec. 16, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WAKEFIELD CORPORATION (apps.) v. COOKE AND OTHERS (resps.). (a)

Local Government—Private street works—Summary jurisdiction of justices—Decision that road is highway repairable by inhabitants at large—No estoppel—Wakefield Corporation Act 1887 (50 & 51 Vict. c. lxxi.), ss. 29, 30, 31—Private Street Works Act 1892 (55 & 56 Vict. c. 57), ss. 6, 7, 8.

The decision of justices on an objection taken under sect. 30 of the Wakefield Corporation Act 1887 (which is identical with sect. 7 of the Private Street Works Act 1892), that the street in

which the works are proposed to be executed is a highway repairable by the inhabitants at large, is not a judgment in rem and will not estop the local authority from subsequently claiming the amount of an apportionment in respect of the same street under proceedings subsequently taken.

Effect and scope of sects. 29, 30, and 31 of the Wakefield Corporation Act 1887 (corresponding to sects. 6, 7, and 8 of the Private Street Works Act 1892) considered.

Reg. v. Hutchins (44 L. T. Rep. 364; 6 Q. B. Div. 300) followed.

CASE stated by justices.

At a meeting of the general works committee of the corporation of Wakefield, held on the 26th Nov., the following resolution was passed:

That in pursuance of sect. 29 of the Wakefield Corporation Act 1887 the corporation do the following private street works in the private street known as Sludge-lane in this city, extending from Eastmoor-road for a distance of 350 yards, namely, sewer, level, metal flag, kerb, channel, and make good such street; and further, that the city surveyor be directed to prepare as respects such street, and in accordance with the provisions of the said Act—(a) a specification of the private street works above referred to with plans and sections; (b) an estimate of the probable expenses of the works; and (c) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the said Act.

This resolution having been duly approved of at a meeting of the council, the city surveyor on the 11th Jan. 1901 laid before a meeting of the general works committee the specification, plans, and sections, estimate and provisional apportionment which he had been directed to prepare. The committee passed a resolution recommending the council to pass a resolution approving of such specification, plans and sections, estimate and provisional apportionment, and to order that such resolution be published and copies thereof served in the manner required by the Wakefield Corporation Act 1887.

On the 12th Feb. 1901 the corporation resolved that the specification of the private street works required to be carried out in that portion of the private street known as Sludge-lane, extending from the Eastmoor-road for a distance of 350 yards, together with the plans and sections of such works, the estimate of the probable expenses, and the provisional apportionment of the estimated expenses among the premises liable to be charged therewith, which had been prepared by the city surveyor, were approved as required by the Wakefield Corporation Act 1887; and, further, that this resolution was to be published and copies of it served in the manner required by that Act.

This resolution was duly published and copies of it served on the owners of the premises shown as liable to be charged in the provisional apportionment as required by the Act.

Alfred Green, George Stubley, Elizabeth Cradock, Robert Cockell, J. B. Cooke, G. T. Kenworthy, C. B. L. Fernandes, and G. B. Firth, the owners of premises shown in the provisional apportionment as liable to be charged with part of the expenses of the works to be carried out in the street, by separate notices served upon the corporation on the 16th March 1901, objected to

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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the proposals of the corporation on the grounds (a) that Sludge-lane was not and did not form part of a street within the meaning of the Wakefield Corporation Act 1887; and (b) that Sludge-lane was a highway repairable by the inhabitants of the city of Wakefield at large.

The county council of the West Riding of Yorkshire, the owners of certain other premises shown in the provisional apportionment, by notice served on the corporation on the same day, objected to the proposals of the corporation on similar grounds, with the following additional ground, that the street was a highway repairable by the inhabitants at large, and was so found to be by the justices of the city of Wakefield at a court of summary jurisdiction held at Wakefield on the 6th Jan. 1898.

The month during which owners of premises shown in the provisional apportionment as liable with any part of the expenses of executing the works could by written notice object to the proposals of the corporation expired on the 23rd March 1901.

Messrs. Claude Leatham and Co., as solicitors and agents for the acting executors and trustees of the will of Thomas Nichols, one of the owners shown in the provisional apportionment as liable to be charged with some part of the expenses of the works proposed to be carried out in Sludge-lane, by notice served on the corporation on the 20th April 1901 objected to the proposals of the corporation on similar grounds.

On the 10th July 1901 the corporation, in pursuance of sect. 31 of the Act, applied to a court of summary jurisdiction in and for the city of Wakefield to appoint a time and place for determining the matter of all the objections, and the 25th July 1901 at the Town Hall at Wakefield was appointed for the purposes. At the hearing it was admitted that all the resolutions, plans, and notices had been passed, prepared, published, and given by the corporation in accordance with the provisions of the Act, but the objectors objected that the matter was *res judicata*, and a certified copy of an order of three justices of the city of Wakefield dated the 6th Jan. 1898, which had not been appealed against and remained in full force and effect, was put in.

The order was as follows:

In the city of Wakefield, before the court of summary jurisdiction sitting at the Town Hall in the said city, Jan. 6, 1898.—Whereas the mayor, aldermen, and citizens of the city of Wakefield in exercise of the powers vested in them by virtue of the Wakefield Corporation Act 1887 at a meeting duly held and convened on March 9, 1897, passed a resolution of which the following is a copy: "That the specification of the private street works required to be carried out in the private street commonly known as Sludge-lane in this city, together with the plans and sections of such works, the estimate of the probable expenses of such works, and the provisional appropriation of the estimated expenses among the premises liable to be charged therewith which had been prepared by the city surveyor in accordance with instructions given to him now laid before this meeting, be approved as required by the Wakefield Corporation Act 1887; and, further, that this resolution was duly published, and copies of such resolution were duly served on the owners of the premises shown as liable to be charged in the said provisional apportionment, and whereas in accordance with the provisions of the said Act the following owners—namely, Frederick Simpson, J. B. Cooke, George Stubble, Thomas Nichols, Robert Cookell, Alfred

Green, G. F. Firth, the county council of the West Riding of Yorkshire, and the executors of the late Benjamin Watson—objected to the proposals of the corporation on (*inter alia*) the following ground: 'That Sludge-lane is a highway repairable by the inhabitants of the city of Wakefield at large; and whereas as further required by the said Act the corporation . . . made application to two of Her Majesty's justices of the peace acting in and for the city of Wakefield . . . to appoint a time and place for hearing the matter of the said objections . . . and whereas . . . two of Her Majesty's justices of the peace acting in and for the said city . . . did appoint . . . Monday, December 20, 1897 . . . for hearing and determining the matter of the said objections, from which day the hearing and determining of the matter of the said objections as aforesaid hath been adjourned to this day, and whereas we, the undersigned, sitting as a court of summary jurisdiction in pursuance of sect. 31 of the Wakefield Corporation Act 1887, to hear and determine the matter of all such objections as aforesaid, do hereby determine that the following objection—namely, that Sludge-lane is a highway repairable by the inhabitants of the city of Wakefield at large—made by or on behalf of the said Frederick Simpson, J. B. Cooke, George Stubble, Thomas Nichols, Robert Cookell, Alfred Green, G. F. Firth, the county council of the West Riding of Yorkshire, and the executors of the late Benjamin Watson, is a good and valid objection.'"

It was admitted as a fact by all the parties that the resolutions, plans, notices, and objections referred to in the application of the 10th July 1901 related not only to so much of Sludge-lane as was the subject-matter of the proceedings of the 6th Jan. 1898, but also to an additional length of eighty yards in a straight line and continuous therewith.

The same objectors were present or represented at the hearing on the 25th July 1901 as were present or represented at the hearing on the 6th Jan. 1898, except Frederick Simpson and Thomas Nichols. Elizabeth Cradock, who objected on the 25th July 1901, was not an objector on the 6th Jan. 1898, although then owning property the subject-matter of the proceedings. The property belonging to Frederick Simpson on the 6th Jan. 1898 was included in the proceedings of the 25th July 1901 as belonging to George Stubble, by Stubble having purchased the property from Frederick Simpson in the meantime. Thomas Nichols had died between the 6th Jan. 1898 and the 25th July 1901, and his executors, as owners of the property included in the proceedings of the 6th Jan. 1898, were represented at the hearing on the 25th July 1901. The property belonging on the 6th Jan. 1898 to the executors of Benjamin Watson had been acquired from them by G. T. Kenworthy and C. B. L. Fernandes, and was included in the proceedings of the 25th July 1901, at which they appeared. It was admitted that C. B. L. Fernandes was also present at the hearing on the 6th Jan. 1898, and that he expressed his willingness to be bound by the proceedings on that occasion.

It was contended on behalf of the objectors that as the court of summary jurisdiction had on the 6th Jan. 1898 found as a fact that Sludge-lane was a highway repairable by the inhabitants at large, and had so determined, and that as the subject-matter, namely, as to whether Sludge-lane was a highway repairable by the inhabitants at large, and the parties, namely, the corporation on the one hand and the owners of the property

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abutting on the road in question on the other, were the same, the matter was *res judicata*, and the corporation were estopped in the present proceedings by the determination of the court on the 6th Jan. 1898.

It was contended for the corporation, on the authority of *Reg. v. Hutchins* (44 L. T. Rep. 364; 6 Q. B. Div. 300), that the court of the 6th Jan. 1898 had no power to try the question whether Sludge-lane was a highway repairable by the inhabitants at large, and that the subject-matter was not the same by reason of the corporation having taken a greater length of road than on the previous occasion, and that the parties were not the same, since some of the property had changed hands since the 6th Jan. 1898, and one owner objected who did not object then. The corporation further urged that since the 6th Jan. 1898 they had discovered and intended to adduce in evidence certain additional facts relevant to the objection that Sludge-lane was a highway repairable by the inhabitants at large.

The justices decided that the matter was *res judicata*, and declined to hear any evidence or go into the merits of the objection, but stated this case for the opinion of the court.

The sections of the Wakefield Corporation Act 1887 (50 & 51 Vict. c. lxxi.) relevant to the question in the case are the following, which are practically identical with sects. 6, 7, and 8 of the Private Street Works Act 1892 (55 & 56 Vict. c. 57):

Sect. 29 (1). Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, kerbed, channelled, made good, and lighted to the satisfaction of the corporation, the corporation may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works), that is to say, to sewer, level, pave, metal, flag, kerb, channel, or make good, or to provide proper means for lighting such street or part of a street, and the expenses incurred by the corporation in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street. (2) The surveyor shall prepare as respects such street or part of a street (a) a specification of the private street works referred to in the resolution, with plans and sections (if applicable); (b) an estimate of the probable expenses of the works; (c) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act. Such specifications, plans, sections, estimates, and provisional apportionments shall comprise the particulars prescribed in part 1 of the 2nd schedule to this Act and shall be submitted to the corporation, who may by resolution approve the same respectively with or without modification or addition as they think fit. (3) The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments shall be published in the manner prescribed in part 2 of the 2nd schedule of this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment. During one month from the date of the first publication the approved specifications, plans, and sections (if any), estimates, and provisional apportionments (or copies thereof certified by the surveyor), shall be kept deposited at the corporation offices, and shall be open to inspection at all reasonable times.

Sect. 30. During the said month any owner of any premises shown in a provisional apportionment as liable

to be charged with any part of the expenses of executing the works may by written notice served on the corporation object to the proposals of the corporation on any of the following grounds (that is to say) (a) that an alleged street or part of a street is not and does not form part of a street within the meaning of this Act; (b) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large.

Sect. 31. (1) The corporation at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors, and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be and with the same powers and subject to the same provisions with respect to stating a case as if the corporation were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution, plans, sections, estimates and provisional apportionments, or any of them, on the application either of any objector or of the corporation. The court may if it thinks fit adjourn the hearing and direct any further notices to be given. (2) No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever. (3) The costs of any proceedings before a court of summary jurisdiction in relation to objections under this Act shall be in the discretion of the court, and the court shall have power if it thinks fit to direct that the whole or any part of such costs ordered to be paid by an objector or objectors shall be paid in the first instance by the corporation and charged as part of the expenses of the works on the premises of the objector or objectors in such proportion as may appear just.

Macmorran, K.C. (Senior with him).—The only question the justices were entitled to decide in 1898 was whether the resolution brought before them was valid or not. They decided that it was not valid on the ground that Sludge-lane was a highway repairable by the inhabitants at large. This ground of their decision was a mere finding of fact, and was in no sense a judgment at all, or at any rate a judgment *in rem*, settling finally the status of Sludge-lane. The justices had no jurisdiction to decide that question. Therefore the decision as to the resolution in 1898 in no respect made the matter now in question *res judicata* (*Reg. v. Hutchins, sup.*) But even if the justices had jurisdiction to decide the matter, their decision would only be binding between the same parties, and so far as the subject-matter of the proceedings was the same. Here the parties are different, and the subject-matter is not the same portion of Sludge-lane, but the same portion and a further part of that lane.

Danckwerts, K.C. (Alexander Glen with him) for some of the objectors.—*Reg. v. Hutchins (sup.)* was a decision upon the procedure established by sect. 150 of the Public Health Act 1875. In that section no express power is given to the justices to decide whether a road is or is not a highway repairable by the inhabitants at large. All they are entitled to do is to decide whether or not the expenses sued for are recoverable. But under sects. 29 to 31 of the Wakefield Corporation Act 1887 jurisdiction is expressly given to the justices to decide that question. It is made an objection which may be expressly set up, and which the

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justices may expressly decide, and in sect. 31 (2) their decision is to be final. It is not an incidental question, but the question decided by the justices. Their decision, then, is final as to the status of the road, and estops the reopening of the question in any way. He referred to

Reg. v. Inhabitants of Hartington, 4 E. & B. 780;

Reg. v. Inhabitants of Haughton, 1 E. & B. 501;

Reg. v. Blakemore, 2 Den. C. C. 410.

Compston for other objectors.

Macmorran, K.C. in reply.—Neither the Wakefield Corporation Act 1887 nor the Private Streets Act 1892 altered or was intended to alter the law as laid down in *Reg. v. Hutchins* (sup.). The object of both was to enable objections to be taken by persons liable before the works were executed and the expenses incurred. He referred to

Twickenham Urban Council v. Munton, 81 L. T. Rep. 136; (1899) 2 Ch. 603.

Dec. 16.—Lord ALVERSTONE, C.J. read the following judgment of the court:—This is an appeal from a decision of the justices of the city of Wakefield deciding that certain proceedings under the Wakefield Corporation Act 1887, for providing for the expense of paving, metalling, and channelling a certain street of the city were invalid on the ground that in similar proceedings taken in the year 1898 it had been decided by the justices having jurisdiction in the matter that the street to which the proceedings relate was a highway repairable by the inhabitants at large. The matter arises under sects. 29 to 31 of the Wakefield Corporation Act 1887, which contain provisions analogous to those in sect. 150 of the Public Health Act 1875, and practically identical with sects. 6 to 8 of the Private Street Works Act 1892. The point raised for our decision is whether a finding of the magistrate taken under sect. 30 of the Act of 1887 to the effect that a street is a highway repairable by the inhabitants at large is conclusive in any subsequent proceedings for apportionment, whoever may be the parties to the subsequent proceedings. In the case of *Reg. v. Hutchins* (sup.) it was decided by the Court of Appeal that an adjudication by justices upon a summons to recover the amount of an apportionment made under sect. 150 of the Public Health Act 1875, that a street was a highway repairable by the inhabitants at large, did not prevent the local authority from subsequently claiming the amount of apportionment in respect of the same street under proceedings subsequently taken. It was, however, contended before us that the provisions of sect. 31 of the Act of 1887 and the corresponding provisions of sect. 8 of the Private Street Works Act 1892 had altered the law in this respect, that proceedings under these sections were of the nature of proceedings *in rem*, that they affected the status of the street, or that at least they were conclusive and final as between the corporation and the person who either themselves or their predecessors in title had been parties to the earlier proceedings. This contention was based upon the following among other grounds: that under sub-sect. (b) of sect. 30 the owner of premises shown in a provisional apportionment liable to be charged would object upon, among other grounds, that the street in question was a highway repairable by the inhabitants at large, and that under sub-sect. 1 of sect. 31 a court of summary jurisdiction was to appoint a time for determining the matter

of all objections, and might proceed to hear and determine the matter of all such objections in the same manner as if the corporation were proceeding summarily against the objectors to enforce payment; and, further, that by sub-sect. 2 of the same section, by which it was provided that "no objection which could be made under this shall be otherwise made or allowed in any suit, proceeding, or manner whatsoever." It was also argued that these provisions show that any objection which could be raised by objectors was to be determined once and for all, not only as regards the apportionment then under consideration, but for the purposes of any future proceedings under the same section. The consequences of such a view are very far-reaching. For example, although some only of the owners liable to be charged may have taken objections, the finding would be held binding upon other owners or persons entitled to object who were no parties to the proceedings. If the justices had power to determine finally and as against all parties that a street was a highway repairable by the inhabitants at large, they must have power to determine that it was not, and in that case a serious injury might be inflicted, because other owners might be in a position to produce quite different evidence from that on which the decision proceeded. Still, the consequences of giving effect to this contention would not be sufficient to prevent us from so holding if the language of the section fairly read leads to that conclusion. But, in our opinion, the provisions were enacted with an entirely different object, and not, as was suggested, with the view of altering the law as laid down in the case of *Reg. v. Hutchins* (sup.). We think that the objects of sects. 30 and 31 were to enable objectors to raise objections to the apportionment before any expense had been incurred, and also to enable preliminary points to be determined at an early stage, which could not be raised upon a summons to recover the apportioned amount. Under sect. 150 of the Public Health Act 1875, the urban authority were compelled, before they could take proceedings to recover the amount, to execute the work. The section in question—sect. 30 of the Act of 1887—allows owners to raise questions as to the character of the proposed works, the propriety of the estimate, the sufficiency of the plans, and other matters which, if they are to be raised at all, it is convenient that they should be raised before the works are executed. We think that the real jurisdiction given to the justices is that contained in the concluding words of sub-sect. (1) of sect. 31, to "quash in whole or part or may amend the resolutions, plans, sections, estimates, and provisional apportionments," and that the earlier words, "appoint a time for determining the matter of all objections," and the words "and shall proceed to hear and determine the matter of all such objections," are only intended to enable the justices to determine the questions which, as provided by sect. 30, may be raised by the persons entitled to object. This determination enables the justices to quash or amend or confirm the resolutions, plans, estimates, and provisional apportionments. In this view the reasoning of the Court of Appeal in *Reg. v. Hutchins* applies to this case, and we think that the objection taken on behalf of the objectors, that there has been a previous determination that the street in question

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was a highway repairable by the inhabitants of the city at large, was no bar to proceedings taken in this case. It is unnecessary to consider the points which were raised on behalf of the appellants.

Appeal allowed.

Solicitors for the appellants, *Sharpe, Parker, and Co.*, for *C. J. Hudson*, Town Clerk, Wakefield. Solicitors for the first objectors, *Seaton F. Taylor*, for *J. B. Cooke*, Wakefield.

Solicitors for the second objectors, *Radford and Frankland*, for *C. W. L. Fernandes*, Wakefield.

CROWN CASES RESERVED.

Dec. 14, 1901, and Feb. 1, 1902.

(Before Lord ALVERSTONE, C.J., LAWRENCE, BRUCE, WRIGHT, and DARLING, JJ.)

REX v. JAMES. (a)

Criminal law—Practice—Pleading—Indictment—Necessary averment—Negating proviso—Married woman—Larceny by wife of husband's goods—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), ss. 12, 16.

Where a statute by which an offence is created contains a proviso which affords a defence to proceedings taken in respect of the offence, it is not necessary for the prosecution to negative the proviso, unless the proviso is in the nature of an exception so incorporated, directly or by reference, with the enacting clause that the enacting clause cannot be read without the qualification introduced by the proviso.

A married woman was charged on an indictment with larceny of her husband's goods. It was not alleged in the indictment that she was the wife of the prosecutor, nor that the goods were taken by her when leaving or deserting her husband. It was objected that the indictment was bad because it did not allege circumstances which showed that the case did not come within the proviso to sect. 12 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75)—applied to wives by sect. 16—which enacts that no criminal proceedings shall be taken unless under the circumstances mentioned.

Held, on a case stated, that as the proviso to sect. 12 affords a defence merely, stating circumstances which may be pleaded in answer to an indictment founded on the section, it is not necessary that these circumstances should be negated in the indictment.

THIS was a case stated by the chairman of the Glamorganshire Quarter Sessions, and was as follows:—

Sarah Eliza James and Thomas Johnson were indicted on an indictment charging them with stealing certain goods of John Thomas James.

The offence was averred in the indictment as against the form of the statute, and there was no averment that the female prisoner was the wife of the prosecutor.

The evidence showed that Sarah Eliza James was the wife of the prosecutor, and Thomas Johnson a lodger in his house.

On the day alleged in the indictment Johnson induced the prosecutor to go to Cardiff with him,

and during his absence Sarah Eliza James, the wife, removed the articles charged from the prosecutor's house and deserted the house, and shortly afterwards joined Johnson.

Some of the goods were consigned or deposited with a railway company in Johnson's name, and he took delivery of them.

The woman appeared as a witness, and stated that she was the wife of the prosecutor.

At the close of the evidence and before the case was put to the jury, counsel for the prisoners objected that the indictment was insufficient as against the wife for want of an averment that the woman was the wife of the prosecutor, and that the property alleged to be stolen was wrongly taken by her when leaving or deserting her husband so as to complete the statement of an offence under the Married Women's Property Act 1882, ss. 12, 16.

The chairman held that the allegation was not necessary to the form of the indictment, but stated a case for the opinion of the court.

Morgan for the prisoner Sarah Eliza James.—The offence is statutory; it is an offence under the Married Women's Property Act 1882, and therefore all the matters which must be proved should be averred in the indictment. The indictment should have averred that the woman was the wife of John James, and that she stole the goods when about to desert her husband. The indictment is therefore bad. He referred to

Reg. v. Streeter, 83 L. T. Rep. 288; (1900) 2 Q. B. 601;

Hale's Pleas of the Crown, vol. 2, ss. 169, 170.

Parsons for the Crown.—The offence is larceny, not an offence under the Married Women's Property Act 1882. The proviso in sect. 12 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75) merely affords a defence, and it is not necessary to negative a proviso. The *contra formam statuti* in the indictment does not refer to the Married Women's Property Act 1882. He referred to

R. v. Hall, 1 T. R. 320;

Thibault v. Gibson, 12 M. & W. 95.

Morgan in reply.

Cur. adv. vult.

The judgment of the court was delivered by

LORD ALVERSTONE, C.J.—At common law a wife could not steal her husband's goods, and now she can only be convicted of larceny by virtue of the provisions of the Married Women's Property Act 1882: (*Reg. v. Kenny* (36 L. T. Rep. 36; 2 Q. B. Div. 307; 16 Cox C. C. 397.) Sect. 12 of that Act enacts in substance that every woman, whether married before or after the Act, shall have in her own name against all persons whomsoever including her husband (subject as regards her husband to the proviso thereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as a *feme sole*. After further provision the section contains the following proviso: "Provided always that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife." The 16th section provides in substance that a wife doing any act with respect to any property of her husband, which if done by the husband with respect to the property of the wife would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband. Criminal proceedings can only be instituted by the husband against the wife if the wife and husband are not living together at the time the criminal proceedings are taken, and even then they can only be taken concerning an act done by the wife at the time when they were not living together concerning property of her husband, unless such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert her husband. We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so if the act relied upon as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting or about to leave or desert her husband. But the question to be determined is whether the conditions imposed by the proviso contained in sect. 12 and incorporated into sect. 16 are conditions which must be proved by the prosecution to exist in order to establish the offence, or whether the offence may be established without regard to the conditions in the absence of any evidence offered by defendant of facts which would establish a defence under the proviso. If compliance with the conditions is a necessary ingredient in the offence, then we think statements alleging compliance with the conditions are an essential part of the indictment. In *Thibault v. Gibson* (12 M. & W. at p. 94) Lord Abinger, C.B. said: "I believe it is a well-established principle that in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause exempting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence." In the same case Parke, B., after quoting a passage from 1 Wm. Saund. much to the same effect as the passage cited from Lord Abinger, proceeds as follows: "In all cases of exception where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it, and I have some doubt whether the same rule does not also hold even where the exception comes by way of proviso in the same section, although it will not be necessary to decide that point at present." In the case of *Rez v. Jarvis*, reported in the note 1 East, 643, Lord Mansfield, C.J. says: "It is a known dis-

inction that what comes by way of proviso must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them." In the same case Denison, J. says: "There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the Act." And in the same case Forster, J. says: "Where negatives are descriptive of the offence there they must be set forth." In *Chitty on Pleading*, in the chapter on the Declaration, Part 2, its Parts and Particular Requisites in Debt, vol. 1, 4th edit., p. 322, the law is thus stated: "It is material, however, in all cases that the offence or act charged to have been committed or omitted by the defendant appear to have been within the proviso of the statute, and all circumstances necessary to support its action must be alleged." . . . "Where a person is exempt from a penalty under certain circumstances by a proviso in a statute, and not in the body of it, the plaintiff need not state that the defendant is not within the exemptions, for that is merely matter of difference to be shown by the defendant; but where the exception is contained in the enacting clause, it must be negated in the declaration; and where an Act of Parliament in the enacting clause creates an offence, and gives a penalty, and in the same section there follows a proviso containing an exception, which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative the exception; and in this respect there seems a material difference between a proviso and an exception." In *Steele v. Smith* (1 B. & Ald. 94) the marginal note is to the following effect: "Where an Act of Parliament in the enacting clause creates an offence and gives a penalty and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative such proviso in his declaration." In that case Bayley, J. said: "I cannot say that the proviso is part of the same sentence; for if it had been omitted the preceding sentence would have been entire." In the same case Abbott, J. said: "There is a technical distinction between a proviso and an exception which is well understood. All the cases say that if there be an exception in the enacting clause, it must be negated, but if there be a separate proviso, it need not." It is true that the last two quotations refer to declarations in civil actions, but the principles applicable are the same, although no doubt the principles will be applied with greater strictness in criminal than in civil proceedings. In *Hawkins' Pleas of the Crown*, vol. 4, in the chapter on Indictment, chap. 25, sect. 113, p. 68, 7th edit., there is this passage: "It seems agreed that there is no need to allege in an indictment that the defendant is not within the benefit of the proviso of a statute whereon it is founded, and this hath been adjudged, even as to those statutes, which in their purview expressly take notice of the provisos; as by saying that none shall do the thing prohibited otherwise than in such special cases, &c., as are expressed in this Act." We think the substance of the authorities

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is this—that it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception. Thus in an indictment on a statute which enacts that if any person shall put off any milled money whatsoever unlawfully diminished, and not cut in pieces for a lower rate than its nominal value, he shall be guilty of felony, it is necessary to state in the indictment that the money was not cut in pieces (1 Leach, 102). In the present case sects. 12 and 16 must be read together, and the enacting clause in sect. 12, when read in connection with sect. 16, makes the wife liable to criminal proceedings by her husband, subject to the proviso contained in the latter portion of sect. 12. But the conditions imposed by that proviso do not affect the quality or character of the offence. They merely introduce matters which may be pleaded by way of defence, and we think they are not matters necessary to be negated in the indictment. For these reasons we think the indictment good, and that the conviction should be affirmed.

Conviction affirmed.

Solicitor for the Crown, *W. T. Davis*, Porth.
Solicitor for the defendants, *Colenso Jones*,
Pontypridd.

Saturday, Feb. 1.

(Before Lord ALVERSTONE, C.J., WRIGHT,
RIDLEY, BIGHAM, and WALTON, JJ.)

REX v. PENFOLD AND EDWARDS. (a)

*Criminal law—Practice—Procedure—Evidence—
Ingredients of offence—Previous conviction—
Claim to be tried by jury—Trial by jury—
Prevention of Crimes Act 1871—Summary
Jurisdiction Act 1879 (34 & 35 Vict. c. 112),
ss. 7, 9, 20—42 & 43 Vict. c. 49, s. 17.*

Every ingredient of an offence charged in an indictment must be proved before the jury.

By sect. 7 of the Prevention of Crimes Act 1871 a person who has been convicted on an indictment for a crime is guilty of an offence under that Act if (inter alia) he is found in any place under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction.

On the trial of a person charged with an offence under this section, the proper practice is to prove the convictions as part of the case for the prosecution. If the defendant having claimed to be tried by a jury is indicted, the fact of the previous conviction is to be disclosed to the jury.

Rex v. Brown (65 J. P. 136) overruled.

THIS was a case stated by the deputy-chairman of the quarter sessions for the county of London, the facts being as follows:—

The prisoners were charged before one of the

magistrates of the police courts of the metropolis, sitting as a Court of Summary Jurisdiction with an offence under sect. 7 of the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112); that is, that they, being persons who had been convicted of crime, were found in a place under such circumstances as would satisfy a court that they were about to commit a crime, or were waiting for an opportunity to commit an offence punishable on indictment or summary conviction.

The facts relied upon by the prosecution were that the prisoners had each been several times convicted of felony, and were on the evening of a day in December observed by the police to be loitering about certain streets and squares in which most of the houses were occupied by working jewellers; that, noticing the police, the prisoners had run away, and that being apprehended one of them was found to be armed with a revolver.

This offence is not indictable, but punishable on summary conviction.

On being brought, however, before the magistrates, the prisoners claimed to be tried by a jury, and were accordingly dealt with under sect. 17 of the Summary Jurisdiction Act 1879, as if they had been charged with an indictable offence; and an indictment in which their previous convictions were averred was preferred at the quarter sessions.

If the prisoners had been tried by the magistrate these previous convictions would have been proved before him as part of the case against the prisoners.

At the trial at the quarter sessions counsel for the Crown proposed to prove the previous convictions as part of his case, on the ground that the offence for which the prisoners were indicted was that they, being persons who had been convicted of felony, were found in a place under such circumstances as would justify the jury in coming to the conclusion that their intention was to commit a felony, and that the gist of the offence was the prisoners' previous conviction, it being no offence to be found in a place under suspicious circumstances.

*Counsel for the prisoners objected to this evidence on the ground that the rules of procedure contained in sect. 116 of the Larceny Act 1861 (24 & 25 Vict. c. 96), which were applied to proceedings under the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112) by sect. 9 prevented the jury from inquiring into previous convictions charged in an indictment until the defendant had been found guilty of the offence which was the subject of the indictment; that in this case the offence was the intention to commit a felony, and that, therefore, until the jury had found that the prisoners had intended to commit a felony, the facts of the previous convictions must not be proved before them. He cited the case of *Rex v. Brown* (65 J. P. 136), in which the Recorder of London had decided that under similar circumstances the previous convictions should not be disclosed to the jury.*

The learned deputy-chairman overruled the objection and admitted the evidence.

The jury convicted the prisoners.

H. Sutton for the Crown.—The offence is the offence specified by sect. 7 of the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112). The

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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rules in sect. 116 of the Larceny Act 1861 are applied by sect. 9 to the procedure on the trial not for an "offence" but of an indictment for a "crime" as defined by sect. 20. The subject matter of the indictment was then an offence to which the procedure laid down by sect. 116 of the Larceny Act was not applicable. The essential ingredient of the offence was the fact of the previous convictions, and it was necessary that this should be proved, because it was an essential ingredient. The practice laid down in *Rez v. Brown* (sup.) is wrong. The intention of the Act is that the offence shall be dealt with summarily by magistrates to whom the previous convictions would be disclosed.

The prisoners were not represented.

LORD ALVERSTONE, C.J.—It appears that there has been some doubt as to the practice which should prevail on the trial of an indictment when the defendant is charged with an offence under the Prevention of Crimes Act 1871. When in an indictment a crime is charged for which different degrees of punishment are annexed, if the person charged has been previously convicted, then it is clear that the fact of the antecedent convictions should not be known to the jury until after they have found a verdict on the subsequent crime. Sect. 116 of the Larceny Act deals with mixed cases. Now in this case the prisoners were charged with something which would not have been an offence but for their previous convictions, and if they had been tried by a court of summary jurisdiction the fact of the previous convictions would have been before the magistrates who formed the court. But having claimed to be tried by a jury the prisoners were brought before the quarter sessions on indictment. In my opinion when an offence is merely statutory, and requires ingredients specified in the statute, it is right that every ingredient should be proved just as all the circumstances which compose an ordinary crime have to be proved. Sect. 20 of the Prevention of Crimes Act 1871 draws a distinction between "crime" and "offence," but it does not provide that the procedure at a trial before a jury is to differ from that at a trial by justices as a court of summary jurisdiction. We think, therefore, that the learned deputy-chairman was right in allowing all the circumstances which made the offence to be proved before the jury. Our decision in this case overrules *Rez v. Brown* (65 J. P. 136).

WRIGHT, RIDLEY, BIGHAM, and WALTON, JJ. concurred.

Conviction affirmed.

Solicitor: *The Solicitor to the Treasury.*

The prisoners were not represented.

Saturday, Feb. 1.

(Before Lord ALVERSTONE, C.J., WRIGHT, RIDLEY, BIGHAM, and WALTON, JJ.)

REX v. PIKE. (a)

Criminal law—Evidence—Admissibility—Statement of affairs in bankruptcy—Compulsory examination—Misappropriation by trustee—Bankruptcy Act 1883—Bankruptcy Act 1890, General Rule 217—25 & 26 Vict. c. 96, s. 80—46 & 47 Vict. c. 52, s. 16—53 & 54 Vict. c. 71, s. 27 (2).

The statement of affairs made by a bankrupt in compliance with sect. 16 of the Bankruptcy Act 1883 and rule 217 is not a statement made in a compulsory examination within the meaning of sect. 27 (2) of the Bankruptcy Act 1890. It is therefore admissible in evidence against a bankrupt charged with appropriating trust moneys to his own use.

THIS case, stated by Kennedy, J., was as follows:

William Good Pike was tried before me at Worcester at the autumn assizes holden for the city of Worcester on the 23rd Dec. 1901, on an indictment for misdemeanour, consisting of two counts, which it is not necessary for the purpose of this case to set out at length, whereby in substance and effect he was charged under 24 & 25 Vict. c. 96, s. 80, with having unlawfully and wilfully converted and appropriated to his own use certain sums of money of which, under the will of one William Ayre, deceased, he was trustee for the use and benefit of three children of his brother Samuel Robert Pike, with intent to defraud.

In the course of the trial, in order to prove the receipt by the prisoner of certain sums of money, counsel for the Crown tendered in evidence the debtor's statement of affairs in bankruptcy, which showed in sheet E (contingent or other liabilities) the receipt by the bankrupt of the moneys in question. The statement of affairs was the statutory statement of affairs prepared by the accused in the course of his bankruptcy, verified by oath by the bankrupt before the assistant official receiver at Worcester, and filed by the assistant official receiver in accordance with the provisions of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 16, and General Rules, 217.

The file of the bankruptcy proceedings will be in court so that reference to it can be made if necessary.

Counsel for the prisoner objected to the receipt of this evidence upon the ground that it was evidence which was rendered inadmissible by the operation of the provisions of 24 & 25 Vict. c. 9, s. 85, as amended by 53 & 54 Vict. c. 71, s. 27. He based his contention upon the words which are contained in sub-sect. (2) of the last cited section, which provides that a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence in any proceeding in respect of any of the misdemeanors referred to in sect. 85.

After hearing the argument of counsel for the prisoner and reply of counsel for the Crown, who pressed for the admission of the evidence, I was of opinion that the objection was not well founded,

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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and that the statement of affairs did not constitute a compulsory examination or deposition made before a court on the hearing of a matter in bankruptcy within the meaning of the said section, and I admitted the evidence.

The accused was found guilty by the verdict of the jury.

The question for the opinion of the court is whether the evidence above mentioned was or was not properly admitted, and whether the conviction should stand.

W. R. KENNEDY.

J. B. Matthews for the prisoner.—This was a statement made in the course of a compulsory examination. A bankrupt is by rule 217 compelled to make a statement of his affairs. The examination in court is only a subsequent part of the same proceeding. The Bankruptcy Acts are penal statutes and must be construed strictly:

Fletcher v. Lord Sondes, 3 Bing 580.

He also referred to

Re Mysore West Gold Fields, 61 L. T. Rep. 453; 42 Ch. Div. 535;

Green v. Lord Penance, 41 L. T. Rep. 353; 6 App. Cas. 657.

A. T. Lawrence, K.C. (with him *N. G. Davidson*) for the Crown.—There is nothing in the Bankruptcy Acts which makes a statement inadmissible because it was made under compulsion. The statement or admission referred to in sect. 27 (2) of the Bankruptcy Act 1890, which is inadmissible, is a statement or admission made before a court at a "hearing." The statement in question was not made in a compulsory examination before a court. The statement of affairs to be made to the official receiver is one of the proceedings consequent on the making of a receiving order: (Bankruptcy Act 1883, s. 16); these proceedings are quite distinct from the proceedings before a court of which the public examination of the debtor is one. That examination may be dispensed with. [He was stopped by the Court.]

J. B. Matthews replied.

Lord ALVERSTONE, C.J.—We are all of opinion that the statement was admissible. The prisoner was charged with the misappropriation of a trust fund, and in order to prove that charge the statement of his affairs made by him in his bankruptcy was put in evidence. It is argued that this statement was not admissible as evidence because of the provisions of the Bankruptcy Act 1890, s. 27 (2), that a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding against that person in respect of any of the misdemeanours referred to in sect. 85. On the other hand it is argued that this was not a statement made in the hearing of any matter in court, and was not made in a compulsory examination. We must look at the object of the section. The words are "in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy." *Prima facie* this seems to apply to the case of a man making a statement on cross-examination, when he is forced to say what he would not have said under ordinary circumstances. But we are asked to extend that provision to all statements made by a bankrupt in the course of his bankruptcy.

Does the statement of affairs come within the words "compulsory examination"? We think that if that had been the intention of the Legislature other language would have been used. I come to the conclusion that the statements made by a bankrupt in his statement of affairs are not statements made by him in a compulsory examination.

WRIGHT, RIDLEY, BIGHAM, and WALTON, JJ. concurred.

Solicitors: *Solicitor to the Treasury*; *Dobbs and Hill*, Worcester.

House of Lords.

Tuesday, Feb. 25.

(Before Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY.)

MIDLAND RAILWAY COMPANY v. ATTORNEY-GENERAL. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Revenue—Stamp duty—Railway company—Increase of amount of nominal share capital—Stamp Act 1891 (54 & 55 Vict. c. 39), s. 113.

A railway company obtained a special Act authorising the rearrangement and consolidation of the several classes and denominations of the shares in their capital, and of their loan and debenture stocks. The effect of the Act was to make no real addition to the value of their capital, but the face value of the stock was increased.

Held (affirming the judgment of the court below), that there was an "increase of the amount of the nominal share capital" of the company within sect. 113 of the Stamp Act 1891, and that duty was payable under that section.

THIS was an appeal from a judgment of the Court of Appeal (Smith, M.R., Collins and Stirling, L.J.J.), reported 84 L. T. Rep. 15; (1901) 1 K.B. 220, who had affirmed a decision of the Divisional Court (Ridley and Darling, JJ.) reported 82 L. T. Rep. 716; (1900) 2 Q. B. 353.

The question involved was whether certain conversions and consolidations of the guaranteed, preference, and ordinary stocks of the appellants which were authorised by the Midland Railway Act 1897 (60 & 61 Vict. c. clxxxiii.) constituted an increase of the amount of nominal share capital within the meaning of sect. 113 of the Stamp Act 1891 (54 & 55 Vict. c. 39), which provides that "in case of any increase of the amount of nominal share capital of any corporation or company, whether now existing or to be hereafter formed, being authorised by any . . . Act, a statement of the amount of such increase shall be delivered by the corporation or company to the Commissioners" of Inland Revenue within one month of the passing of the Act. Such statement is made subject to an *ad valorem* stamp of 2s. per cent.

By sect. 59 of the Act of 1897 it was provided that certain rent-charge, preferential, and guaranteed stocks should be consolidated into one guaranteed stock of one class, bearing interest at the uniform rate of 2½ per cent. per annum, sub-

(a) Reported by U. E. MALDEN, Esq., Barrister-at-Law.

ject to the consent (which was duly obtained) of the holders of these stocks.

The stocks so dealt with were as follows:—Four per cent. consolidated perpetual rentcharge stock, 3,899,121l. 5s.; Sheffield and Rotherham perpetual preferential stock, 150,000l.; 4 per cent. consolidated perpetual guaranteed preferential stock, 6,337,076l. 12s. 6d.—10,386,197l. 17s. 6d.—and the amounts of new stock issued in lieu thereof were respectively 6,238,594l., 375,000l., and 10,139,322l. 12s.—a total of 16,752,916l. 12s.

The result of the operation was, therefore, that stock to the amount of 10,386,197l. 17s. 6d. disappeared and was replaced by stock to the amount of 16,752,916l. 12s., an increase of 6,366,718l. 14s. 6d.

SECT. 60 of the Act provided that all the then existing and authorised 4 per cent. perpetual preference stock should be cancelled, and new $2\frac{1}{2}$ per cent. perpetual preference stock created in lieu thereof to an amount exceeding by 60 per cent. the nominal amount of the stock cancelled, and holders of the old stock were to receive new stock at the rate of 160l. for every 100l. of old stock.

The nominal amount of the new $2\frac{1}{2}$ per cent. preference stock exceeded by 17,428,915l. 1s. the old 4 per cent. preference stock for which it was substituted under the above provisions.

By SECTS. 61 to 63 of the Act the ordinary stock was cancelled, and new ordinary stock divided into preferred converted ordinary stock and deferred converted ordinary stock, created, and every holder of ordinary stock received in lieu thereof preferred converted ordinary stock to the same nominal amount as he previously held ordinary stock, and he also received an equal nominal amount of deferred converted ordinary stock.

The effect of these sections was that the nominal amount of the ordinary stock was doubled, the old ordinary stock cancelled amounting to 35,434,947l. 8s., and the new ordinary stock issued amounting to 70,869,894l. 16s., exactly double.

The Commissioners of Inland Revenue claimed duty upon 59,230,581l. 3s. 6d., being the aggregate increase of the amount of nominal share capital authorised by SECTS. 59, 60, and 61 of the Midland Railway Act 1897, and alleged that the appellants should have delivered a statement of such increase duly stamped with such *ad valorem* duty within one month of the passing of the Act.

By SECT. 113, sub-sect. (3) of the Stamp Act 1891 it is provided that in case of neglect to deliver such statement the company shall be liable to pay to His Majesty a sum equal to 10l. per cent. upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect shall continue.

The appellants refused to deliver the statement, duly stamped, and on the 22nd April 1899 the respondent filed an information claiming 108,581l. 10s. accrued penalties under the above section. To this information the appellants pleaded the general issue.

It was contended on behalf of the appellants that the duty imposed by SECT. 113 of the Stamp Act 1891 upon an increase of the amount of nominal share capital only applied to cases where there was an actual increase of the resources of the company by an authorisation of the issue of new shares or stock in return for money paid.

The Divisional Court gave judgment in favour of the claim of the Commissioners of Inland Revenue, and their decision was affirmed as above mentioned.

Sir R. Reid, K.C., Asquith, K.C., and Lochnis appeared for the appellants.

The Solicitor-General (Sir E. Carson, K.C.), Danckwerts, K.C., and Rowlatt, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellants, their Lordships gave judgment as follows:—

LORD MACNAGHTEN.—My Lords: The only question in this case is whether an “increase of the amount of nominal share capital” of the Midland Railway Company was authorised by the Midland Railway Act 1897. It seems that the company were desirous of effecting, as it is called in this Act, a “rearrangement and consolidation of the several classes and denominations of their shares and stocks”; and this was carried into effect by the Act of 1897. It may be convenient to give two instances of what was done under that Act. The company had a perpetual preference stock, carrying a dividend of 4 per cent. They were desirous of reducing that dividend to a uniform dividend of $2\frac{1}{2}$ per cent., and that was carried out by the Act of Parliament in this way. It was declared that “the existing and authorised 4 per centum perpetual preference stock of the company shall be by virtue of this Act cancelled and extinguished,” and “there shall be created in lieu thereof $2\frac{1}{2}$ per centum perpetual preference stock of the company to an amount exceeding by 60 per centum the nominal amount of the stock so cancelled and extinguished.” Was not that an increase in the amount of the nominal share capital? Then there was a large amount of consolidated ordinary stock, and the company were minded to give to their shareholders such advantages as would result from splitting their stock; but instead of splitting it in the proper sense of the word and giving to every holder of 100l. stock 50l. of preferred ordinary stock and 50l. of deferred ordinary stock, they really duplicated their stock and gave each holder of 100l. stock 100l. of preferred and 100l. of deferred. Again, was not that increasing the amount of their nominal share capital? It seems to me that this company has done the very thing which brings them within the words of the Act of Parliament (the Stamp Act) and within the grasp of the Commissioners of Inland Revenue. I cannot see any loophole of escape. It seems to me that if you were asked to describe what has been done with regard to the ordinary consolidated stock of the company you would say that the actual capital—the working capital—has not been increased by one penny, but the amount of the nominal share capital has been doubled. I therefore move your Lordships that this appeal be dismissed with costs.

LORD SHAND.—My Lords: I am entirely of the same opinion, and I will only add a very few words to what has been said because of the general importance of the question, for I understand that there are a number of cases which will be regulated by the decision. I cannot express my view of the case better than it is expressed in

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the judgment of Ridley, J., in which he says in reference to the interpretation of the statute: "The words are, 'in case of any increase of the amount of nominal share capital.' Now, the 'nominal share capital' means the capital in shares and the figure value attached to it. The increase of such nominal share capital seems to me to be simply this. If instead of being 100l. it becomes 200l.—not necessarily that it means more, but that if the company extends the capital, and gives it a greater nominal value, that is an increase which requires an additional statement of the amount of such increase to be delivered by the company." Of course, that statement being given to the Commissioners of Inland Revenue infers an increase in the stamp duty which has to be paid. It seems to me that this is clearly the effect of sect. 61 and sect. 66 of this company's private Act. An increase is created in the amount of the nominal share capital, and indeed it is so called in the Act itself. By sect. 61 the previous nominal capital is abolished, and the amount is nearly double under that section. And in sect. 66 those who are obtaining this Act of Parliament very correctly, I think, characterise it in this way: "Any increase in the nominal amount of the preference or ordinary capital of the company by virtue of this Act shall not increase" their borrowing powers which are there mentioned. The case seems to me clearly to fall within the 113th section of the Stamp Act, as all the learned judges who have applied their minds to this question think it does. Therefore, I am of opinion with your Lordships that the appeal must be dismissed.

Lord DAVEY.—My Lords: I am of the same opinion, and I can really add nothing to what has been already said. The section of the Act appears to me to be free from any possible ambiguity, and I cannot bring my mind to entertain any doubt as to the right construction of it—indeed, but for the very learned and able arguments which we have heard from Sir Robert Reid and Mr. Asquith, I should have said that the case was unarguable.

Lord BRAMPTON.—My Lords: I concur.

Lord ROBERTSON.—My Lords: I am of the same opinion. The appellants' success depends on their contention that an "increase of the amount of nominal share capital," in the sense of the Act of 1891, only takes place when there is an increase in the resources of the company. It seems to me that this test is purposely disregarded by the Legislature in favour of a standard entirely different and more arbitrary. The standard selected is the amount of nominal share capital; and in the present case that is now, as the result of operations authorised by statute, let us say 70,000,000l. It is perfectly plain that if this had been the original amount this would be the taxable sum. Now, the enactment about change does not let in any new criterion of amount, but adheres to the same criterion as is set up for a new company by the same section, the question therefore comes, as Stirling, L.J. says, to be merely one of arithmetic.

Lord LINDLEY.—My Lords: I am of the same opinion, and I will express my view by asking and trying to answer two questions. First of all, what is now the amount of the nominal share capital of the company, taking the ordinary

stock? The only answer to that question is 70,000,000l. The next question is, what was it before the Act of Parliament was passed? The only answer to that question is 35,000,000l. Can you say there has been no increase? Mr. Asquith has urged, supposing there was an increase, the increase was not authorised because it was not done by the company under the powers of the Act, but was done by the Act itself. That is too subtle for me, and I cannot follow it. If the Act had been imposed by *vis major* I could have followed it, but when the company went and got the power themselves I cannot follow it.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, Beale and Co.
Solicitor for the respondents, F. C. Gore, Solicitor of Inland Revenue.

Judicial Committee of the Privy Council.

Dec. 12, 14, 1901, and Feb. 22, 1902.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY, and Sir FORD NORTH.)

HULL ELECTRIC COMPANY v. OTTAWA ELECTRIC COMPANY AND THE CORPORATION OF HULL. (a)

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Electric Lighting—Exclusive privilege—Revocable licence—Revocation.

In 1887 a town council granted to the O. Company permission to place posts in the streets for the establishment of a system of electric lighting, and the company established such system.

In 1894 the H. Company obtained the "exclusive privilege" during thirty-five years of establishing in the town a system of lighting and heating whether by gas, electricity, or otherwise, and this grant was confirmed by an Act of the Provincial Legislature.

The corporation professed to grant such exclusive rights "as it possesses and as it has the right to grant this day."

Held (affirming the judgment of the court below), that the grant to the H. Company was made subject to the existing rights of the O. Company, and did not operate as a revocation of the licence to them.

THIS was an appeal from a judgment of the Court of King's Bench for Lower Canada (Lacoste, C.J., Bossé, Blanchet, Hall, and Wurtele, JJ.), who had reversed a judgment of the Court of Review (Tait, acting C.J., Gill and Pagnuelo, JJ.), who had reversed a judgment of the Superior Court (Lavergne, J.) at the trial, in favour of the respondents, the defendants below.

The facts of the case are fully set out in the judgment of their Lordships.

Blake, K.C. (of the Canadian Bar) appeared for the appellants, and argued that all that was granted to the Ottawa Company was a licence revocable at pleasure, and it was revoked by the grant to the Hull Company, and by the Act of the Provincial Legislature validating that grant.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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Haldane, K.C. and Belcourt, K.C. (of the Canadian Bar), for the respondents, the Ottawa Company, maintained that the appellants had no *locus standi* to maintain this action. Their rights were concurrent with the respondents' existing rights. If the grant affected to confer a right exclusive of the respondents it is invalid. See

Plimmer v. Mayor of Wellington, 51 L. T. Rep. 475; 9 App. Cas. 689;

Hill v. Tupper, 8 L. T. Rep. 792; 2 H. & C. 121;

Nuttall v. Bracewell, 15 L. T. Rep. 313; L. Rep. 2 Ex. 1;

Sts. Hyacinthe Gas Company v. Sts. Hyacinthe Hydraulic Company, 25 Can. Sup. Ct. Rep. 188;

Delorme v. Cusson, 28 Can. Sup. Ct. Rep. 66;

Liggins v. Ings, 7 Bing. 682;

Winter v. Brockwell, 8 East, 308;

Keys v. Guy, 36 Q. B. Can. 356;

Morgan v. Lisle, 33 Q. B. Can. 369;

Hardcastle on Statutes, 274-276.

The licence was not revocable, and was not in fact revoked. A revocation must be in express terms:

Corporation de St. André Avelin v. Corporation de Ripon, Quebec Off. Rep. 4 Q. B. 167;

Bernardin v. North Dufferin, 19 Sup. Ct. Rep. 581.

The rights of the Ottawa Company were specially reserved by the words such rights "as it has the right to grant."

Champagne, K.C. and Loehnis appeared for the corporation of the city of Hull intervening.

Blake, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Feb. 22.—Their Lordships' judgment was delivered by

LORD MACNAGHTEN.—In March 1887 Ahearn and Soper applied to the mayor and aldermen of the city of Hull stating that they had organised a company for the purpose of supplying the city with electric light and asking for permission to erect their poles in the streets. On the 4th April 1887 the city council passed the following resolution: "That the petition of Mr. Ahearn and Mr. Soper, asking that they be permitted to erect within the limits of the city poles for the establishment of their system of electric light be granted under such restrictions and regulations as are observed in Ottawa, and subject to the instructions of the committee on streets and improvements as to the places where these poles shall be erected." The company on whose behalf Ahearn and Soper were acting was the Chaudière Electric Light and Power Company Limited. They transferred their rights and assets to the respondents, the Ottawa Electric Company, hereinafter called the Ottawa Company. Under the permission granted by the foregoing resolution the Chaudière Company established a system of electric lighting in the city of Hull. It was continued and extended by the Ottawa Company, and is still in operation. In 1894 one Vian, described as a contractor, presented a petition to the city council setting forth the importance of establishing a line of electric cars connecting the city with certain neighbouring places, and also the advantage of establishing a system of lighting and heating for the city by electricity, natural gas, or otherwise, and praying for special privileges in the shape of exclusive rights for a certain term of years, and a tempo-

rary exemption from taxes in order to enable him to carry out his enterprise. On the 7th May 1894 the city council under its corporate seal passed a bye-law, known as bye-law No. 61, in reference to Vian's scheme. Under the 1st and 2nd paragraphs of this bye-law Vian obtained an exclusive privilege of constructing and maintaining a railway worked by electricity or any other motive power except steam or horse-power connecting the city with certain neighbouring places, and passing over one or more of the city streets. Pars. 3 and 4 were in the following terms: "3. From the date of the publication of the present bye-law the said Theophilus Vian, whether personally or with other persons with whom he shall think fit to associate himself, and his or their heirs or legal representative, shall have an exclusive privilege during thirty-five years to establish in the city of Hull a system of lighting and heating by electricity or by natural gas or otherwise. 4. The city of Hull by the present bye-law grants to the said Vian individually or through the society or company which he may think fit to form later the exclusive rights mentioned in pars. 1 and 3 such as it possesses, and as it has the right to grant this day." Then followed among other provisions a provision to the effect that in case the proposed works were not commenced within two years from the date of the publication of the bye-law the concession should become null and void. The Hull Electric Company, hereinafter called the Hull Company, was promoted for the purpose of working Vian's concession. It was incorporated by an Act of the Legislature of Quebec (58 Vict. c. 69) passed on the 12th Jan. 1895. By this Act, bye-law No. 61 and the provisions thereof were declared to be legal and valid, and the franchises, privileges, rights, and exemptions therein contained were declared legal and binding upon the corporation of the city of Hull. After some delay, but within the time limited by the bye-law, the Hull Company commenced their works. They proceeded to construct the proposed railway, and also established a system of lighting by electricity in competition with the Ottawa Company. The Hull Company, finding that the operations of the Ottawa Company interfered with their profits, issued a written protest, dated the 17th March 1897, and thereby required the Ottawa Company to remove their appliances and to desist from supplying electric light by means of their system. The protest proved ineffectual, and on the 10th May 1897 the Hull Company commenced the action which has led to this appeal. This action, in which the city of Hull intervened with the view of supporting the Ottawa Company, was tried before the Superior Court. The trial judge, Laverigne, J., dismissed the action with costs, holding the bye-law bad and the Quebec Act void on the ground that electric light is a commercial commodity, and that, therefore, the regulation of trade in it falls within the exclusive competence of the Parliament of Canada. The Superior Court, sitting in review, reversed this judgment, and ordered the Ottawa Company to remove their posts and wires and to pay 200 dollars as damages accrued during the period which elapsed between the date of the protest to the institution of the action. They held that the city had power to grant Vian's concession that the bye-law properly construed was not invalid, and that the Quebec

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Act was not unconstitutional. They further held that the licence to Ahearn and Soper was revocable; that it was incompatible with the exclusive grant to Vian; that the effect of that grant was to enable Vian to insist on the revocation of the former licence, and that the licence had in fact been revoked either by the Quebec Act or at latest by the protest of the 17th March 1897. The Court of Queen's Bench on the 31st Dec. 1899 reversed the judgment of the Court of Review, and restored the judgment of the Superior Court. The judgment in the Queen's Bench was given by Lacoste, C.J. The decision was rested on two grounds. In the first place, agreeing with the Superior Court, the Court of Queen's Bench held the bye-law bad and the Quebec Act unconstitutional. In the second place the court considered that the licence granted to Ahearn and Soper did not require the formality of a bye-law, and that the resolution of the 4th April 1887 was valid for the purpose in view. They doubted whether such a licence was revocable at all events without compensation. They thought that at any rate an express revocation was necessary. The city had not in their view delegated to the Hull Company any power of revocation. Their conclusion, therefore, was that the Hull Company could not prevent the Ottawa Company from supplying electric light or using for that purpose the posts and wires which it had placed in the streets of Hull under the permission accorded by the resolution of April 1887. The first ground on which the Chief Justice bases his decision may be laid aside. It was abandoned at the Bar by the leading counsel for the respondent. It is obviously untenable. The scheme in favour of which bye-law No. 61 was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the Provincial Legislature, and not the less so because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival traders. Nor is there any difficulty with respect to the resolution of April 1887. Ahearn and Soper asked for nothing more than a permission in its nature revocable. Nothing more was given to them. There seems to be no reason why such a permission should not be granted by a simple resolution and recalled in a similar manner. The real difficulty of the case lies in determining the true meaning and effect of bye-law No. 61. In approaching the question it must be borne in mind that at the time when that bye-law was passed the Ottawa Company had, in accordance with the resolution of April 1887 and by the express permission of the council, established a system of electric lighting in the city of Hull, and that they were actually supplying the municipality with electric light under a contract which was only terminable by a notice to be given on a distant day in the current year, and, if not so terminated, would run on from year to year until terminated by a like notice on the same day in some following year. Vian, of course, was quite aware of the position of the Ottawa Company. Indeed it is not disputed that par. 4 of the bye-law was intended to place on record the fact that the Ottawa Company had at the time a system of electric lighting in operation in the city. At first sight, no doubt, the grant to one person or to one body of persons of the exclusive right to establish a system of electric lighting

within a particular area seems hardly consistent with the continuance within the same area of a similar system of lighting in the hands of another body carrying on operations under a revocable licence from the very same grantors. But the two things are not incompatible. Now, it seems quite clear that it was not intended that the licence granted by the resolution of 1887 should be revoked off-hand by the bye-law itself. An immediate revocation would have exposed the municipality to a serious liability for breach of contract; and it would have caused no little inconvenience to the municipality and the private customers of the Ottawa Company. There was no other source of supply available; there was no immediate prospect of obtaining a supply through Vian's scheme. Moreover, it is to be observed that the bye-law itself provided that in the event of the proposed works not being commenced within two years the concession should drop, and even if the works were commenced within the prescribed period it would not follow that Vian's system of electric lighting would ever be established. Vian and his associates might find it more to their advantage to confine their operations to the electric railway. Then if the bye-law did not of itself revoke the licence of 1887 when and under what circumstances was revocation to take place? The bye-law is silent on the point. There are only two alternatives. Either the power of revocation remained in the hands of the council or it passed to Vian and his associates. It certainly was not given to them expressly. Was it given to them by necessary implication? Even assuming that the licence of 1887 was to continue unrevoked bye-law No. 61 was anything but a prudent or businesslike arrangement. Vian was not a man of substance. He had not the control of any water-power. He had no one at his back. Apparently he was without any means of carrying his scheme into effect except what he could get by pledging the concession. For the concession itself he paid nothing. By accepting it he came under no obligation to do anything of any sort or kind. He gave no security to the council. He was not bound to supply electric light to the city or to those of the inhabitants who might require it. Nor was he placed under any restriction as to the amount of the charges which he and his associates might make. He and they were left at liberty to charge as much as they pleased or as much as they could get, and they were left at liberty to grant or withhold the supply at their pleasure. In these circumstances the claim of the appellant company that no other person or body of persons shall supply electric lighting to the city during the period of their concession is not one that commends itself to favourable consideration. It seems to their Lordships that it would have been an act of incredible folly on the part of the council to give Vian and his associates the right of terminating the licence of the Ottawa Company at their will and pleasure. Unless the bye-law admitted of no other construction their Lordships would certainly hesitate to come to the conclusion that the council of the city of Hull had so utterly neglected their duty. Their Lordships, however, agree with the Court of Queen's Bench in thinking that the bye-law admits of a more reasonable construction. Their Lordships think that the real meaning of the transaction was this:

The City of Hull granted to Vian an exclusive right of establishing a system of electric lighting for a certain term of years—that is to say, by their grant to him they bound themselves during that period not to grant such a right to anybody else; but at the same time they said to Vian: "You must remember that we have granted permission to the Ottawa Company to establish a system of electric lighting in the city of Hull and that system is now in operation—we bind ourselves not to convert that permission into a right, but we do not bind ourselves to revoke that permission at your bidding. We keep the power of revocation in our own hands." Possibly the consideration that the Ottawa Company was to be left to carry on its operations in Hull until the council saw fit to revoke its licence may account for the singular fact that in passing bye-law No. 61 the council did not think it necessary either to impose on Vian and his associates any obligation to furnish a supply of electric light to the municipality or to those of the inhabitants who might require it or to place any restriction upon the charges which Vian and his associates might demand. In the result, therefore, their Lordships agree in substance with the second ground of the decision of the Court of Queen's Bench, and they will humbly advise His Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for the appellants, Norton, Ross, Norton, and Co.

Solicitors for the respondents, Harrison and Powell.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 7 and 8.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

J. AND J. CASH LIMITED v. JOSEPH CASH. (a)
APPEAL FROM THE CHANCERY DIVISION.

Trade name—Rival traders—Same name—Goods of same class—Misleading public—Right to trade under own name—Form of injunction.

In 1895 J. and J. C., an old firm at Coventry dealing in textile goods, was converted into a limited company, the plaintiffs in this action. The defendant, J. C., was one of the directors. He retired in 1898 and set up in the same class of business at Coventry as "J. C. and Co."

Held, that the defendant could not be restrained from carrying on trade in his own name; but he must take reasonable precautions to clearly distinguish his goods from those of the plaintiffs, and to prevent the public being misled into the belief that the business carried on by him was that of the plaintiffs.

Decision of Kekewich, J. (84 L. T. Rep. 349) varied.

On the 4th April 1895 the plaintiffs in this action, J. and J. Cash Limited, were incorporated under the Companies Acts when they purchased the business and goodwill of the old-established firm of J. and J. Cash of Coventry, who were manufacturers of ribbons, frillings, and other textile

goods. The defendant, Joseph Cash, was one of the vendors of the business and goodwill, and became one of the directors of J. and J. Cash Limited.

By an agreement made between the vendors and the limited company the company purchased the aforesaid business and goodwill and the trade names in connection therewith, and in particular the exclusive right to use the names of J. and J. Cash" and "Cash's frillings." And it was provided thereby that the vendors should be the first directors of the company, and should not be allowed to resign for five years after the incorporation of the company, except by consent; and that none of the vendors should, whilst director, without consent of the other directors, either solely or jointly with any other person or company, directly or indirectly, carry on or be concerned in the business of manufacturers of ribbons, frillings, tapes, or other textile goods, or permit his name to be used in connection therewith, except as a member or director of the plaintiff company.

By a deed of the 1st Dec. 1898, the plaintiff company released the defendant from his engagement not to resign his directorship, which he accordingly resigned.

On the 11th May 1899, the defendant formed a limited company called "Joseph Cash Limited," for the purpose of carrying on at Coventry the business of manufacturer of ribbons, frillings, tapes, and other textile goods. The plaintiff company protested, and the defendant gave an undertaking not to proceed with his company.

Subsequently the defendant commenced to carry on business at Coventry of the same kind as the plaintiff company's business, under the name of "Joseph Cash and Company."

The plaintiff company thereupon brought this action alleging that the result of the defendant's trading in a business similar to theirs, "under the style of Joseph Cash and Co." was to create confusion between the businesses, and to represent that his business and goods were, and cause them to be mistaken for, the business and goods of the plaintiff company.

They objected in particular to the manufacture and sale of frillings and woven names and initials under the name of "Cash" by the defendant as being an important speciality of their own business.

The plaintiff company also asked for damages and costs.

The defendant denied that he was carrying on his business in the manner alleged by the plaintiff company, and asserted his right to carry on his business in his own name.

On the 25th May 1900 the plaintiff company obtained an interim injunction against the defendant substantially as asked by the plaintiff company: (*vide* 82 L. T. Rep. 655).

The trial of the action took place before Kekewich, J., who held that it was impossible for the defendant trading under his own name of Cash to sell "frillings" without their being known as "Cash's frillings"; that that term having been proved to mean goods of the plaintiffs, to sell "Cash's frillings" was to represent such frillings to be the goods of the plaintiffs, and that the defendant must therefore be restrained from selling frillings under the name of Cash.

From this decision the defendant appealed.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

CT. OF APP.]

Re FRITH; NEWTON v. ROLFE.

[CHAN. DIV.]

Hugo Young, K.C. and O. L. Clare for the appellant.—The court will not restrain a man from carrying on business in his own name. He is entitled to do so provided he does not attempt to mislead the public. The defendant does not desire to sell these articles as “Cash’s” frillings or woven names. He only wishes to sell an ordinary article of commerce. The fact that confusion will arise is not sufficient to enable the plaintiffs to obtain an injunction. The defendant is not bound to do anything to avoid confusion, but he must not do anything to create it:

Burgess v. Burgess, 3 De G. M. & G. 896;

Turton v. Turton, 61 L. T. Rep. 571; 42 Ch. Div. 128, 134.

Cellular Clothing Company Limited v. Maston and Murray, 80 L. T. Rep. 809; (1899) A. C. 326.

If this injunction is rightly granted, the defendant could not sell these things under his own name, but might do so under an assumed name such as “Brown.” This case goes further than *Croft v. Day* (7 Beav. 84). The law on this subject is thoroughly considered in *Reddaway v. Banham* (74 L. T. Rep. 289; (1896) A. C. 199). In that case “camel hair belting” had become to mean the belting made by the plaintiffs, but it was not a case of the use by a man of his own name. They also referred to

Wotherspoon v. Currie, 27 L. T. Rep. 393; L. Rep. 5 E. & L. App. 508;

Mussam v. Thorley's Cattle Food Company, 42 L. T. Rep. 851; 14 Ch. Div. 748;

Powell v. Birmingham Vinegar Brewery Company, 74 L. T. Rep. 509; (1896) 2 Ch. 59;

Montgomery v. Thompson, 64 L. T. Rep. 748; (1891) A. C. 217;

Trego v. Hunt, 73 L. T. Rep. 514; (1896) A. C. 7.

Sargant (Warrington, K.C. with him) for the plaintiffs.—The judge has found that it is impossible for the appellant to use his name in connection with these articles without deceiving the public. The injunction was therefore properly granted. The court will restrain any method of trading by which one man may pass off his goods as those of another:

Reddaway v. Banham (*ubi sup.*).

In *Montgomery v. Thompson* (*ubi sup.*) the use of the words “Stone Ale” was restrained although the ale was made at Stone. In *Turton v. Turton* (*ubi sup.*) the court did not come to the conclusion that the use of the name must necessarily cause deceit.

The court having intimated that they were of opinion that the injunction granted by Kekewich, J. went too far, the following order was settled after some discussion: “This court doth order that the defendant, Joseph Cash, be restrained from selling any frillings or woven names or initials not manufactured by the plaintiffs, as ‘Cash’s frillings’ or ‘Cash’s woven names or initials,’ and from carrying on the business of a manufacturer or seller of frillings or woven names or initials under the name of ‘Joseph Cash and Co.’ while not in partnership with any other person; and from carrying on any such business either in the name of ‘Cash,’ or under any style in which the name ‘Cash’ appears, without taking reasonable precautions to clearly distinguish the business carried on, and the frillings and woven names and initials manufactured or

sold, by the defendant from the business carried on, and the frillings and woven names and initials manufactured, by the plaintiffs; and from carrying on any such business under any name or in any manner so as to mislead or deceive the public into the belief that the business of the defendant or the frillings or woven names or initials manufactured or sold by him is the business of, or goods manufactured by, the plaintiffs, or that the defendant is carrying on the business formerly carried on at Coventry by Messrs. J. and J. Cash, the vendors to and predecessors in business of the plaintiffs.”

WILLIAMS, L.J.—Now that the form of injunction has been agreed upon, I wish to say a few words upon the case. It may be that a trade is of such a nature that the products of that trade, when used in connection with a particular trade name, have become almost indissolubly connected with the business carried on by a certain manufacturer who has created that particular business. But still, even though that may be so, and even though the nature of the trade must be taken into consideration in an action for an injunction, there never has been a case yet where an order has been made restraining a man altogether from carrying on a particular trade in his own name. Every decision up to the present time has been limited to restraining him from carrying on a trade which has thus become so identified with the business of another person, without taking such steps as any honest man would wish to take to prevent his goods being confounded with the other person’s goods which have become so identified with the name. In my judgment, under the circumstances, the order of Kekewich, J. went too far, and the order which we now make goes as far as it is possible to go. The order of the learned judge will therefore be varied in the manner stated.

STIRLING and COZENS-HARDY, L.JJ. concurred.

Solicitors: *Maddocks and Colson*, agents for *H. Maddocks*, Coventry; *Mackrell, Maton, Godlee, and Quincey*, agents for *Wragge and Co.*, Birmingham.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, Jan. 18.

(Before KEKEWICH, J.)

Re FRITH; NEWTON v. ROLFE. (a)

Trustees—Trade creditors—Indemnity—Defaulting trustee—Subrogation.

By his will made in 1886 a testator empowered his trustees to carry on his business after his death, and to employ his estate therein. The trustees carried on the business for some years and incurred debts. An action was brought by beneficiaries against the trustees to administer the estate, and it was found that one of the trustees was a defaulter. The master certified what debts were properly incurred by the defendants in carrying on the business, and a summons was taken out in the action by creditors

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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asking that the debts found due from the trustees to them might be paid out of moneys standing in court to the credit of the action.

Held, that the applicants were entitled to payment out of the trust estate, notwithstanding that one of the trustees was a defaulter.

THIS was a summons taken out by creditors in an administration action asking that the debts found due by the master from the trustees of the testator Harry James Frith to them might be paid out of moneys standing in court to the credit of the action.

By his will made the 17th June 1886 the testator appointed the defendants W. E. Rolfe, A. B. Ellis, and J. L. Fysh, his executors and trustees, and empowered them during such time as they should think fit to carry on the businesses of a boot and shoe maker carried on by him in the Westminster Bridge-road, at Chelsea, and Clapham, or any one or more of such businesses, with liberty to retain and use in any such business the whole or any part of the capital which should be employed therein at his death, and any further part of his estate which his trustees should think fit, with power to appoint managers of such businesses, and his trustees were to have the same powers and discretions as to the mode of managing or carrying on the same as his trustees would have if they were the absolute owners thereof.

The testator also declared that if his businesses or any of them should be carried on, the defendant W. E. Rolfe should, if he were willing to act in such capacity, be the general manager thereof, with power to appoint sub-managers and examine and approve their accounts, and engage, fix the wages of, and discharge workmen, and the testator directed his trustees to permit the defendant W. E. Rolfe to arrange all such matters as aforesaid in such manner as he should deem advantageous, and the testator authorised his trustees to delegate to the defendant W. E. Rolfe any other powers thereby given to his trustees (except the power of deciding how long the businesses should be carried on), and declared that the other trustees should not be answerable for any loss which might be caused to the testator's estate in consequence of anything done or omitted by the said W. E. Rolfe whilst acting as such manager.

The testator also directed that so long as the defendant W. E. Rolfe should act as such manager he should receive a salary of 200*l.* a year. It was also provided that if the businesses should be carried on until his son should attain the age of twenty-five years, his son should, on attaining that age, have the right to purchase all or any of the businesses upon the terms therein mentioned.

The testator died in 1886, leaving a widow, an infant son, and two infant daughters. The widow died in 1888.

Up to 1896 the businesses were carried on by the defendants under the management of W. E. Rolfe.

In that year the testator's three children commenced this action for the administration of the testator's estate, and on the 13th March the usual administration decree was made, and a receiver and manager of the businesses was appointed.

An inquiry was directed as to what debts had been properly incurred by the defendants in carrying on the businesses, and by his certificate dated the 11th March 1897 the master certified the amount of such debts, and the persons to whom they were due.

An account was taken, and it appeared that the defendants Ellis and Fysh were clear, subject to certain payments being set off against costs due to them.

The defendant W. E. Rolfe was found to be a defaulter, a sum of 92*l.* 9*s.* 9*d.*, together with other sums in respect of costs, being due from him to the estate.

P. O. Lawrence, K.C. and Hon. M. M. Macnaghten for the applicants.—The creditors of the businesses can recover against Ellis and Fysh or either of them; they are therefore entitled to rank against the testator's estate by subrogation to the rights of these two trustees:

Dowse v. Gorton, 64 L. T. Rep. 809; (1891) A. C. 190.

The fact that the defendant W. E. Rolfe was a defaulter is immaterial.

Warrington, K.C. and T. T. Methold for the plaintiffs.—The principle discussed in *Dowse v. Gorton* (*sup.*) and *Re Johnson; Shearman v. Robinson* (43 L. T. Rep. 372; 15 Ch. Div. 548) and *Re Brooke; Brooke v. Brooke* (71 L. T. Rep. 398; (1894) 2 Ch. 600) does not apply where the *cestui que trust* does not get the full benefit owing to the default of one of the trustees. In such a case the creditors cannot be subrogated to the rights of the trustees until the defaulting trustee has made good his default.

Church for the trustees.

KEKEWICH, J.—This seems to me to be a question of the application of a well-settled principle to a state of facts which probably has occurred before and will occur again, but which, so far as I am aware, has not hitherto occurred so as to raise the question for the decision of the court. The trustees of a trader's will have carried on his trade or business, and employed part of his estate therein, under a power in the will. An account has been taken, and it appears that two of these three trustees are clear (subject to certain payments being set off against costs due to them). The third trustee has not shown a clear account, and has been found to be a defaulter, a sum of 92*l.* 9*s.* 9*d.*, together with other sums in respect of costs being due from him to the estate. In carrying on the testator's business the trustees incurred debts, and those persons to whom they incurred debts are, of course, entitled to sue them. There is no question about that. But the question which I have to consider is whether those creditors are now entitled to rank against the trust estate by subrogation to the equities of the trustees or any of them, or whether that subrogation is precluded by the fact that one of the trustees has been found a defaulter. The principle has been well settled and presents no difficulty. In the administration of an estate, where the business of the testator has been carried on after his death, it frequently happens that the court is asked for an inquiry in the administration whether there are any creditors of the business—that is, creditors of those by whom the business has been carried on; and the form of order has been settled,

and is to be found in Seton on Decrees, 6th edit., vol. 2. I know that the same form of order has been adopted in my chambers. The first question which has to be considered before directing that inquiry—it having been proved that the business has been carried on by the trustees—is whether the business has been carried on under a power in the will, or whether it has been carried on by the trustees in such circumstances that the court must infer or assume the consent of the creditors of the testator. I do not know whether under any other circumstances an inquiry can be directed, but those are the two usual states of circumstances under which an inquiry is generally asked and directed. If the business has been properly carried on as against the creditors of the testator, that is either because the testator has so directed, or because such creditors have assented, then this inquiry as to the creditors of the business is directed, and the creditors of the business apply for it in the first instance at their own risk, because it may turn out that there is nothing to be paid. Then when the time comes when the debts of the business have been ascertained, the only question which has to be considered is whether the trustees' accounts are clear; and if they are clear, then the creditors of the business are entitled to be paid, and paid in priority to the creditors of the testator. There is one possible modification of that, and that is that there may be some money owing by the trustees to the estate, and the creditors may be willing to pay that in order to make the trustees' accounts clear, and in that event the creditors are entitled to an assignment of the equity to which the trustees become entitled on clearing their accounts. That has been expounded in *Re Johnson*; *Shearman v. Robinson* (43 L. T. Rep. 372; 15 Ch. Div. 548) and in *Dowse v. Gorton* (64 L. T. Rep. 809; (1891) A. C. 190). It is true that in *Dowse v. Gorton* the only question before the House of Lords was whether the creditors' right was limited to that portion of the assets which had come into existence or had changed its form since the testator's death, or whether it included the whole estate. But that question involved the whole principle upon which the right depends, and which was discussed by the Law Lords. The judgment which is generally referred to on that and to which I now allude, is the judgment of Lord Macnaghten. There is no difference between his Lordship's judgment and that of Sir George Jessel in *Re Johnson*. They both say the same thing. The creditor of the business has no right whatever against the testator's estate, but he has a right to sue the trustee who has incurred the debt. If the trustee on his part has a clear account, and is entitled to be indemnified out of the testator's estate, the creditor is subrogated to that right, and for that purpose is allowed to come in and intervene. He can sue the trustee, and can claim the benefit of the indemnity to which the trustee is entitled out of the estate. If, on the other hand, the trustee is in default and has not got that right, then the creditor can get nothing, because he is relying on an equity which does not exist. That is true, but that does not seem to me to prevent the right of the creditors of the business in this case. They have a claim against these three defendant trustees. Now, what is the position of these trustees? The indemnity to the

trustees is, not to the trustees as a body, but to each of the trustees. Each of them, on doing what is right and proper, is entitled to be indemnified against the debts properly incurred in the performance of the trusts imposed upon him. The court says that a trustee cannot insist on that right unless he comes in with clear accounts; but if he comes in with clear accounts, he is not the less entitled to be indemnified because he has a co-trustee who has run away with certain moneys. I am, of course, excluding the case where a trustee who has a clear account is responsible for a co-trustee who has not. If that were so, the trustee who has a clear account of his own would still be found liable to the trust estate, because he would have to make good what the defaulting trustee owed to the estate. Except in that case, a trustee who has a clear account is entitled to an indemnity for what he has done, quite independently of the question whether another trustee has been found a defaulter or has committed a breach of trust. That is not a question which for the present purpose the court need go into. Look at it in another light. The creditor is entitled to sue all or any of the debtors. He may sue and issue execution against all three of these trustees, or any two or any one of them. Why would it be fair to say that because he has a right against A. or against A. and B. he must not enforce it because C. is in default? That would be so if the right of A. depended on the right of C., but I have already shown that the right of A. does not depend on the right of C. A trustee in the right is entitled to insist on his indemnity. It seems to me, therefore, that, applying the principle of *Dowse v. Gorton* and *Re Johnson*, these creditors are entitled to be subrogated to the right of the innocent trustees to be indemnified out of the trust estate. I have already anticipated the practical view. If I refuse this order the result may be that one of these creditors may sue these two trustees or one of them. Is it credible that that trustee applying for an indemnity against the expenses which have been incurred by him in doing his duty, the court would refuse that indemnity because his co-trustee owed money to the estate? It seems to me that if the court were to refuse such an application, it would be making use of the position to do something which would be not only much less than equity, but also the greatest injustice.

Solicitors: James, Mellor, and Coleman; Bolton and Co.; Thomas Ingle.

Dec. 16 and 20, 1901.

(Before BYRNE, J.)

HONYWOOD v. HONYWOOD. (a)

Settlement—Several estates in same settlement—Several charges—Tenant for life—Remaindermen—Interest accrued during life tenancy—Sale of part of settled estates—Payment off of charges and arrears of interest—Liability to make good arrears out of subsequent income.

Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

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and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing during the same life tenancy: (*Revel v. Watkinson*, 1 Ves. Sen. 93; *Tracy v. Hereford*, 2 Bro. C. C. 129; *Caulfield v. Maguire*, 2 Jo. & Lat. 141).

Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates: (*Frewen v. Law Life Assurance Society*, 75 L. T. Rep. 17; (1896) 2 Ch. 511; *Re Hotchkys*; *Freke v. Calmady* (55 L. T. Rep. 110; L. Rep. 32 Ch. Div. 408).

Upon principle, therefore, a tenant for life of several estates included in the same devise remains liable as between himself and the remaindermen to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of a part of the property.

By his will, dated the 18th Feb. 1859, William Philip Honywood devised all his real estates to trustees upon trust to manage the same and to allow his wife to have the occupation of his mansion and all the lands and premises then occupied by him during her life or widowhood, and, after the payment of all interest moneys due on any security or securities, to pay out of the rents and profits of his real estate certain annuities therein mentioned which had long since ceased to be payable. And subject thereto to pay the surplus rents and profits to his wife during her life or widowhood; and, subject to the foregoing trusts, the testator devised all his real estate to Philip Courtenay Honywood for life with remainder to his first and other sons successively in tail, with remainder to the eldest and every other son of Sir Courtenay Honywood for life, with remainder to the first and other sons of such sons of Sir C. Honywood in tail, with an ultimate remainder to the testator's own right heirs. And after certain specific bequests of furniture by way of heirlooms, the testator directed his trustees to convert all other his personal estate into money, and to stand possessed of the proceeds upon trust to pay thereout his just debts and funeral and testamentary expenses, and subject thereto to hold the same in augmentation of his real estate, and the testator appointed his trustees executors of his will.

Certain parts of the testator's real estate were subject to mortgages created by the testator, each of which contained a personal covenant to pay the money thereby secured.

The testator died on the 20th Feb. 1859, leaving his widow Frances Emma Honywood him surviving.

In 1862 Mrs. Honywood commenced an action for the administration of the testator's estate, and, by an order dated the 28th May 1868, she was appointed receiver of the rents and profits and income of the real and personal estate respectively, and entered into possession of the real estate and kept down the interest on the mortgages until the date of her death, the 30th Jan. 1895.

P. C. Honywood thereupon became tenant for life of the testator's estate.

In the same year the various mortgages brought actions for foreclosure or sale, and also claimed payment out of the testator's estate as creditors on the covenants contained in their respective securities.

Receivers were appointed in these actions, and they received the rents which accrued since Mrs. Honywood's death and applied them in payment of the interest on the mortgages.

The rents, however, were insufficient to keep down the whole of the accruing interest.

Under orders made in the mortgages' actions the greater part of the testator's estate had been sold, and the proceeds were applied in discharge not only of the principal moneys, but also of the arrears of interest due at the time of such payment.

A small portion of the testator's real estate which it was not necessary to sell had been subject to a mortgage, but this mortgage had been discharged out of the surplus proceeds of sale that remained after satisfying the mortgages affecting the parts of the estate sold.

P. C. Honywood, the present tenant for life, had assigned his life interest to the Eagle Insurance Society.

This was a petition presented by the surviving trustees of the testator's will for the determination of certain questions arising in the administration of the remaining estate of the testator, one of the questions being whether the income which had accrued since the death of Mrs. Honywood on certain funds in court and the future income to arise therefrom and the rents of the unsold real estate which had accrued since her death, and the future rents to accrue during the life of P. C. Honywood ought to be applied in recouping to the capital of the testator's estate the amount which had been expended thereout in discharge of the arrears of interest that had accrued since the death of Mrs. Honywood.

Bowden, K.C. and H. C. Hawkins for the trustees.

Levett, K.C. and E. Beaumont for the persons interested in remainder.—The tenant for life is to pay interest on all the charges, and the testator meant to create certain equities between the tenant for life and remaindermen. Those equities cannot be affected by the act of an outsider who has a title paramount. The life estate must be treated as a whole, and, the mortgages having been paid off out of the proceeds of part of the estate, the tenant for life has no right to sever the remaining part of the estate, but the subsequent income is liable to recoup the arrears of interest which have been paid out of capital:

Re Hotchkys; *Freke v. Calmady*, 55 L. T. Rep. 110; 32 Ch. Div. 408;

Frewen v. Law Life Assurance Society, 75 L. T. Rep. 17; (1896) 2 Ch. 511;

Waring v. Coventry, 2 Myl. & K. 406;

Makings v. Makings, 1 De G. F. & J. 355;

Re Kensington; *Longford v. Kensington*, 85 L. T. Rep. 577; (1902) 1 Ch. 203;

Fisher on Mortgages, 5th edit., p. 877;

Gover on Capital and Income, p. 80.

Norton, K.C. and Quin for the Eagle Insurance Society.—Although the tenant for life is bound to keep down the interest on mortgages when they are going on, he is not bound to do so after they have been paid off, except in so far as he

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may have received rents during the time the mortgages were in existence. Here no rents were received either by the tenant for life or by the Eagle Insurance Society. When the court directed the sale in 1898, the arrears of interest then due in so far as the income was insufficient were properly paid out of capital and cannot be stopped from the tenant for life. The income is only to be applied in payment of interest so long as it is interest. The act of an outsider can materially alter the rights of the parties:

Tewart v. Lawson, L. Rep. 18 Eq. 490;
Norton v. Johnstone, 30 Ch. Div. 649;
Re Green; *Baldock v. Green*, 60 L. T. Rep. 225;
 40 Ch. Div. 610.

The tenant for life is not bound to put his hand in his own pocket if the income is insufficient to keep down the interest on the mortgages:

Syer v. Gladstone, 30 Ch. Div. 614.

There is no equity to compel him to pay as against the next tenant for life. They also referred to

Penrhyn v. Hughes, 5 Ves. 99;
Sharehaw v. Gibbs, 1 Kay, 383.

T. A. Nash for other parties interested.

Levett, K.C. in reply.

Cur. adv. vult.

Dec. 20.—BYRNE, J. read the following judgment:—Apart from any question arising from the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing during the same life tenancy: (see *Revel v. Watkinson*, *ubi sup.*; *Tracy v. Hereford*, *ubi sup.*; and the judgment of Lord St. Leonards in *Caulfield v. Maguire*, *ubi sup.*, where he sums up the result of the earlier authorities). Where, as in the present case, several estates are included in the same settlement, the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates: (*Frewen v. Law Life Assurance Society*, *ubi sup.*; *Re Hotchkys*, *ubi sup.*). It appears to me upon principle that the tenant for life of several estates included in the same devise remains liable as between himself and the remaindermen to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of a part of the property. It was argued that upon payment off out of corpus of principal, interest, and costs due in respect of the charges, there was an end to the matter, and that the tenant for life became as fully discharged in respect of arrears as though his life tenancy had come to an end. I am unable to accept this view. If instead of several properties a single property in mortgage were settled, and the interest being in arrear in consequence of insufficiency of the rents to keep it down a part of the property were sold, principal, interest, and costs due on the mortgage being then paid off out of the proceeds, I do not see any fair ground for holding that the tenant for life could claim as against the remaindermen to enjoy the rents and

profits of the unsold property except subject to a liability to recoup out of such rents when and as received by him the amount of arrears accrued during his life tenancy. It is quite true that he would not be under any personal liability in respect of the arrears, but the rents received by him ought, so far as I can see, to remain liable as between himself and the remaindermen to recoup amounts paid out of capital in satisfaction of arrears. There is no express authority, so far as I know, on the point, the reported cases being cases where there has been default in keeping down interest, rents being sufficient. The cases referred to of *Tewart v. Lawson*, *Norton v. Johnstone*, and *Re Green* (*ubi sup.*) appear to me to have little bearing upon the present question. They establish that where there is a trust created for payment of debts out of the income of a testator's estate either by means of accumulation or otherwise, and the debts are in fact lawfully paid out of corpus, the event not being provided for in the will, there is no equity on the part of the remaindermen to have the corpus recouped out of income. No question arose as to any equity which possibly might have arisen had there been arrears of interest not kept down. I think, therefore, that the income which has arisen since the death of Frances Emma Honeywood from the funds in court, and the future income to arise therefrom, and the rents and profits of the unsold real estate, are during the lifetime of the present tenant for life liable to be applied in the first instance in recouping to capital the amount of arrears of interest accrued during the same life tenancy.

Solicitors: Burch, Whitehead, and Davidsons; Sandilands and Co.; Hammond and Richards; Wood, Bigg, and Nash, agents for H. M. James, Exeter.

Monday, Feb. 24.

(Before FARWELL, J.)

Re CHETWYND'S SETTLEMENT; SCARISBRICK v. NEVINSON.

Marriage settlement—Trustee—Discharge of one trustee without appointing a substitute—Trustee Act 1893 (56 & 57 Vict. c. 53), ss. 11, 25.

The court has power under its inherent jurisdiction in administering the trusts of a settlement to discharge a trustee when there are other trustees remaining without appointing a trustee in the place of the retiring one, but it has not such power under the Trustee Act 1893.

ADJOURNED SUMMONS.

This was originally a summons by one of the four trustees of the marriage settlement of Mr. and Mrs. Chetwynd asking to be discharged from the trusteeship, defendants being the other three trustees and the various parties interested in the trust funds.

The summons was originally taken out under the Trustee Act 1893, without asking for administration, and when it came before Farwell, J. in chambers the court was of opinion that the Trustee Act contained no provision for the simple discharge of a trustee. The summons was then amended by asking for administration

(a) Reported by W. VALENTINE BALS, Esq., Barrister-at-Law.

and by making the retiring trustee plaintiff, and all other parties interested defendants.

Finch appeared for the plaintiff.

Prior for the defendant trustees.

Lecke for the infant children of the marriage.

Mrs. Chetwynd was not represented.

FARWELL, J.—The summons in this case was originally taken out under the Trustee Act 1893, and I then expressed the opinion, which I still hold, that there is no power under that Act to allow a trustee to retire, unless the court can appoint the other trustees in place of themselves and the retiring trustee, as to which there has been considerable conflict of judicial opinion. In *Re Harford's Trusts* (41 L. T. Rep. 382; 13 Ch. Div. 135) Sir G. Jessel held that under sect. 32 of the Trustee Act 1850, the court has jurisdiction to appoint continuing trustees in place of themselves and an absconding trustee, but in *Re Aston* (48 L. T. Rep. 195; 23 Ch. Div. 217) he declines to make such an order in deference to the views of other judges, though he stated that he still adhered to his former opinion. At any rate the court does not now, in fact, allow trustees to retire simply under the Act. When the summons came before me in chambers I suggested that the court always had power under its inherent jurisdiction to allow a trustee to retire, and the summons has now been amended by asking for administration of the estate and by adding all parties interested in the fund. I think that the plaintiff has brought forward reasonable grounds for asking to be discharged, and I shall accordingly make an order for his discharge. I adopt the words of Lord St. Leonards in *Courtenay v. Courtenay* (3 J. & L. T. 519, at p. 533): "It is quite a mistake to suppose that a trustee who is entitled to be discharged from his trust is bound to show to the court that there is some other person ready to accept the trust. The court refers to the master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the court and not discharge him. The court will, however, take care that the trustee shall not suffer thereby." In the present case no such difficulty arose as was contemplated by the Lord Chancellor. There will still be three trustees of the settlement, and I feel no difficulty in discharging the applicant from the trust without appointing anyone else in his place. Trustees can do out of court, under sect. 11 of the Act, what I now propose to do in court. I therefore feel no difficulty in discharging the plaintiff from being trustee without appointing anyone in his place. No vesting order is necessary, as I simply discharge the plaintiff from being a trustee.

Solicitors: *Rowcliffe*, for *Finch*, *Johnson*, and *Finch*, *Preston*; *Lethbridge* and *Prior*.

Wednesday, March 12.

(Before BUCKLEY, J.)

McCHEANE v. GYLES. (a)

Practice—Adding defendant—Opposition of plaintiff—Order XVI., r. 11.

Except in actions where the plaintiff sues in a representative capacity, or under very special circumstances, the court cannot under Order XVI., r. 11, add a defendant hostilely to the plaintiff. A beneficiary under a settlement sued the surviving trustee of the settlement in respect of a breach of trust. The defendant applied to have the legal personal representative of his deceased co-trustee added as a defendant in order that he might issue a third-party notice upon her claiming contribution. The plaintiff opposing, it was held that there was no jurisdiction to make the order.

THIS was an application by a defendant for a direction that another person, against whom he claimed contribution, should be added as a defendant.

The action was brought by the sole beneficiary under a marriage settlement against *Walter Gyles*, the surviving trustee, and the plaintiff claimed a declaration that the defendant had been guilty of a breach of trust in lending the fund on a contributory mortgage of land in Ireland, and was liable to make good the loss.

The settlement was Irish, and all the parties except the plaintiff were domiciled in Ireland, but the defendant was served with the writ while staying in this country.

The defendant entered an appearance, and applied *ex parte* for leave to issue a third-party notice claiming contribution upon Mrs. Cronyn, the legal personal representative of his deceased co-trustee, who had been a party to the transaction complained of, and the applicant asked for leave to serve the notice upon Mrs. Cronyn in Ireland, out of the jurisdiction, or, alternatively, that she might be added as a defendant.

Byrne, J. gave leave to issue and serve the third-party notice, whereupon Mrs. Cronyn entered a conditional appearance, and moved before Buckley, J. to discharge the order. Buckley, J. refused to make any order upon the motion, but the Court of Appeal came to the conclusion that the rules as to service out of the jurisdiction of a third-party notice were the same as for a writ, and that the case did not fall within the provisions of Order XI.; and accordingly discharged the order of Byrne, J., but without prejudice to any application by the defendant to have Mrs. Cronyn added as a defendant under the alternative relief asked by his original summons: (see *ante*, p. 1, where the facts are more fully set out).

The defendant put in his defence, and now applied by a fresh summons for a direction that Mrs. Cronyn should be added as a defendant.

By Order XVI., r. 11, it is provided that

The court or a judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order . . . that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court

(a) Reported by A. L. MORRIS, Esq., Barrister-at-Law.

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effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

Austen-Cartmell for the applicant.—The two trustees are equally guilty, if they are guilty at all, and it is only just that their liability should be decided in the same proceedings once and for all. If Mrs. Cronyn is added as a defendant, the difficulty as to service out of the jurisdiction will disappear, for the defendant Gyles can then serve a third-party notice on her without any leave:

Order XVI., r. 55;

Touss v. Loveridge, 49 L. T. Rep. 466; 25 Ch. Div. 76.

Under Order XVI., r. 11, a defendant can be added, in spite of the opposition of the plaintiff, whereas here the court cannot fully adjudicate upon the whole matter in his absence:

Dix v. Great Western Railway Company, 54 L. T. Rep. 830;

Montgomery v. Foy, Morgan, and Co., 73 L. T. Rep. 400; (1895) 2 Q. B. 321.

Douglas for the plaintiff.—There are two points: (1) Is there any jurisdiction to add a defendant in a case where the plaintiff objects; (2) ought the jurisdiction to be exercised? The plaintiff objects to add Mrs. Cronyn as a defendant, because she has long since fully administered the estate of the deceased trustee, and his action against her would therefore fail. She is not a necessary party:

Re Harrison; Smith v. Allen, 64 L. T. Rep. 442; (1901) 2 Ch. 349.

There is no jurisdiction to add a defendant where the plaintiff objects:

Norris v. Beazley, 35 L. T. Rep. 845; 2 C. P. Div. 84;

Moser v. Marsden, 66 L. T. Rep. 570; (1892) 1 Ch. 487;

Birmingham and District Land Company v. London and North-Western Railway Company, 55 L. T. Rep. 699; 34 Ch. Div. 261.

Austen-Cartmell in reply.—The old rule laid down in *Norris v. Beazley* has gone, and the true test is whether or not justice requires a party to be added. In *Re Harrison; Smith v. Allen* Chitty, J. refused the application at the trial, but he would have granted it if it had been made earlier.

BUCKLEY, J.—If I could see my way to make the order asked in this case, I would gladly do so, and I regret that I cannot. I regret it because, if the order could be made, it would have enabled this matter to be decided once for all. The case is shortly this. A beneficiary under a settlement has brought an action alleging that there were two trustees, and that there has been a breach of trust from which he has suffered damage. That allegation, if sustained, gives him a joint and several remedy against the trustees, and he elects to sue one of them, the defendant Gyles. He might have sued both, but he has chosen to pursue his remedy against one only, and that he is perfectly entitled to do. Now the other trustee is dead, and Mrs. Cronyn is his legal personal representative. Under those circumstances, the defendant Mr. Gyles obtained from Byrne, J. an order giving him leave to serve a third-party notice claiming indemnity

upon Mrs. Cronyn, and to serve it out of the jurisdiction, she being resident in Ireland. The application before me previously was a motion to discharge that order. I refused to disturb the order, but the Court of Appeal have decided that in third-party proceedings the same rules apply as on the issue of a writ, and that therefore a third-party notice cannot be served upon Mrs. Cronyn out of the jurisdiction. The order of the Court of Appeal was, however, made without prejudice to any application by the defendant Gyles for leave to join Mrs. Cronyn as a defendant, and that is the application now before me. The plaintiff refuses to accede to the suggestion, and the question is whether, as against the plaintiff, I can make him add a defendant. It appears to me that I cannot. There is a class of case where a defendant can be added hostilely to a plaintiff, and of that the leading example is *Wilson v. Church* (39 L. T. Rep. 413; 9 Ch. Div. 552), and that is where the plaintiff is suing in a representative capacity. The case of *Dix v. Great Western Railway Company* (54 L. T. Rep. 830), which was cited on behalf of the applicant, really falls within the same principle. The plaintiff there sued the railway company upon a covenant entered into with him and his co-vendors, under which the company undertook to make a certain road and to allow the vendors to have the use thereof for all purposes. The plaintiff was not the sole person interested, and Kay, L.J. says: "How, then, is it possible for the court effectually and completely to adjudicate upon and settle all the questions involved in the cause without the presence of all the covenantors?" The other two persons did not fall within the description of parties "who ought to have been joined," but they were persons "whose presence" was "necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause." So that that case really falls within the same principle as *Wilson v. Church*. One other case has been cited on the part of the applicant—*Montgomery v. Foy, Morgan, and Co.* (73 L. T. Rep. 400; (1895) 2 Q. B. 321)—which, when carefully examined, is an authority against his contention. In that case, a shipowner was suing the consignees of goods for a declaration that he was entitled to the amount of the freight deposited by them with the warehouseman. The consignees had no property in the goods and were mere agents for the shippers, and they could not as against the shipowner have set up any right of set-off or counter-claim, and would have had no defence. Under those circumstances, the Court of Appeal thought that the shippers of the goods ought to be joined as defendants adversely to the plaintiffs for the purpose of setting up a counter-claim, because the cause or matter to be adjudicated upon really involved the question whether there was or was not any valid counter-claim by the owners of the goods, and the original defendants, the consignees, were only sued so as to enable the plaintiff to reach the fund. Kay, L.J. says: "I wish to guard myself against being supposed to decide that in all cases it would be a sufficient reason for joining a person as defendant that, if joined, he would have a counter-claim against the plaintiff. This is a peculiar case." That case is no authority for the proposition that if a plaintiff elects to sue one of two persons who he alleges are jointly

and severally liable to him, the defendant can bring in the other as a co-defendant in order to claim contribution. The applicant cannot really bring himself within the words of the rule. The question involved in this action, and the only question, is whether Gyles has been guilty of a breach of trust, and, if so, for how much money is he liable. That can be satisfactorily adjudicated upon without the presence of Mrs. Cronyn, the representative of his deceased co-trustees. Suppose that she were joined as a defendant. The plaintiff might not choose to make any allegation against her, and then she could at once apply to have the action dismissed so far as she was concerned. There is, moreover, another ground on which I think this application ought to be dismissed. Supposing that I have jurisdiction to make the order asked for, ought I to exercise it in this case? The defence has been delivered, and the plaintiff is now in a position to set the action down for trial, and to try it next week. If the application is granted, there must be a long postponement to enable Mrs. Cronyn to be brought in. Ought I in those circumstances as against the plaintiff to delay the trial of the action because it is convenient for Mr. Gyles, the defendant, to try at the same time his right over against somebody else for contribution? I think not, and for these reasons I must dismiss the summons with costs.

Solicitors for the plaintiff, *Atkinson and Dresser*.
Solicitors for the defendant, *Bircham and Co.*

Saturday, Dec. 21, 1901.

(Before EADY, J.)

LEIGH v. LEIGH. (a)

Advowson—Patron—Infant—Guardian.

A settlement conveyed to trustees an advowson to the use of an infant in tail male, and provided that during the minority of any tenant in tail male the trustees might present.

By 6 & 7 Vict. c. 16, glebe lands were vested in trustees with power to sell with the consent of the patron.

Held, that the consent of the patron could be given by the infant's guardian, and that the trustees of the settlement were not patrons within the meaning of the Act.

THIS was a summons to determine who could give the consent of the patron to the sale of glebe lands of the rectory of Walton-on-the-Hill.

By an indenture dated the 10th July 1901, made by order of the court in pursuance of a covenant in a settlement (amongst other things), "the advowson and perpetual right of patronage and presentation of and to the rectory or parish church of Walton-on-the-Hill" was conveyed to trustees to hold the same unto the said trustees and their heirs to the use of John Cecil Gerard Leigh in tail male with remainders over. The settlement contained a proviso

That during the minority of any person who, under the limitations hereinbefore contained, is, or would, if of full age, be entitled for the time being to the possession or the receipt of the rents and profits of the freehold

hereditaments hereby settled as tenant in tail male or in tail by purchase, the trustees or trustee may present a fit person to any vacant ecclesiastical benefice either absolutely or subject to such lawful terms as to resignations as the trustees or trustee deem proper.

Glebe lands were vested in trustees with power to sell with the consent of the patron or patrons by 6 & 7 Vict. c. xvi., which provided:

Sect. 51. That all acts, matters, and things by this Act authorised to be done, and every consent required to be signified by the patron of any of the aforesaid rectories or of the said present rectory, and of the said vicarage of Walton-on-the-Hill, may be done and signified by the patron or patrons for the time being of the said respective benefices, whether one or more, who shall be seised of the advowson thereof in possession, whether for an estate of inheritance or any less estate, and by any such patron or patrons being a married woman or married women, notwithstanding her or their coverture, and by the guardians or committees of any such patron or patrons, being an infant or infants, lunatic or lunatics, or idiot or idiots respectively; and that every act, matter, and thing which shall be so done, and every consent which shall be so signified shall be as valid and effectual as if the party or parties by whom or on whose account such act, matter, or thing shall be done, and such consent signified, was or were seised of the said advowson in fee simple in possession and free from any incapacity.

Method for the trustees of the settlement.—The person who has the right to present is the patron of the living for the time being:

Co. Litt. 119b.

The trustees can give all consents required from the patron.

Arkle for the trustees of the Act.

R. J. Parker for the infant.—An advowson is an incorporeal hereditament, and not a mere power to present. The tenant in tail is the patron, and his consent must be given by his guardian:

Hoskins v. Featherstone, 2 Bro. C. C. 552;

Strachy v. Francis, 2 Atk. 217;

Portland v. Bingham, 1 Hagg. Cons. 157;

Bracton, bk. 4, tract 2, 240b.

Method replied.

EADY, J.—This summons has been adjourned out of its turn that it may be immediately disposed of, so I must deal with the matter as it stands without consulting the authorities. In my opinion the guardian is the proper person to give the consent, having regard to the terms of sect. 51 of the Walton-on-the-Hill Rectory Act 1843. The trustees of the settlement are not entitled to the advowson for any estate of inheritance, but the infant is tenant in tail in possession. An advowson confers other rights than the right of presentation—e.g., of obtaining an injunction to restrain waste.

Solicitors: *Roncliffes, Rawle, and Co.*; *Field, Roscoe, and Co.*; *Lowe and Co.*

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Tuesday, Jan. 21.

(Before EADY, J.)

GREENWELL v. PORTER. (a)

*Company—Directors—Agreement as to voting—
Ultra vires.*

A brewer converted his business into a company, and at his death a large part of his property consisted of shares in the brewery company. On his death his executors required money, and approached G., who insisted upon the appointment of independent directors.

By an agreement dated the 26th July 1898 the four executors agreed with G. to take all steps and do all things within their power which might be required for obtaining the election of A. G. and T. W. as directors, and at all times thereafter to vote for and not against their re-election as directors upon their retirement by rotation, and not to vote for their removal.

The majority of the shares stood in the names of the executors. On the re-election of directors some of the executors voted on a show of hands against the re-election of W. A motion was made for an injunction to restrain the executors, their proxies, and agents, from voting at a poll to be taken on the 28th Jan. 1902 against the resolution for the re-election of W. as a director or from otherwise voting contrary to the agreement of the 26th July 1898. One of the executors was willing to vote in accordance with the agreement, but the other three submitted (1) that the agreement was *ultra vires*, and a delegation of their powers as executors; (2) that such an agreement was inconsistent with their duty as directors of the company, and ought not to be enforced; (3) that if the injunction was granted W. would be a director for three years, although a different decision might be arrived at when the action was tried.

Held, (1) that the agreement did not postpone the realisation of the shares, and that it was within the powers of the executors; (2) that it was not inconsistent with their duty as directors; (3) that as W. agreed to give an undertaking to retire if the court at the trial so directed, the injunction must be granted.

THIS was a motion in an action brought by the plaintiff, Walpole Greenwell, against Jane Porter, John Herbert Porter, Stanley Porter, and William Allan Miller, asking that the defendants and each of them, their proxies and agents, might be restrained by injunction until the hearing of the action or further order from voting at the poll to be taken on the 28th Jan. 1902 or on any other date on which the same might be fixed pursuant to the demand made for a poll at the ordinary general meeting of Robinson's Brewery Limited held on the 20th Dec. 1901, against the resolution for the re-election of Thomas Trevor White as a director of the company, or from otherwise voting contrary to the provisions of an agreement dated the 26th July 1898, and made between the defendants of the one part and the plaintiff of the other part.

The plaintiff was in Feb. 1898 approached by the defendants with a view to inducing him to purchase shares in Robinson's Brewery Limited, in which the defendants, as executors of James Porter, deceased, were largely interested. As a

condition of his so doing the plaintiff insisted on the appointment of independent directors.

By an agreement dated the 26th July 1898 and made between Jane Porter, widow, John Herbert Porter, Stanley Porter, and William Allan Miller, as executors and trustees of James Porter, deceased, and the plaintiff, after reciting that the trustees were entitled to certain large numbers of ordinary and preference shares in the company, and that the plaintiff was also largely interested in the company, it was agreed that the executors should take all steps and do all things within their power which might be required for obtaining the election as directors of the company of Aynsley Greenwell and Thomas Trevor White, and that they should at all times thereafter vote for and not against the re-election as directors of the same two persons upon their retirement by rotation so long as they should be willing to remain directors of the company (unless in case of either of the other two the other four directors should concur in his not being re-elected), and that the executors should not at any time, except with such concurrence as aforesaid, vote for the removal of either of the two, and should not, except with such concurrence as aforesaid, take any steps or do any acts to induce or compel them or either of them to relinquish their or his office of director, but should at all times, to the best of their ability, by their votes and otherwise, support them and each of them in their office; and each of the executors further agreed that the above provisions should apply to him or her, and to any shares then or at any time thereafter held by him or her in his or her own personal capacity, and not only as such executor or trustee as aforesaid.

At the show of hands at the meeting on the 20th Dec. 1901 three of the defendants voted against the re-election of Mr. Trevor White. Mr. William Allan Miller was willing to act in accordance with the agreement.

Warmington, K.C., Vernon Smith, K.O., and Whinney for the plaintiff.—The agreement is a perfectly legitimate one; it was within the powers of the executors, and does not postpone the realisation of the estate, and the arrangement made was beneficial.

Eve, K.C. and Jessel for three of the executors.—We say (1) the agreement was *ultra vires*, and a delegation of their powers by the executors. (2) The agreement is inconsistent with the duty of the defendants as directors of the company, and it ought not to be enforced. (3) If the injunction is granted Mr. Trevor White will be a director for three years, although the court may come to a different decision at the trial of the action.

Ashton Cross for William Allan Miller.

Vernon Smith, K.O. in reply.—Mr. Trevor White will undertake to retire if the court so directs at the trial of the action.

EADY, J.—The plaintiff does not claim to make the defendants vote in accordance with the agreement, but claims an injunction to restrain them from voting against the re-election of Mr. Trevor White. [His Lordship read the agreement.] This action has been brought to enforce these provisions as to voting. The agreement was entered into as part of the consideration on the

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

CHAN. DIV.] STEPHENS v. MYSORE REEFS (KANGUNDY) COMPANY LIMITED. [CHAN. DIV.]

sale of a large block of shares to the plaintiff at a good price. The executors thought that it was for the interest of their testator's estate that the shares should be sold, and the plaintiff had stipulated for the agreement. Three of the executors seek to evade performance of the agreement. Their first ground is that it is *ultra vires* and a delegation of their powers as executors. But the shares are not tied up, and the agreement only applies while the executors hold the shares, and the realisation of the estate is not postponed. On the facts I find that the arrangement was for the benefit of the estate and within the powers of the executors. Next it is said that as to the shares held by some of the executors in their individual names, the fact that they are directors of the company prevents them from binding themselves by any such agreement. But there is no authority for this proposition, and it cannot be supported. Then it is said that the effect of granting the injunction will be to make Mr. Trevor White a director for three years, although at the trial a different decision may be arrived at. But Mr. Trevor White has agreed to undertake that if the court at the trial so directs, he will resign the office of director and offer himself for re-election at the next ordinary meeting of the company, and on his signing an undertaking to that effect in the registrar's book I will grant the injunction asked for.

Solicitors: Markby, Stewart, and Co.; McDiarmid and Hill; Gibson and Weldon.

Tuesday, Feb. 25.

(Before EADY, J.)

STEPHENS v. MYSORE REEFS (KANGUNDY)
COMPANY LIMITED. (a)

Company—Memorandum of association—Primary object—Ultra vires—Injunction.

A company was incorporated with the object of acquiring and taking over as a going concern the undertaking, assets, and liabilities of a gold mining company in Mysore. The memorandum contained clauses giving the company power to acquire property and concessions; to promote a company to take over property and concessions, and to take the purchase money in shares of any company so promoted. A clause provided "that the objects specified in each paragraph of this clause shall be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company."

The company proposed to acquire a gold-mining property on the west coast of Africa, and a shareholder applied for an injunction to restrain the company from so doing.

Held, that the primary object of the company was to take over the undertaking in Mysore, and that the proposed course was ultra vires and must be restrained by injunction.

THIS was a motion to restrain the defendant company from carrying out a scheme proposed in a circular which had been sent out to shareholders.

The company was incorporated in 1899 by way of reconstruction of the Mysore Reefs (Kangundy) Limited (incorporated in 1897), and the

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

objects specified in the third clause of the memorandum were:

(1) To acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy) Limited, and all or any of the assets and liabilities of that company, and with a view thereto to enter into and carry into effect "an agreement therein mentioned."

Then twenty-three clauses stated the objects in very wide terms to be to acquire gold mines in Mysore or elsewhere, to purchase the property, business, and liabilities of any company carrying on any business which the company was authorised to carry on, or possessing property suitable for the purposes of the company, to promote a company for the purpose of acquiring the property, rights, or interest of the company, and to subscribe for any part of the capital of such company.

By clause 25:

The objects specified in each paragraph of this clause shall be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company.

The company, finding operations in Mysore not to be remunerative, issued a circular in Jan. 1902 stating that the company had had several offers of mining property, and proposed to take an option on mining property in West Africa, to get a report on the property, and promote a company to take it over.

The plaintiff was the holder of 6454 preference and 2788 ordinary shares, and he now applied for an injunction to restrain the company from acting in the manner proposed.

Micklem, K.C. and Dickinson for the plaintiff.—The primary object of the company is mining in Mysore. Neither the directors nor the shareholders contemplated acquiring options in different parts of the world and forming subsidiary companies to purchase them. If the memorandum authorised this it would be a trap for the unwary:

Re German Date Coffee Company, 46 L. T. Rep. 327; 20 Ch. Div. 169;

Re Crown Bank, 62 L. T. Rep. 745; 44 Ch. Div. 634;

Re Amalgamated Syndicate, 77 L. T. Rep. 431; (1897) 3 Ch. 600.

Ever, K.C. and Martelli for the company.—A company may be formed for more purposes than one, for instance to work gold mines and publish prayer-books. The company has power to acquire property, concessions, and the like. It has the right to promote companies, and the right to take its purchase money in shares in the company so promoted. The court endeavours to attach some meaning to general words, and interprets them as being ancillary to the main object. The cases referred to are quite different, for they were cases of winding-up. *Re Coolgardie Consolidated Gold Mines Limited* (76 L. T. Rep. 269) was quite a different case. The company there was unable to work in West Australia, and its main object had failed. Then there is an express provision that the generality of the objects specified in each of the paragraphs in the memorandum shall not be cut down by inference. If this clause is legal, effect ought to be given to it.

EADY, J.—This is a motion to restrain the defendant company from carrying out a scheme referred to in a circular sent out to shareholders.

CHAN. DIV.] URBAN DISTRICT COUNCIL OF ESHER & THE DITTONS v. MARKS. [K.B. DIV.]

The defendant company was incorporated on the 1st July 1899 by way of reconstruction of the Mysore Reefs (Kangundy) Limited (incorporated in 1897), and the first object specified in the memorandum is, 'To acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy) Limited, and all or any of the assets or liabilities of that company, and with a view thereto to enter into and carry into effect' the agreement therein mentioned. In other words, the first object is to acquire the property, assets, and liabilities of its predecessor in Mysore. Apparently the second company was not successful in working in Mysore, and in January it was determined to send out the circular. "I am instructed by the directors to inform you that they have had several offers of mining property. It is proposed to obtain an option on mining property in West Africa, to obtain a report, and promote a subsidiary company to take the property over." The plaintiff objects to the scheme, and he is the holder of 6454 preference and 2788 ordinary shares. He brings an action for an injunction to restrain the defendant company from acting as proposed in the circular on the ground that such proceedings would be *ultra vires*. The defendant company say that what it proposes to do is authorised by the memorandum. In my judgment the correct construction of the memorandum is to deal with the first clause as showing the primary object of the company. The remaining clauses confer full and ample powers subsidiary to that main object. A liberal construction ought to be given to the various subsidiary clauses in aid of the main object, but I ought not to accept a construction which would enable the company to carry on every possible kind of business. Even if I wished to adopt such a construction I am precluded by authority from so doing. In *Re German Date Coffee Company (ubi sup.)*, Lindley, L.J. says: "In construing this memorandum of association, or any other memorandum of association, in which there are general words, care must be taken to construe these general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else." Every line of that is applicable to the present case. Construing the memorandum reasonably, I do not think that it authorises what is proposed. Then I have to consider clause 25. It is said that it makes every precedent clause a separate object of the company. In my judgment it cannot have such a wide effect. It is true that a company is not restricted to one object, but unless objects are set forth in reasonably clear terms, the provisions of sect. 8 of the Companies Act 1862 would not be complied with. I wish to guard myself from being held to restrict wide general powers in a case where they are properly applicable to the primary object of the company.

Solicitors: C. W. Bawlinson; Francis and Johnson.

KING'S BENCH DIVISION.

Oct. 31, Nov. 1, 1901, and Jan. 11, 1902.

(Before WALTON, J.)

URBAN DISTRICT COUNCIL OF ESHER AND THE DITTONS v. MARKS. (a)

Highways—Repair ratione tenuræ—Writ ad quod damnum—Inquisition—Presumed licence from Crown—Stopping up old highway—Obligation imposed on owner and his assigns to make and repair new road—Liability to repair ratione tenuræ—Local Government Act 1894 (56 & 57 Vict. c. 73), s. 25, sub-s. 2.

A grant of a licence by the Crown to the owner of lands to stop up and inclose for the benefit of himself and his heirs a public highway through his lands, imposing at the same time a condition that the owner should make a new road through his lands, and that he, his heirs and assigns, should keep the new road in repair, establishes against the grantee, who has acted upon the grant by stopping up the old road, an obligation *ratione tenuræ* to repair the new road, and it is immaterial whether such grant was made before or after the reign of Richard I., the period of legal memory. In such case the liability to repair is charged upon the heirs and assigns of the lands, and if the lands become divided among several persons the alienee and occupier of each and every part of the lands is liable to the whole charge.

Upon an inquisition taken in 1773 under a writ of *ad quod damnum* the jurors presented that the King should grant to O., the owner of certain lands through which passed an old highway for horses, carts, carriages, and foot passengers, a licence to inclose and stop up the old highway and hold the same when so stopped up to him and his heirs for ever, upon the condition that O. did in his own land make and set out another road equally fit and convenient for horses, carts, carriages, and foot passengers, and that such new road should be for ever thereafter kept in proper repair by O., his heirs and assigns. The old road was stopped up and inclosed, and the new road set out pursuant to the inquisition, and has ever since been used as a highway, although at some period it was stopped up at one end for horses, carts, and carriages, and became a *cul de sac* for traffic of that kind, but it was always used as a highway for foot passengers. No licence from the King pursuant to the terms of the inquisition could be found, and if any such licence was granted it appeared to have been lost.

In an action against the owner and occupier of part of the lands formerly belonging to O. for the expenses of repairing the substituted highway on the ground of a liability to repair the same *ratione tenuræ*:

Held, that a licence from the King incorporating the conditions of the inquisition must be presumed in fact to have been granted; that the substituted road was laid out pursuant to such inquisition and licence; that the road was still a public highway, notwithstanding the changes in it, and that the defendant was an "assign" of O. within the meaning of the inquisition, and that as such "assign," and by reason of his tenure and occupation of the lands, he was liable

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

K.B. DIV.] URBAN DISTRICT COUNCIL OF ESHER & THE DITTONS v. MARKS. [K.B. DIV.]

for the repair of the highway, although he was an assign of part only of the lands formerly belonging to O.

ACTION tried before Walton, J. without a jury.

The action was brought to recover the sum of 137l. 10s. 5d. incurred by the plaintiffs as the urban district council of Esher and the Dittons and the highway authority for the district for the repair of a certain highway known as Ember-lane, which led from Bridge-road, Thames Ditton, westward to the bank of the river Ember, and which the plaintiffs alleged the defendant was liable to repair *ratione tenuræ*.

The statement of claim was shortly as follows :

The defendant was the occupier and owner of certain lands and tenements called Ember Court, in the parish of Thames Ditton, and by reason of his tenure and occupation of those lands and tenements ought to have repaired the aforesaid highway when and so often as there was occasion to do so.

The liability of the defendant was as the owner and occupier of lands formerly belonging to one George Onslow, and existed under and by virtue of a writ of *ad quod damnum* of the 6th Oct. 1773, directed to the sheriff of Surrey and the inquisition duly taken in pursuance thereof and the return made thereto, which writ and return were duly enrolled with the Clerk of the Peace of the County of Surrey by order of the justices, dated the 10th Jan. 1774, and the licence granted by the Crown in consequence thereof to George Onslow to inclose and stop up to hold so inclosed and stopped up to him, his heirs and assigns, as part of the lands a certain highway, being the highway in the writ mentioned, upon the terms and subject to the liability that George Onslow did in his own lands and soil set out in lieu of the highway another road known as Ember-lane, and that such new highway was to be for ever thereafter kept in good and sufficient repair by George Onslow, his heirs and assigns, and which first-named highway was stopped up and inclosed and ever since held by George Onslow, his heirs and assigns, as part of his lands known as the Ember Court Estate, of which Ember Court is part.

The plaintiffs also claimed in the alternative that such liability arose from a lost grant whereby the lands known as Ember Court were formerly granted to be holden by the service of repairing the highway now in question, and that such grant was to be presumed from the fact that the defendant and those who occupied the lands before him had from time out of memory been accustomed to repair the highway.

In April 1900 it was reported to the plaintiffs by a competent surveyor that the highway, Ember-lane, was not in proper repair, whereupon the plaintiffs, under sect. 25, sub-sect. 2, of the Local Government Act 1894, requested the defendant as the person liable to repair the same, to properly repair the highway, which the defendant failed to do, whereupon the plaintiffs repaired the highway, and incurred expenses to the amount of 137l. 10s. 5d., which the plaintiffs under the above statute were entitled to recover from the defendant.

The defendant in his statement of defence admitted that from the 29th Sept. 1899 to the 24th Oct. 1900 he was the owner (but not the occupier) of Ember Court, part of the lands

formerly belonging to Mr. Onslow, but he denied that Ember-lane was a highway, or that he was the person liable to repair it *ratione tenuræ* within the meaning of the Act of 1894, or otherwise.

He admitted that the writ, inquisition, and return were respectively issued, taken, and made, but not that the licence mentioned in the statement of claim was granted.

He denied that the lost grant ever existed or was capable of existing, or ought to be presumed; and that if the alleged liability arose from a lost grant, the plaintiffs were not parties or privies to such grant or successors in title to the grantor (if any), or entitled to sue in respect of such grant, and that the powers conferred by sect. 25 (2) of the Local Government Act 1894 would not in that case be applicable; and he denied that he or those who occupied the lands, or Mr. Onslow or his heirs or assigns, had ever repaired the road, and that no attempt had been made to enforce the alleged liability until this action.

He further alleged that if Ember-lane was still a highway it was so for foot-passengers only, and that as a footpath it was in proper repair when he was requested to repair it; that under the return to the writ of *ad quod damnum* the liability (if any) of George Onslow, his heirs, and assigns was to repair a road fit and convenient for horses, carts, carriages, and foot-passengers to pass and repass through the same: that before the defendant became owner of Ember Court the road had, with the knowledge and acquiescence of the plaintiffs, or of the highway authority for the time being, but not through any act or default of the defendant or any of his predecessors in title, become incapable of being used by horses, carts, and carriages, and it had become a *cul de sac*; and that therefore the liability under the return to the writ was thereby extinguished, or only survived in respect of the footpath.

The writ of *ad quod damnum*, the inquisition, and order of quarter sessions for its enrolment were put in at the trial, and evidence was given of some repairs having been done to the new road by predecessors in title of the defendant. It was admitted that the defendant was during the material times the owner and occupier of Ember Court, which formed part, but part only, of the Ember Court Estate formerly belonging to Mr. Onslow, said to be the Speaker of the House of Commons.

At some period between the date of the inquisition and the time now in question Ember-lane had been stopped up at one end for horses, carts, and carriages, but was open at the other end for such traffic, and it was and remained a public highway for foot passengers at both ends. It was a *cul de sac* so far as horse and carriage traffic was concerned.

The facts and the section of the Act (sect. 25, sub-sect. 2 of the Local Government Act 1894) under which the action was brought are set out in the judgment.

The writ of *ad quod damnum* was as follows :

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith. To the Sheriff of Surrey greeting. We command you that by the oath of honest and lawful men of your county, by whom the truth of the matter may be best known, you diligently inquire whether or no it be to the damage or prejudice of us or of any other if we should grant to George Onslow, Esqre., licence to inclose and

stop up and hold so inclosed and stopped up to him and his heirs that part of the common highway for horses, carts, carriages, and foot passengers leading from the townships or villages of Esher and Thames Ditton towards Ember Mills, East Molesey and West Molesey, which lies in the said parish of Thames Ditton, between the lands of the said George Onalow called the Lawn, in his own occupation, and the lands of the said George Onalow in the occupation of Edward Hopkins on the south, south-west, and west parts thereof and other lands of the said George Onalow there in the occupation of Edward Hopkins on the north, north-east, and east parts thereof, containing in length three hundred yards or thereabouts and in breadth twenty feet or thereabouts. To hold the same when so inclosed to him the said George Onalow and his heirs for ever, so that the said George Onalow doth in his own land and soil set out in lieu thereof another road as convenient and commodious for passengers through the same. And if it will be to the damage or prejudice of us or of any other Then to what damage or to what prejudice of us and to what damage or to what prejudice of any other and of whom and how and in what manner and how much that way to be hold doth contain by number of perches or feet of land as well in length as breadth. And that you return the inquisition thereof distinctly and plainly made without delay into our Chancery under your seal and the seals of those by whom it shall be so taken, together with this writ. Witness ourself at Westminster the 6th day of October in the thirteenth year of our reign by Edward Thurlow, Attorney-General to Our Lord the King.

The execution of this writ appears by the inquisition hereunto annexed.

RICHARD EARL BEDFORD, Esqre., Sheriff.

Copy of inquisition :

Surrey.—An Inquisition indented taken at Thames Ditton, in the county of Surrey, on the 11th day of October in the thirteenth year of the reign of our Sovereign Lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c., and in the year of our Lord, one thousand seven hundred and seventy-three, before me, Richard, Earl Bedford, Esqre., sheriff of the said county by virtue of a writ of our Sovereign Lord the King, to me directed, and to the said inquisition annexed, upon the oath of Stephen Digby of Thames Ditton, Esqre., Henry Dodwell of West Molesey, Esqre., Walter Chetwynd of West Molesey, Esqre., Thomas Sutton of West Molesey, Esqre., Richard Barwell of Esher, Esqre., John Freeland of Cobham, Esqre., Thomas Willett of East Molesey, gentleman, Charles Carpenter of West Molesey, gentleman, Joseph Tealing of Thames Ditton, gentleman, William Parker of Esher, gentleman, Francis Gildart of Thames Ditton, gentleman, Thomas Davis of Thames Ditton, gentleman, Richard Whiting of Thames Ditton, gentleman, and John Brooks of Thames Ditton, gentleman, honest and lawful men of my bailiwick who, having been sworn and upon their oath charged to inquire into the matter and things in the said writ specified and directed to be inquired of, do thereupon say that it will not be to the damage or prejudice of our Sovereign Lord the King, or of any other, if our Sovereign Lord the King should grant to George Onalow, Esqre., licence that he the said George Onalow may inclose and stop up that part of the common highway for horses, carts, carriages, and foot passengers, leading from the townships or villages of Esher and Thames Ditton towards Ember Mills, East Molesey, and West Molesey, which lies in the said parish of Thames Ditton between the lands of the said George Onalow called the Lawn in his own occupation, and the lands of the said George Onalow in the occupation of Edward Hopkins on the south, south-west, and west parts thereof, and other lands of the said George Onalow there in the occupation of

Edward Hopkins on the north, north-east, and east parts thereof, containing in length three hundred yards or thereabouts, and in breadth twenty feet or thereabouts, to hold the same when stopped up to him the said George Onalow and his heirs for ever, so that instead thereof he the said George Onalow doth in his own land and soil make another road, or that there do remain another road as fit and convenient for horses, carts, carriages, and foot passengers, to pass and repass through the same. And the said jurors upon their oath further say that it will not be to the damage or prejudice of our Sovereign Lord the King, or of any other, if our Sovereign Lord the King do grant to the said George Onalow such licence as aforesaid, if the said George Onalow doth in his own lands and soil set out in lieu thereof another road as the same as now marked out (that is to say) of the width of twenty-eight feet, including the ditch on each side, beginning opposite the footbridge over the river Mole next below the mills in the said parish of Thames Ditton, called Ember Mills, and entering a field of the said George Onalow in the occupation of Edward Hopkins, north of the messuage and garden in the occupation of Joseph Tealing, and going through that field eastward into another field of the said George Onalow in the occupation of the same Edward Hopkins, and going through the same eastward into the present high road leading to Hampton Court Bridge towards Esher, such new road to be made with ample sweep at each end and to be for ever hereafter kept in good and sufficient repair by the said George Onalow, his heirs and assigns, and the said Jurors further say that the said new road will be as convenient and commodious for horses, carts, carriages, and foot-passengers passing along the same as the said road so to be inclosed and stopped up, and that the said road so to be inclosed and stopped up doth contain in length eighty perches or thereabouts, and in breadth twenty-six feet or thereabouts. In testimony whereof as well I the said Sheriff as the said Jurors have hereunto severally put our seals the day and year first above written.

Surrey.—Memorandum that at the General Quarter Sessions of the Peace of our Sovereign Lord the King, holden at Southwark, in and for the county aforesaid, on Tuesday in the week next after the close of Epiphany, to wit, on Tuesday, 11th day of January, in the fourteenth year of the reign of our Sovereign Lord George the Third, King of Great Britain, &c., before Sir Joseph Mawbey, Baronet, John Mawbey, John Fassett, Samuel Swaby, Esquires, and others their fellows, Justices of our said Lord the King, assigned to keep the peace and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county.

The inquisition and return hereunto annexed were by order of the said Court entered and recorded by the Clerk of the Peace of the said county amongst the records of the said Session, according to the Act of Parliament in that case made.

LAWSON, Cl. of the Peace for Surrey.

Examined with the record by Chas. Deaves, one of the Clerks of the Petty Bagge.

Macmorran, K.C. (Manisty, K.C. with him) for the plaintiffs.—The liability which the plaintiffs now seek to enforce is a liability arising under sect. 25, sub-sect. 2 of the Local Government Act 1894, by reason of the defendant's tenure of Ember Court. The plaintiffs claim that such liability exists by virtue of the writ of *ad quod damnum* and the inquisition taken in pursuance of such writ, and in the alternative by virtue of a lost grant whereby these lands were formerly granted to Mr. Onalow on the condition of repairing this highway. To the suggestion that no grant can be produced or ought to be presumed. there are two answers, first, that by the Act of 1773 (13 Geo. 3, c. 78) the necessity for a licence

was taken away; and, secondly, having regard to the fact that the new road exists, the Court will presume a legal origin for that state of things. As to the necessity for a licence, sect. 19 of 13 Geo. 3, c. 78 (since repealed), provided that the new highway so set out should be for ever a public highway to all intents and purposes; so that under that Act the licence of the Crown became absolutely unnecessary provided that the proceedings were properly taken and there was no appeal. The date of the inquisition was in 1773, and the next quarter sessions was in Feb. 1774, so that that Act would apply to the inquisition. As to the question of presumption, it must be presumed that all the formalities were duly complied with.

Leigh Urban District Council v. King, 83 L. T. Rep. 777; (1901) 1 Q. B. 747.

Phillimore, J., there says that in such cases even an order of quarter sessions might be presumed, which exactly applies here. Therefore the licence from the King may, if necessary, be presumed to have been granted, and under the writ and inquisition the liability was imposed on Mr. Onslow his heirs, and "assigns" to maintain and keep in repair this new and substituted road. The next point is that, assuming that this was a road which Mr. Onslow, his heirs, and assigns were bound to repair, that is a liability which falls on all his assigns. The "assigns" of Mr. Onslow who are mentioned in the inquisition, and who are made liable for the repair of the new road, are assigns of the lands through which the road was made, and that includes the assigns of any and every part of such lands, so that an assign of any part of such lands is liable for such repair. Ember Court as occupied by the defendant was part of the lands formerly belonging to Mr. Onslow. The defendant is an assign of the lands at one side of the road; he is one "assign" of the lands, and is therefore liable as such, although he is not the assign of the whole of such lands:

Mayor, &c. of Lyme Regis v. Henley, 1 Bingh. N. C. 222.

When charges of this kind are imposed on land with conditions attached, as in this case, the conditions attach to every part of the land, and it cannot be said that the charges are to be apportioned:

Reg. v. Duchess of Buccleugh, 1 Salk. 358.

The subsequent division of the lands does not affect the liability, which attaches to all these lands held by Mr. Onslow, and the division amongst several assigns would cast the liability on each and every assign, and the liability can be enforced against any assign of any part of the lands:

Pratt on Highways, 14th edit., p. 60.

The next point is as to the stopping up of the road at one end for horse and carriage traffic, and the suggestion in the defence is that by reason of the change in the road and the stopping of it up at one end it has ceased to be a highway, and the liability to repair it *ratione tenuræ* is gone altogether. There is no authority for that suggestion. If a highway be legally stopped up at both ends it then ceases to be a highway (*Bailey v. Jamieson*, 34 L. T. Rep. 62; 1 C. P. Div. 329); but the stopping up of one end of a highway does

not make it cease to be a highway: (per Lord Coleridge, C.J., *ibid.*). The road is still a highway although it is stopped up at one end for horses and carts and is a *cul de sac*:

Per Alderson, B. in *Gwyn v. Hardwicks*, 25 L. J. 97, M. C.; 1 H. & N. 49;

Rea v. Marquis of Downshire, 4 A. & E. 698;

Reg. v. Burney, 31 L. T. Rep. 828.

If the highway were practically destroyed the liability to repair it *ratione tenuræ* would cease:

Per Lord Coleridge, C.J. in *Reg. v. Barker*, 62 L. T. Rep. 578; 25 Q. B. Div. 213.

There has been nothing of the kind here, and the only suggestion that can be made is that at some period there has been some encroachment on the road, which does not affect the matter. If the liability once existed, no length of time would affect it; there is no statute of limitations in such a case, and the mere failure to enforce the liability does not extinguish it. The plaintiffs rely on the inquisition, and not on the repairs from time immemorial.

Robson, K.C., and *G. F. Hart* for the defendant.—The plaintiffs are proceeding under sect. 25 (2) of the Act of 1894. Their proceeding is entirely misconceived. They rely on the inquisition and licence as proving a liability *ratione tenuræ*, but, in the first place, this is not a case of repairing the road *ratione tenuræ* at all; the repair (if any) by the defendant's predecessors in title was a repair not by reason of the tenure of the lands, but by reason of the agreement or licence. There is no definition of what repair *ratione tenuræ* means; but if the defendant is right in saying that this is not a repair *ratione tenuræ*, then the plaintiffs are wrong in proceeding under sect. 25 (2) of the Act of 1894: (*Pratt on Highways*, 14th edit., p. 334). They ought to have proceeded under sect. 34 of the Highway Act 1862. The words "or otherwise howsoever" in that section are wide enough to include this case. That section remains good, but is modified by the section in the Act of 1894, under which the plaintiffs are proceeding. Sect. 25 (2) of the Act of 1894 refers alone to repairs *ratione tenuræ*; and except as to these, the provisions in sect. 34 of the Act of 1862 stand, and under these provisions the highway authority must go before justices for an order. An obligation to repair *ratione tenuræ* can exist by prescription only; so that where the road can be shown to have been made within legal memory the liability cannot exist. It is a class of legal obligations to which the law has given effect in the absence of any legal document, and it assumes a lost grant, and that what the parties have done from time immemorial has been done under a grant:

Rea v. Inhabitants of Hatfield, 4 B. & A. 75.

If the instrument exists, then the liability to repair is under the instrument, and not *ratione tenuræ*:

Archbold's Criminal Pleading, 22nd edit., p. 1160, Form of Plea;

Reg. v. Sheffield Canal Company, 13 Q. B. 913, at p. 926;

Rea v. Hayman, M. & M. 401;

Reg. v. Beeby, 8 L. J. N. S. 38, M. C.

Only the occupier can be proceeded against, and not the owner, whereas if the liability arise under

a deed any person named in the deed can be proceeded against:

Reg. v. Barker, 62 L. T. Rep. 578; 25 Q. B. Div. 213.

This liability must be proved from the acts of the parties from time immemorial; and no liability *ratione tenuræ* can exist except such liability as can be proved by the acts of the parties in the absence of a document. The next point is that the plaintiffs rely on the writ and inquisition. These contemplate a Crown grant and that Mr. Onslow should provide and make and keep up a new substituted road. The fair inferences are either that there was a licence granted without the additional term imposed by the jury, or that Mr. Onslow said he would not have the licence on any such term, and the matter would go on without his having any such licence. The licence must be presumed not to have been in the terms of the inquisition. The present road (which is 21ft. wide) differs from that specified in the inquisition (which was 28ft.), and therefore the present road must be presumed to have been made not under the inquisition, but under a lost document. The mere fact that some slight repairs have been done to the road is not sufficient, and is no evidence of any liability to repair *ratione tenuræ*:

Rundle v. Hearle, 78 L. T. Rep. 561; (1898) 2 Q. B. 83.

The next point is that the road has been changed; it has been destroyed as a carriage-way and turned into a *cul de sac*. It is no longer a highway; but is a mere footpath, and the local authority, in allowing this change, have abandoned it as a highway, and there is no longer any liability to repair it *ratione tenuræ*, if such ever existed:

Reg. v. Barker (*ubi sup.*);

Bourke v. Davis, 62 L. T. Rep. 34, at p. 36; 44 Ch. Div. at pp. 121-3.

Then the "order or proceeding" referred to in sect. 19 of 13 Geo. 3, c. 78, seems rather to refer to the order and proceeding before the two justices, and not to the proceeding on the writ *ad quod damnum*. The plaintiffs, therefore, cannot avail themselves of that section; but they rely on *Leigh Urban District Council v. King* (*ubi sup.*), and they say that although they have no certificate by two justices, one ought to be assumed. There never was a certificate, and one ought not to be presumed. Lastly, the covenant does not run with the land, and therefore the assigns are not bound. They referred to

Mayor of Lyme Regis v. Henley (*ubi sup.*).

Macmorran, K.C., in reply, referred to

Ex parte Venner, 3 Atk. 766;

Fitz. Nat. Brev. tit. "Writ of Ad quod damnum," pp. 221-226.

Cur. adv. vult.

Jan. 11.—WALTON, J. read the following judgment: In this action the Urban District Council of Esher and the Dittons claim a sum of 137l. 10s. 5d., the amount of expenses incurred by the district council in the repair of a road within their district called Ember-lane. The action is brought under the Local Government Act 1894, s. 25, sub-s. 2, which provides: "Where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same

fails when requested so to do by the district council to place it in proper repair, the district council may place the highway in proper repair and recover from the person liable to repair the highway the necessary expenses of so doing." The history of Ember-lane appears to be as follows: In the year 1773 Mr. George Onslow was the owner of lands which may be described as the Ember Court Estate. Ember Court, or as it was then more commonly called, Imber Court, or, by a still earlier name, Imworth, was a manor in the parish of Thames Ditton: (see the recitals of the Inclosure Act, 48 Geo. 3, c. cxxiv.). Through those lands of Mr. Onslow there passed an old highway, leading from Thames Ditton and Esher towards East and West Molesey. Mr. Onslow desired to stop up and inclose this highway, and accordingly, on the 6th Oct. 1773, he sued out a writ of *ad quod damnum*; and on the 11th Oct. in the same year an inquisition was taken before the sheriff of the county of Surrey by virtue of such writ, and the jurors upon this inquisition found that it would not be to the damage of the King, or of any other, if the King should grant to George Onslow a licence to inclose and stop up the old highway, which was a highway for horses, carts, carriages, and foot passengers, and to hold such road when stopped up to George Onslow and his heirs for ever, so that instead thereof George Onslow did in his own land make another road as fit and convenient for horses, carts, carriages, and foot passengers to pass and repass; and the jurors further said that it would not be to the damage or prejudice of the King, or of any other, if the King granted to George Onslow such licence if George Onslow did in his own lands set out in place of the existing highway another road commencing opposite to the foot-bridge over the river Mole next below Ember Mills and passing through certain land belonging to George Onslow to the road leading from Hampton Court-bridge towards Esher, such road to be for ever thereafter kept in good and sufficient repair by George Onslow, his heirs, and assigns. At the following quarter sessions for the county of Surrey, held on the 11th Jan. 1774, the inquisition and return were by order of the court entered and recorded amongst the records of the sessions. It is not disputed—indeed upon the pleadings it was admitted—that the old highway referred to in the inquisition was stopped up and inclosed and was from that time held by George Onslow, his heirs, and assigns, as part of his lands known as the Ember Court Estate. And it cannot be doubted (nor was it disputed at the trial, although a question was raised as to a subsequent alteration in its character) that Ember-lane, as originally set out, was the road which Mr. Onslow was required by the terms of the inquisition to set out, and which he did set out for the use of the public in place of the old highway which he stopped up and inclosed. Apparently, when Ember-lane was first made it led to a foot-bridge across the river and by a ford for horses and carriages to a cart or carriage way on the other side of the river, leading to East and West Molesey. It may be noticed that in the finding of the jury the new road was described as commencing opposite the foot-bridge over the river Mole. The river Mole empties itself into the Thames by two mouths, one of which is called the Mole and the other is now called the

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Ember. The road called Ember-lane in fact commences opposite to a foot-bridge across that mouth of the Mole which is now called the Ember. I am satisfied that in 1773 both mouths were spoken of as the "Mole," or perhaps more commonly as the "Moulsey river." This appears from old maps, and even if I am not entitled to take judicial notice of this as a geographical fact, I am satisfied upon the evidence—and, as I have said, it was not really disputed—that Ember-lane is the road which was set out pursuant to the inquisition of 1773. I shall deal with the question as to its subsequent change of character presently. I have first to consider a difficulty which arises in the present case from the fact that, although the terms of the writ and inquisition and return have been proved by the production of the records of the Quarter Sessions of Surrey, no trace can be found of any licence by the King, which in the ordinary course should have been granted in the terms of the findings of the jury upon the inquisition. If any such licence was granted it appears to have been lost. There is no doubt that the inquisition was acted upon, the old road was stopped and the new road was made and has ever since been used as a highway. There was also evidence which satisfies me that the new road was never repaired by the inhabitants or by any public authority. There was evidence that such repair as has from time to time been done was done by owners of lands forming part of the lands referred to in the inquisition as the lands of Mr. Onslow. This evidence of repair would not be sufficient to prove a liability to repair by prescription; but, taken in connection with the other facts showing that the inquisition was acted upon, it cannot be entirely disregarded. The case of *Leigh Urban District Council v. King* (*ubi sup.*) is an illustration of the kind of inference which a court is entitled to draw in a case of this kind, where certain formal orders and proceedings necessary to legally justify the substitution of one highway for another cannot be proved. In such cases when, for a long period of time every one has acted openly as if the required orders and proceedings had been made and taken, there is a strong presumption that such orders were made and such proceedings taken, and that the records and evidence of them have been lost. I have no hesitation in finding as a fact that a licence was granted by the King, and that the old road was stopped up, and Ember-lane set out and substituted for it under such licence. The question no doubt remains whether the licence incorporated the conditions required by the findings in the inquisition. When one remembers that as far back as 8 & 9 Will. 3 any member of the public aggrieved by the inclosure of a road under an inquisition taken upon a writ of *ad quod damnum* had an appeal to quarter sessions, and the determination of such appeal was final and conclusive, it is impossible to suppose that the Crown would override the rights of the public by granting a licence which did not give to the public the protection required by the inquisition. I find, therefore, that a licence was granted by the King in the terms and subject to the conditions of the inquisition. A point was raised by Mr. Robson on behalf of the defendant with which it will be convenient to deal at once. He contended that the case was similar to *Reg. v. Barker* (*ubi sup.*), and that the old road set out as a highway in 1774 or

thereabouts had disappeared; that its character had been so completely changed that it had, long before any question arose between the plaintiffs and the defendant, ceased to be the road which Mr. Onslow, his heirs and assigns, were required to repair, and had become something entirely different. It is true that at some date later than 1773, probably about 1821, the road on the other side of the river towards which Ember-lane led ceased to be used by carts or carriages, and for many years past there has been no access to or egress from Ember-lane at the end nearest to the river except for foot-passengers. Ember-lane itself, however, has always been open from the other end to the use of the public for cart and carriage traffic, although, no doubt, it has in fact been used principally by foot-passengers. It was contended by Mr. Robson, on behalf of the defendant, that it had ceased to be a highway for carts and carriages, but in my judgment, the fact that it has become a *cul de sac* for traffic of that character has not taken away the rights of the public to use it so far as it may be found convenient to do so for carts, carriages, and horses: (see *Gwyn v. Hardwicke*, *ubi sup.*; *Reg. v. Burney*, *ubi sup.*). I am further satisfied that there has been no such change in the character of the road as to make it so different from the road which Mr. Onslow and his heirs and assigns were required to keep in repair, that the old Ember-lane can be said to have disappeared. I find therefore that Ember-lane was and is a highway for horses, carts, carriages, and foot-passengers, and that it was laid out and thrown open to the public pursuant to the inquisition of the 11th Oct. 1773, and a licence of the Crown, which allowed Mr. Onslow to stop up the old road on condition that he and his heirs and assigns should keep the substituted road Ember-lane in repair. About April 1900 it was reported to the plaintiffs by their surveyor (who was a competent surveyor within the meaning of sect. 25, sub-sect. 2 of the Act of 1894) that Ember-lane was not in proper repair so as to be fit for use either by carts or carriages or by foot-passengers. At this time the defendant Mr. Marks was the owner and occupier, and as such was an assign of Mr. George Onslow of part of his lands referred to in the inquisition. The district council claimed that as such assign and by reason of his tenure and occupation he was liable to repair Ember-lane. Certain correspondence passed in April 1900 between the district council and the defendant, and by a letter of 24th April the council required the defendant to place the road in a proper state of repair. The defendant, however, repudiated any liability to repair, and the plaintiffs thereupon placed the road in proper repair, incurring expenses in so doing which amounted to 137l. 10s. 5d., the amount claimed in this action. It was contended on behalf of the defendant that a liability to repair a highway *ratione tenuræ* can exist by prescription only, and therefore that where the road in question can be shown to have been first made within the period of legal memory there can be no such liability; and that as Ember-lane did not exist as a road before the year 1773 the defendant could not be liable to repair it *ratione tenuræ*. It is true that in cases in which the claim against an occupier of land, that he is bound to repair *ratione tenuræ*, is founded upon usage or, in other words, on evidence of acts of

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repair, such usage must be immemorial, and if it can be shown in such a case that the usage commenced at some time since the reign of King Richard I., the attempt to establish a liability to repair *ratione tenuræ* fails. In other words, to prove such an obligation by prescription the usage must be immemorial. But, as was pointed out in the case of *Mayor of Lyme Regis v. Henley* (*ubi sup.*), prescription necessarily implies some legal origin, and the legal origin of an obligation to repair *ratione tenuræ* may be a grant from the Crown. If it can be proved that the King granted a licence to the owner of certain lands to stop and inclose for the benefit of himself and his heirs a public highway passing through such lands, imposing at the same time a condition that the owner of such lands should make a new road in place of the old one, and that he, his heirs, and assigns should keep such new road in repair, and if it can further be proved that the grantee accepted and acted upon such grant by stopping up the old highway, this would, in my judgment, be sufficient to establish an obligation *ratione tenuræ* to repair the new road made in place of the old road so stopped up. And it appears to me to be immaterial whether such grant was made and accepted before or after the reign of King Richard I. For these propositions the case which I have cited of *Mayor of Lyme Regis v. Henley* (*ubi sup.*) appears to me to be a sufficient authority. The *Stratford Bridge* case (2 M. & S. 520 n.) affords an example of the way in which this kind of liability might arise before the reign of Richard I. It may, however, be suggested that the defendant was not an assign of Mr. Onslow within the meaning of the inquisition. He admits that he was the owner and occupier of Ember Court from 29th Sept. 1899 to 24th Oct. 1900, and that Ember Court formed part of the lands formerly belonging to George Onslow, and that the expenses in question were incurred about Aug. 1900. But it is true that some part of the lands of George Onslow referred to in the inquisition never belonged to the defendant. In *Reg. v. Duchess of Buccleugh* (*ubi sup.*) it was held that where a manor was held subject to an obligation of repairing a highway and the manor became afterwards divided amongst several persons, each alienee was liable to the whole charge, his remedy being by contribution from the others. In the present case there was a licence to the owner of lands to stop and inclose a highway passing through such lands and "to hold it, when stopped up, to him and his heirs for ever," subject, however, to the condition that the owner of the lands should make another road through his lands in place of the old road, and that he, his heirs and assigns, should for ever keep the new road in repair. I think that "heirs and assigns," within the meaning of the inquisition, are the heirs and assigns of the lands through which the old road passed and through which also the new road was to pass—that is to say, the lands constituting the Ember Court Estate of Mr. Onslow. In my judgment, therefore, the liability to repair was charged upon the heirs and assigns of that estate. Following the principle of the case which I have cited, when the estate became divided among several persons, each alienee and occupier of any part of the estate, and, therefore, the defendant, was liable to the whole charge. It was further suggested that,

even if there was an obligation upon the defendant to repair, it was not an obligation *ratione tenuræ*, because such an obligation is enforceable against an occupier only, and not against an owner who is not an occupier, and therefore an action under sect. 25, sub-sect. 2 of the Act of 1894 would not lie, and that the only remedy was under sect. 34 of the Highway Act 1862. In the first place, it is admitted that at all material times the defendant was occupier as well as owner. In my judgment, a grant of a licence by the Crown in the terms of the inquisition of 1773 is sufficient to create an obligation *ratione tenuræ*. The cases already cited of *Mayor of Lyme Regis v. Henley* (*ubi sup.*) and the *Stratford Bridge* case (*ubi sup.*) appear to me to establish this. The rule that was acted upon when highways were stopped and substituted roads made under a licence granted pursuant to an inquisition upon a writ of *ad quod damnum* was to leave the burden of repair as far as possible where it lay before: (see *Ex parte Venner*, *ubi sup.*; *Re v. Inhabitants of Flecknow*, 1 Burr. 461; and see also the concluding words of sect. 19 of the contemporaneous statute of 13 Geo. 3, c. 78). There is the strongest ground for inferring that the reason why Mr. Onslow and his heirs and assigns were required to repair the new road was that the old road which was stopped up was one which the owner of Ember Court was bound to repair *ratione tenuræ*. A similar liability was imposed in respect of the new road. For these reasons I think that the plaintiffs have established their case, and, as there is no dispute as to the amount, there will be judgment for the plaintiffs for 137l. 10s. 5d. and costs.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, Charles Mylne Barker.

Solicitors for the defendant, Michael Abrahams, Sons, and Co.

Jan. 13 and Feb. 1.

(Before JELF, J.)

TAYLOR v. HOLLARD. (a)

Limitations, Statute of—Judgment—Part payment—Judgment obtained in England and sued upon in foreign country—Payment made under foreign judgment—Right to sue for balance of English judgment—Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), s. 8—3 & 4 Will. 4, c. 42, s. 3.

A part payment to take a case out of the statutes of limitation must be a part payment made under circumstances from which an admission of liability and a promise to pay the residuum can be inferred.

The plaintiff in the year 1884 obtained against the defendant, who was domiciled in the then South African Republic (the Transvaal), but who was temporarily in England, a judgment in the High Court in respect of money lent, and in 1886 he sued the defendant in the Transvaal courts on the English judgment, when the Transvaal court inquired into the original cause of action and gave judgment for a part only of the English judgment. The plaintiff took steps to enforce the Transvaal judgment by sequestration,

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

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and in 1889 payment was made to the plaintiff of the whole amount due on the Transvaal judgment, and the defendant's insolvency was rescinded. In an action commenced by the plaintiff in the year 1900 to recover the balance due on the English judgment:

Held (on the authority of *Jay v. Johnstone*, 68 L. T. Rep. 129; (1893) 1 Q. B. 189), that the period of limitation applicable was the twelve years limitation in sect. 8 of the Real Property Limitation Act 1874, and not the twenty years given in sect. 3 of 3 & 4 Will. 4, c. 42; that the payment made to the plaintiff in 1889, being a payment made, not on account of the English judgment obtained in 1884, but in satisfaction of the Transvaal judgment, was not such a part payment as would take the case out of the statute, and that the cause of action sued upon was therefore barred, though, if it had not been barred the defendant would not have been released by the insolvency proceedings in the Transvaal.

ACTION tried before Jelf, J. without a jury.

The plaintiff's claim was for money due from the defendant to the plaintiff on a judgment, dated the 28th June 1884, recovered by the plaintiff against the defendant in an action brought by the plaintiff against the defendant in the Queen's Bench Division of the High Court of Justice, on account of which a payment was alleged to have been made by the defendant in the month of February 1889, and for interest thereon.

The judgment was for 15,058*l.* 10*s.* 9*d.*, and costs to be taxed, and the costs were taxed at 8*l.* 19*s.* 2*d.*, making a total of 15,067*l.* 9*s.* 11*d.*

Various payments were made from time to time, and credit was given for a payment made on the 1st Feb. 1889 from the defendant per his trustee in Pretoria, and after giving credit for such payment (which amounted to 9635*l.* 4*s.* 6*d.*) there remained, as the plaintiff alleged, a balance of 5832*l.* 10*s.* 11*d.*, due on the 1st Feb. 1889 to the plaintiff on the judgment. The plaintiff also claimed interest at 4 per cent. on the above sum of 5832*l.* 10*s.* 11*d.* from the 1st Feb. 1889 to the date of this action, which made up the total of 8515*l.* 5*s.* 4*d.*, which was the sum now sued for.

The defendant in his defence (*inter alia*) denied that the payment of the 1st Feb. 1889 was made by him or on his behalf or on account of the alleged judgment, and he alleged that the cause of action did not arise within twelve years before this suit, and was barred by the Real Property Limitation Act 1874; and in the alternative that the plaintiff in Dec. 1885 sued the defendant in the courts of the South African Republic (the Transvaal) at Pretoria upon the same cause of action upon which the judgment sued upon in this action was alleged to have been recovered, and on the 12th May 1886 the plaintiff in the courts at Pretoria recovered upon the same cause of action a judgment against the defendant for 7000*l.* and interest thereon at 8 per cent. per annum and costs; that the plaintiff thereupon took proceedings against the defendant for sequestration in the courts of the South African Republic, and recovered thereby 9635*l.* 4*s.* 6*d.* from the defendant's trustee in the insolvency in respect of the above judgment of 7000*l.* with interest and costs, whereby such judgment was duly satisfied and the cause of

action both in the Transvaal and in this court was merged, and thereby the judgment recovered in this court on the 28th June 1884 was satisfied and discharged; and further, that the defendant was discharged from the judgment debt and was released from the cause of action now sued upon by the sequestration and insolvency proceedings in the South African Republic, whereby the defendant was according to law rehabilitated and released from all debts provable in the insolvency.

Sect. 8 of the Real Property Limitation Act 1874 (37 & 38 Vict. c. 57) provides:

No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien . . . but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

By sect. 3 of 3 & 4 Will. 4, c. 42 (the Civil Procedure Act 1833) the period of limitation for actions coming within that section was twenty years.

The facts and arguments are fully stated in the judgment.

Herbert Reed, K.C. and *Compton-Smith* for the plaintiff.

Macaskie, K.C. and *Lewis Thomas* for the defendant.

Cur. adv. vult.

Feb. 1.—*JELF*, J. delivered the following written judgment: This was an action tried before me without a jury on the 13th Jan. last, whereby the plaintiff sought to recover from the defendant the sum of 8515*l.* 5*s.* 4*d.*, balance alleged to be due for principal and interest on a judgment obtained by the plaintiff against the defendant in the Queen's Bench Division, dated the 28th June 1884, for 15,067*l.* 9*s.* 11*d.*, including costs. Three defences were relied upon by the defendant—First, that the Statute of Limitations (the Real Property Limitation Act 1874, 37 & 38 Vict. c. 57, s. 8) was a bar to the action, as more than twelve years had elapsed between the date of the judgment (June 28, 1884) and the date of the writ in this action (Aug. 7, 1900); secondly, that on the 12th May 1886 the plaintiff obtained judgment in the courts of the then South African Republic (the Transvaal) against the defendant for 7000*l.* and interest thereon at 8 per cent. and costs for the same cause of action as that now sued upon, and took proceedings there for sequestration, and received from the defendant's trustee in insolvency 9635*l.* 4*s.* 6*d.* in respect thereof, and thereby the said judgment now sued upon was merged or satisfied; thirdly, that the defendant was released from the cause of action now sued upon by the sequestration and insolvency proceedings in the Transvaal. As to the plea of the Statute of Limitations, the plaintiff's counsel, Mr. Herbert Reed, K.C. and Mr. Compton-Smith, formally contended that the case was governed not by

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37 & 38 Vict. c. 57, s. 8 (which makes the period twelve years) but by 3 & 4 Will. 4, c. 42, s. 3 (which makes the period twenty years). But they admitted that since the case of *Jay v. Johnstone* (68 L. T. Rep. 129; (1893) 1 Q. B. 25, and C. A. 189) they could only rely on this point in the House of Lords. It was further argued on behalf of the plaintiff that the case was taken out of the statute by a part payment within twelve years of 9635*l.* 4*s.* 6*d.* on account of the debt under the circumstances hereinafter appearing. The defendant formerly resided in the Transvaal, the then South African Republic, and was domiciled there; but being temporarily in England he borrowed money from the plaintiff, contracting to repay the loan with a very heavy bonus, recoverable in England, where there were no usury laws in force. On his failure to pay he was sued in the Queen's Bench Division by the plaintiff, who recovered against him the judgment sued upon in this action. In Sept. 1886 the plaintiff sought to enforce this judgment against the defendant, who had returned to the Transvaal, in the courts of the then South African Republic. The action was brought to recover the 15,067*l.* 9*s.* 11*d.*, and interest upon the English judgment. The Transvaal court, presided over by Koëtze, C.J., instead of either giving judgment for the amount of the English judgment or refusing to enforce it at all, took a middle course. They inquired into the merits of the original cause of action to the extent of finding that only 7000*l.* had been actually lent by the plaintiff to the defendant, and that the rest of the 15,067*l.* 9*s.* 11*d.* had substantially consisted of a bonus by way of interest on the loan, and refused, whether rightly or wrongly it is not for me to determine, to give judgment for the whole amount, holding such bonus to be usurious and unconscionable and not enforceable by the law of the South African Republic; but gave judgment for 7000*l.* and interest at 8 per cent. from the date of the English judgment (instead of 4 per cent., the amount of interest which would be recoverable in this country), making a total of 9635*l.* 4*s.* 6*d.* The plaintiff thereupon took proceedings against the defendant in the courts of the then South African Republic for sequestration, and curators or trustees were appointed by the Transvaal courts. The estate would not pay all the claims of creditors against the defendant, amounting to 12,000*l.* The defendant then availed himself of a payment made on his behalf by another person (Mr. Sivewright) to the curators of 12,350*l.* 15*s.* 11*d.*, and undertook to be responsible for any further liabilities. The 9635*l.* 4*s.* 6*d.* was then paid in full by the curators to the plaintiff's agents, and ultimately the sequestration and insolvency were annulled and the defendant was rehabilitated and released from all debts claimable against his estate. It was contended for the plaintiff that this payment of 9635*l.* 4*s.* 6*d.* took the case out of the statute. The defendant's counsel, Mr. Macaskie, K.C. and Mr. Lewis Thomas, on the contrary, contended, first, that the payment was not made on account of the English judgment but on account, or rather in satisfaction, of the South African judgment; secondly, that it was not made by the defendant or his agent; and thirdly, that it was not such a payment as is contemplated by the statute, not being one from which an acknowledgment of

liability and a promise to pay the residue of the English judgment could be inferred. I am of opinion that the defendant's contention is correct on all three grounds. The payment was not made on account of the English judgment, which in my opinion was necessary in order to take the case out of the statute, but in satisfaction of the Transvaal judgment; and, if this is a question of fact, I so find. Taking the other two grounds together, as they are very closely connected with one another, I find that the payment, though the defendant took advantage of it and obtained his release by means of it and spoke of it as made by him, was not in fact made by him or by any agent of his, but by the curators under his sequestration out of moneys found by Mr. Sivewright; and that it was not in fact made voluntarily, but by way of execution of a hostile judgment obtained against the defendant *in invitum*. Under these circumstances I think it is impossible to infer from the payment of that sum of 9635*l.* 4*s.* 6*d.* an acknowledgment by the defendant or any agent of his of a further liability or a promise on his part or on the part of any agent of his to pay the residue of the English judgment. This being so, I am of opinion that there was no part payment of such a kind as to take the case out of the statute. The old case of *Jackson v. Fairbank* (2 H. Bl. 340) (decided in 1794) was relied on by the plaintiff's counsel to show that a payment by a trustee in a bankruptcy may be sufficient. But I consider that that case has been practically overruled by *Davies v. Edwards* (18 L. T. Rep. O. S. 64; 7 Ex. 22) and *Ex parte Topping* (34 L. J. 44, Bank.), and is, I think, inconsistent with other modern decisions. An attempt was made by Mr. Reed, K.C. to establish a distinction between 3 & 4 Will. 4, c. 27, s. 40, and 37 & 38 Vict. c. 57, s. 8, and to show that the latter statute made the fact of a part payment *ipso facto* sufficient without the necessity of showing that it was made under circumstances from which an admission of liability and a promise to pay could be inferred. The only difference, however, in the wording of the two statutes is in the substitution of the period of twelve years for twenty, and Lord Esher, then Brett, L.J., in *Harlock v. Ashberry* (46 L. T. Rep. 356; 19 Ch. Div. 539, at p. 548), says: "In all statutes of limitations the principles on which they are founded is that in those cases in which a payment is allowed to take the case out of the operations of the Statute of Limitations, it must be such a payment as amounts to an acknowledgment of liability"; and Sir G. Jessel, M.R. emphasises the same proposition. For these reasons I hold that the Statute of Limitations is a complete bar to this action. I am further of opinion that the second defence relied upon by the defendant is established. If the plaintiff had merely obtained judgment in the Transvaal, and, finding it was for 9635*l.* 4*s.* 6*d.* instead of 15,067*l.* 9*s.* 11*d.*, had not taken any step to realise that judgment, he could, I think, have afterwards sued in this country for the original debt. But, in my opinion, when he accepted the judgment with its distinct incidents—i.e., the bonus struck off, but 8 per cent. instead of 4 per cent. put on—and proceeded to sequestration and ultimately obtained the 9635*l.* 4*s.* 6*d.* in full, I think he had elected to take the judgment of the foreign country to which he had appealed in discharge of

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the whole cause of action and could not afterwards sue for the residue of the debt in England. What he wants to do is to take from the foreign court the judgment which that court gave for the whole cause of action and treat it as a part payment and sue for the residue here. To do this would be to approbate and reprobate, or, in more homely language, to blow hot and cold, which neither law nor common sense will allow: (see *Barber v. Lamb*, 2 L. T. Rep. 238; 8 C. B. N. S. 95; 29 L. J. 234, C. P., where Erle, C.J. says, 29 L. J. at p. 236, C. P.: "It would be contrary to all principle for the party who has chosen such tribunal, and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal"). In my opinion the third defence fails, as the release in the foreign country could not *per se* get rid of a cause of action arising out of a contract to be performed in this country: (see Dicey's *Conflict of Laws*, 1896, r. 113, p. 451; *Gibbs v. Société Industrielle et Commerciale des Métaux*, 63 L. T. Rep. 503; 25 Q. B. Div. 399). But, for the reasons above set forth, I think the other two defences are sound, and I give judgment for the defendant with costs.

Judgment for the defendant.

Solicitors for the plaintiff, *Hurford and Taylor*.
Solicitors for the defendant, *Lewis and Lewis*.

Jan. 13 and Feb. 14.

(Before Lord ALVERSTONE, C.J.)

BARNES v. RICHARDS AND OTHERS. (a)

Contract—Setting aside—Undue pressure—Deed executed under undue pressure—Right to set aside—Wrongful dismissal.

In an action for balance of salary and for wrongful dismissal brought by the plaintiff, who had been engaged by the defendants as manager of their music-hall, the defendants set up as a bar to the claim an arrangement which was come to in the course of a discussion in which the plaintiff was asked to explain some alleged irregularities in his accounts, and which arrangement was embodied in a deed executed by the plaintiff under which he was to send in his resignation and was to accept in settlement of cross claims between him and the defendants a certain sum for salary, and was to sign the deed of release.

The plaintiff replied that he was induced to execute the deed by the defendants' threat unlawfully to imprison him, and that he executed it when overwhelmed by the threat, and that he gave no real or free consent to its execution.

The jury having negatived the threats by the defendants of criminal proceedings or imprisonment, but having found that the plaintiff was induced to make the agreement by undue pressure exercised by the defendants to force him to make it:

Held, that the undue pressure so found was not sufficient in law to entitle the plaintiff to set aside the arrangement or the deed which embodied it, and to fall back upon his original claims; and, further, that as the plaintiff had

tendered his resignation, which was accepted, there was no wrongful dismissal.

FURTHER CONSIDERATION by Lord Alverstone, C.J. in an action tried before him with a jury.

The action was brought against the defendants, who were proprietors of Collins' Music Hall, in Islington, in the county of London, to recover a sum of 360*l.* alleged to be due to the plaintiff as manager of the music-hall, in respect of balance of salary and for damages for wrongful dismissal by the defendants on the 27th Oct. 1900.

The defendants in their defence admitted that the plaintiff acted as their manager of the music-hall, but they denied that they wrongfully dismissed the plaintiff from their service; they alleged that on the date in question the plaintiff tendered his resignation, which was accepted by the defendants, and that on that day (the 27th Sept. 1900) there were cross-claims between the defendants and the plaintiff, and that it was agreed that all cross-claims should be satisfied and discharged by the defendants paying the plaintiff the sum of 300*l.* in satisfaction of all claims existing between them, and that in pursuance of such agreement the defendants paid to the plaintiff the sum of 300*l.* which the plaintiff accepted in complete satisfaction and discharge of all his claims against the defendants, and the defendants and the plaintiff then (on the 27th Sept. 1900) executed a deed as follows:

Whereas the proprietors—that is, the defendants—are indebted to the manager—that is, the plaintiff—for certain arrears of salary and for salary accruing and not further or otherwise, and the manager is indebted to the proprietors for certain moneys and effects had and received by him for the use of the proprietors and otherwise, and it has been agreed that the cross-claims shall be satisfied and discharged by the proprietors paying the manager the sum of three hundred pounds. And whereas the manager has tendered and the proprietors have accepted the manager's resignation, and each has agreed to release the other in respect of the above claims, and also all other claims, if any, now existing between them. Now the manager acknowledges receipt of the said three hundred pounds, and the proprietors and the manager hereby covenant with each other, and acknowledge that the resignation has been tendered and accepted as from this date, and that each releases the other as aforesaid, and the manager hereby covenants that he will not from the execution hereof act or do anything as manager. In witness whereof the parties have hereunto set their hands and seals.

In his reply the plaintiff replied (*inter alia*) that if he did execute the deed (which he denied), he was induced to execute the same by the defendants threatening unlawfully to imprison the plaintiff unless he would execute the same, and that the plaintiff executed the deed in fear that the threat would be immediately carried into execution; and, further, that he executed the same when he was so taken by surprise and overwhelmed by the threat, that he gave no real or free consent to the execution of the deed which was produced for his signature by the defendants immediately after they had made the threat in order that the plaintiff might be induced to execute the same when surprised and deceived as the plaintiff was by the threat.

The facts are fully stated in the judgment.

Bray, K.C. and Arthur Powell (*W. Higgins* with him) for the plaintiff.—The answer of the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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jury to the second question is sufficient to set aside the deed and to entitle the plaintiff to fall back upon his claims prior to such deed. The jury find that the deed was executed by the plaintiff in consequence of undue pressure exercised upon him by the defendants. Such undue pressure is sufficient to set aside the deed. To stand in equity the contract must be free and voluntary and freely entered into by the party to it. It must not be brought about by any undue influence or undue pressure of the other party, and no advantage must be taken of the distress or necessity of the other party: (see the several cases collected in 4 Brown's Parliamentary Cases, title "Fraud," and especially *Kenrick v. Hudson, Ib.*, p. 222; *White v. Lightburne, Ib.*, p. 181; and *Gould v. Okeden, Ib.*, p. 198). Though there was no actual misrepresentation or fraud, yet the deed ought to be set aside in consequence of the undue pressure, having regard to the position of the parties:

Evans v. Llewellyn, 1 Cox, 333, at p. 339.

So in sales of property a contract has been set aside by courts of equity on the ground that the vendor was at the time in distressed circumstances and advantage taken of that distress:

Wood v. Abrey, 3 Madd. 417, at p. 423;

Longmate v. Ledger, 2 L. T. Rep. 256, at p. 257; 2 Giff. 157, at p. 163.

And an agreement may be set aside where one party is under great pressure and advantage is taken of it.

Ormes v. Beadel, 2 L. T. Rep. 308; 2 Giff. 166, at p. 178.

Though that case was reversed on appeal (3 L. T. Rep. 344; 6 Jur. N. S. 1103), it was reversed on a different ground—namely, that there had been an acting on the agreement, and an acquiescence in it, and that therefore it was impossible to set it aside. The same principle was laid down by Lord Romilly, M.R. in *Clark v. Malpas* (6 L. T. Rep. 586; 31 Beav. 80), and by Stuart, V.C. in *Barrett v. Hartley* (14 L. T. Rep. 474; L. Rep. 2 Eq. 789, at p. 797). The result of these cases is that the contracting party must be a reasonably free agent. The same principle appears in the Indian Contract Act 1872, which in sect. 10 provides that "all agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration," &c.; and in sect. 14, "Consent is said to be free when it is not caused by (1) Coercion; (2) undue influence, . . ." and sect. 16 defines undue influence. The consent given to the making of the contract must be free and voluntary; in the present case it cannot be so, when the jury have found that the agreement was made by the plaintiff in consequence of undue pressure by the defendants.

Sir Edward Clarke, K.C. and Bowall (Gill, K.C. with them) for the defendants.—The answer to the second question is immaterial, having regard to the case put forward by the plaintiff in his statement of claim. His claim was that he was induced to execute the deed by the threat of prosecution and arrest; that has been expressly negatived by the jury, and as the point raised by the second question was not raised by the plaintiff's claim, the answer to it is immaterial in this case. The defendants ought to succeed on the answer given to the first question. Nothing

could be more distinct than the statement in the claim that the influence exercised on the plaintiff which induced him to execute the deed was a threat of prosecution and arrest, and the jury have found that there was no such threat, and, the jury having found that, the defendants are entitled to judgment. The cases cited have reference to an entirely different state of things. Duress is one thing, but undue influence is wholly different. As to the degree of pressure recognised by the common law as sufficient to set aside an arrangement such as this, there must be helplessness arising from weakness of mind or from urgency of pecuniary circumstances, or the like. If, for instance, the promisor's condition of mind was such, either from weakness of mind or some sudden shock, that he was really helpless, then probably at common law the contract would not be allowed to stand as in the case of money paid under duress; but where it is merely a matter of consideration courts of common law have never interfered to set aside the contract. Here the answer of the jury to the second question is not sufficient to set the agreement aside, and the cases cited do not support the view that they are sufficient. Whatever pressure there was, it was not pressure in the sense in which a court of equity would set aside the transaction on account of pressure; and it was merely a reservation by the defendants of their legal rights: (see per Lord Cranworth, L.C. in *Williams v. Bayley*, 14 L. T. Rep. at p. 804; L. Rep. 1 H. L. at p. 209). The finding of the jury negatives the only ground on which the claim was brought. As to the wrongful dismissal, the plaintiff was not dismissed at all; he merely sent in his resignation, which was accepted, and therefore there was no wrongful dismissal. Therefore, as to the claim for wrongful dismissal, it fails; as to the claim for salary, it is met by the deed and the agreement to accept a sum in satisfaction and discharge of all claims; and as to the undue pressure, that fails also.

Bray, K.C. in reply.—[Lord ALVERSTONE, C.J.—What evidence is there of dismissal?] What took place amounted to a termination of the relation between the parties. The plaintiff was by undue pressure prevented from carrying on the business, and the defendants would not pay him his salary. That is sufficient evidence of dismissal. He referred to

Mostyn v. West Mostyn Coal and Iron Company Limited, 34 L. T. Rep. at pp. 327-8; 1 C. P. Div. at p. 150;

Huguenin v. Baseley, 14 Ves. 273; 1 Wh. & T., 7th edit. p. 247.

[There were other questions argued, that the wafers of the seals were affixed to the deed after its execution, and that the deed was therefore void on that ground, as also on the ground of a material alteration.]

Cur. adv. vult.

Feb. 14.—Lord ALVERSTONE, C.J. read the following judgment:—This was an action for balance of salary due and damages for wrongful dismissal brought by the plaintiff against the defendants and tried before me with a special jury on the 11th, 12th, and 13th Dec. last. The defence set up, on which the question arises, was that all the claims made by the plaintiff were settled for the payment of 300*l.* pursuant to the

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terms of an arrangement made on the 27th Sept. 1900, and embodied in a deed of the same date made between the plaintiff and the defendants. The plaintiff replied that he was induced to execute the deed by the defendants threatening unlawfully to imprison him, and that he was taken by surprise and overwhelmed by the threat, and in consequence of the threat gave no real or free consent to the execution of the deed. I left the following questions to the jury: (1) Was the plaintiff induced to make the agreement of the 27th Sept. 1900 by threats by the defendants or Mr. Rutland of criminal proceedings or imprisonment? To which the jury returned the answer "No." (2) Was the plaintiff induced to make the agreement of the 27th Sept. 1900 by undue pressure exercised by the defendants or Mr. Rutland to force the plaintiff to enter into the agreement? To which the jury answered "Yes," and they assessed the damages provisionally at 100*l*. I reserved for further consideration the question whether the answer to the second question was sufficient to entitle the plaintiff to get rid of the deed and to fall back upon his original claims. The case was argued before me on Monday, the 13th Jan. last, and I took time to consider my judgment. The case is one of considerable difficulty, and in the view I take there is no decision exactly upon the point which I have to consider. A brief outline of the facts will be desirable before dealing with the arguments which were raised before me. The plaintiff had been engaged by the defendants from the year 1897 as the manager of Collins' Music Hall. At a subsequent date he was also appointed the managing director of the London Music Hall, which was owned by a limited company of which the defendants were the principal shareholders. The plaintiff was responsible for the working accounts of both establishments, and these accounts were audited weekly by a firm of accountants, and, up till the 27th Sept. 1900, no question had been raised as to any irregularities by the plaintiff in his accounts or in the discharge of his duties. On that day, being the occasion of the usual weekly meeting at the Collins' Music Hall, the defendants and their solicitor, Mr. Rutland, attended. The plaintiff was called in and asked to explain a number of items relating to the accounts of both music-halls as to which it was suggested that irregularities had occurred. The total amount in many of the items was not large, and as to many of them he was able to give a satisfactory explanation, but as to certain others he was unable, at the time, to give an explanation which was satisfactory to the defendants. The discussion, which lasted from about eleven o'clock in the morning up till five or six in the afternoon, was interrupted in the course of the day by Mr. Rutland, the defendants' solicitor, being obliged to go away on some other business. On his return an arrangement was come to which was embodied in the deed. The plaintiff was to send in his resignation and to accept the sum of 700*l*., being 300*l*. in respect of his claim for salary from the Collins' Music Hall, and 400*l*. in respect of the loan which he had made to the London Music Hall, and to sign the deed of release set out by the defendants in their statement of defence. The original case set up by the plaintiff on the pleadings was that the defendants and Mr. Rutland had threatened him with prosecution

and arrest, and that he had executed the deed under pressure of those threats. As has already been pointed out, this case was negatived by the finding of the jury, but it was contended by Mr. Bray for the plaintiff, both in his opening and in his reply, that I should leave to the jury the question of whether or not the plaintiff was a free agent at the time that he executed the deed in question. After consideration I left to the jury the second question which they have answered in the affirmative. It was contended by Sir Edward Clarke and Mr. Gill on behalf of the defendants that I ought not to have left this question to the jury, because the only substantial defence raised by the statement of defence was founded upon the alleged threat of prosecution or imprisonment, which had been negatived by the jury. If the finding is sufficient to enable the plaintiff to get rid of the deed, I think that I ought not to give effect to this contention. The point was raised by Mr. Bray in his opening statement, and maintained throughout the trial. No objection was taken in point of form, and I should have allowed an amendment in order to raise the question had it been necessary. I have therefore to consider upon the merits, whether such a finding is sufficient to enable the plaintiff to set aside the arrangement embodied in the deed. It was contended before me that there was no evidence which I could properly have left to the jury in support of that finding, and as this point may receive further consideration, and also because it is necessary in dealing with the question which I have to decide, I think I ought to state the evidence which gave rise to the question, and also what I understand the finding of the jury to mean. The evidence which gave rise to the contention, assuming that the plaintiff was entitled to raise it, was that the defendants admitted that in the course of the long discussion the defendants had held that the plaintiff's explanation was unsatisfactory, and that upon the advice of Mr. Rutland, the solicitor, they had determined to, or would, suspend him, in order that there might be a thorough inquiry into his accounts. There was no clause in the agreement enabling the defendants to suspend the plaintiff, or to give them any special right in that respect, but it was contended in the course of the argument before me, that the defendants had, as employers, the right to suspend the plaintiff from his duties pending investigation. It was stated by the plaintiff that in the case of such an employment as that of manager of a music-hall, suspension was a very serious step, and would be regarded as such by persons acquainted with music-hall business; in fact, it was in consequence of this suggestion, or expression of intention, that the plaintiff said he asked the defendants to allow him to resign. There were certain other minor pieces of evidence which it is not necessary for me to refer to, as, for instance, the statement that his explanations were not satisfactory, but what I have stated was the main ground upon which the allegation of pressure was raised, and I therefore held, and still think, that it was impossible for me to say that there was no evidence to support the finding of the jury upon the second question. In considering the question of law it is necessary to deal separately with the two causes of action on which the plaintiff founds his claim: (1) wrongful

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dismissal, (2) a claim to salary which he alleged was due to him up to the date of ceasing to be manager. As regards the wrongful dismissal, since the argument, I have again gone carefully through the evidence, and I can see no evidence of any dismissal at all. The admitted facts appear to be these: Upon the defendants' suggestion that they proposed or had determined to suspend the plaintiff in order that there might be a full investigation into the accounts, he asked them whether they would accept his resignation. This they consented to do, and he thereupon resigned, and although in the letter of the 4th Oct. he claims damages for wrongful dismissal, he never attempted to resume the position of manager after the 27th Sept. Under these circumstances I am of opinion that the plaintiff resigned, and was not dismissed, and that no damages can be claimed in respect of any wrongful dismissal. As regards the amount claimed for salary, I have more difficulty. That seems to me to depend upon whether the finding of the jury in answer to the second question is sufficient to set aside the arrangement made. The strongest cases in favour of the plaintiff are among those cited by Mr. Bray and Mr. Powell in the course of the argument: *Evans v. Llewellyn*, Cox's Cases in Equity, 333; *Wood v. Abrey*, 3 Madd. 417; and probably *Ormes v. Beadel*, 2 L. T. Rep. 308; 2 Giff. 166; and *Barrett v. Hartley*, 14 L. T. Rep. 474, at p. 476; L. Rep. 2 Eq. 789, at p. 797. But I think that the finding of the jury, understood in the sense which I understand it, and which I have already indicated, fails to bring the case within any of the decisions in which courts of equity have set aside arrangements of compromise. The passage in the judgment of Lord Chelmsford in *Williams v. Bayley* (14 L. T. Rep. 802, at p. 806; L. Rep. 1 H. L. 200, at p. 216), on which I framed the second question, must, I think, be taken in conjunction with the preceding sentence and the subject-matter under discussion, and not as laying down any general proposition or rule which can be applied in all cases: (see also the observations on this case in *Flower v. Sadler*, 10 Q. B. Div. 572), which was not cited in the argument before me. In this case the plaintiff undoubtedly had a claim against the defendants for a sum considerably in excess of the amount received—300l. On the other hand, the defendants claimed to have an investigation of the accounts. The plaintiff was the person who had the best means of knowing what the result of such investigation would be. As I have already said, it was conceded in the argument before me that the defendants were entitled to suspend the plaintiff and have an investigation. Accepting, as I am bound to do, the finding of the jury, that the plaintiff was induced to make the agreement of the 27th Sept. 1900 by undue pressure exercised by the defendants or Mr. Rutland to force him to enter into the agreement, I still think that such pressure does not in law entitle the plaintiff to say that he is not bound by the arrangement come to. I have not overlooked the point raised by Mr. Bray with reference to the fact that the wafers which appear on the deed when produced were not upon the deed when it was executed, but were affixed subsequently by some clerk of Mr. Rutland. Mr. Bray claimed in his argument that upon these facts the case of *Davidson v.*

Cooper (11 M. & W. 778; 13 M. & W. 343) was a conclusive authority in his favour. The circumstances of that case were very different, and no question of mutual arrangement or agreement outside the deed arose, as in this case; but even if the question was material I am by no means sure that the necessary evidence was gone into at the trial to enable Mr. Bray to raise the point. I am not satisfied that there was no impression upon the paper or want of execution before the wafers were affixed, and I doubt whether, having regard to the cases which will be found collected at p. 138 of the 17th edition of Roscoe's *Nisi Prius Evidence*, the objection can be maintained. But in this case the matter does not seem to me to be material, inasmuch as the real question is whether or not the plaintiff was bound by the arrangement which he entered into on the 27th Sept. I have only to add that in his letter of the 4th Oct. the plaintiff alleges that the only ground upon which he claims to set aside the arrangement, was the alleged threat of prosecution. With regard to the objections taken by the defendants, first, that the plaintiff ought to have taken independent proceedings; and, secondly, that he had acted upon the arrangement and ratified it by retaining the two sums of 300l. and 400l. I think that as regards the first it is now clearly established that if the plaintiff could in equity have set aside the deed, that can now be set up in other proceedings as an answer to any claim or defence in which the deed is relied upon: (*See v. Cohen*, 45 L. T. Rep. 589), and as regards the second point inasmuch as a larger sum of money was admitted to be due to the plaintiff, apart from the arrangement of the 27th Sept., I do not think that his retention of the cheque was sufficient to have prevented him from contending that he was not bound by the arrangement. For the reasons which I have already given I think that judgment must be entered for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiff, *Lesser and Danger*.
Solicitor for the defendants, *Philip J. Rutland*.

KING'S BENCH DIVISION, IN BANKRUPTCY.

Tuesday, Feb. 11.

(Before WRIGHT, J.)

Re MANDER; Ex parte THE OFFICIAL RECEIVER v. DAVIS. (a)

Bankruptcy—Property of the bankrupt—Verbal contract with solicitor to act in the bankruptcy—Payment of lump sum—Repayment.

A solicitor received from a client a lump sum under a verbal contract to act for him in his bankruptcy proceedings.

Held, that the amount so paid must be repaid to the trustee, less costs incurred to the date of the receiving order.

THIS was a motion by the official receiver, the trustee in the bankruptcy, for a declaration that a sum of 40l. paid to the respondent under the following circumstances vested in the applicant.

Prior to the 18th July 1901 the bankrupt had carried on business as a publican at the Green

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.

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Dragon in Fleet-street, of which he was the owner subject to mortgages for a large amount.

On that date, being in financial difficulties, he made an arrangement with his mortgagees by which he transferred to them his interest in the premises, the consideration being a release from all further liability under the mortgages.

The mortgagees at the same time purchased all his effects on the premises for 163*l.* 3*s.* 2*d.*, for which he received a cheque.

The bankrupt took this cheque, which practically comprised the whole of his estate, to the respondent, who was his solicitor, to whom he was indebted in a small amount for costs, and informed him of his financial position.

It was arranged that the bankrupt should file his petition, and a verbal agreement was entered into by which it was agreed that the respondent should deduct a lump sum of 40*l.* from the cheque for 163*l.* 3*s.* 2*d.*, in payment of the costs due and retain the balance of the 40*l.* as his agreed costs for acting for the bankrupt in the bankruptcy.

A receiving order was made on the 26th July on the bankrupt's own petition, and on the same day he was adjudicated a bankrupt.

On the 2nd Aug. an order for the summary administration of the estate was made, and the official receiver became trustee.

The respondent refused to render an account in respect of this sum of 40*l.*

Muir Mackenzie for the official receiver.—This case is governed by authority. He referred to

Re Beyts and Craig; Ex parte Cooper and Irvine, 70 L. T. Rep. 561;

Re Pollitt; Ex parte Minor, 68 L. T. Rep. 366; (1893) 1 Q. B. 455.

[He was stopped.]

Tindal Davis for the respondent.—This case is not within *Re Beyts* or *Re Pollitt* (*ubi sup.*), but is governed by *Re Charwood; Ex parte Masters* (70 L. T. Rep. 385; (1894) 1 Q. B. 643), and the fact that the agreement in this case was a verbal one makes no difference. The respondent is not liable to account, for the money was not deposited to secure his costs, but under a firm contract, under which he could not be entitled to more than 40*l.* or be accountable for any surplus, and this was a contract which the trustee in bankruptcy could not put an end to by giving notice. He referred to

Ex parte Helder; Re Lewis, 49 L. T. Rep. 612; 24 Ch. Div. 389;

Re Sinclair; Ex parte Payne, 53 L. T. Rep. 767; 15 Q. B. Div. 616.

A bankrupt ought to be able to pay a solicitor to protect him with legal advice during bankruptcy proceedings. The sum paid here was a reasonable one.

WRIGHT, J.—I should like to decide in favour of the respondent to this motion, but the law is too strong for me. A solicitor acting for a bankrupt is always in a difficulty; if his costs are not provided for by the payment of a lump sum his authority is determined by the trustee, and if the bankrupt has paid him a lump sum, in a legal sense that is a fraud under the bankruptcy law. The necessity of legal advice for the bankrupt in relation to his bankruptcy proceedings is not sufficient special justification for such a payment. Such an arrangement is always dangerous for a

solicitor, as he cannot retain costs incurred after the receiving order.

Order for repayment less costs incurred to the date of the receiving order.

Solicitors: *The Solicitor to the Board of Trade; J. Davis.*

Feb. 10 and 11.

(Before WRIGHT and BIGHAM, JJ.)

Re KEEN; Ex parte BRISTOL SCHOOL BOARD v. THE TRUSTEE. (a)

Bankruptcy—Building contract—Builder's plant "to be considered the property" of the building owner—Order and disposition—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44, sub-s. 3.

The bankrupts were builders, and had contracted to build a school for the B. School Board. The contract provided that the plant and materials brought on to the ground should "be considered to be the property of the board," and should not be removed without the certificate of the board's architect.

A subsequent clause provided that if the builders should become bankrupt, &c., or suspend or delay performance of the contract after seven days' notice, all plant and materials upon the property should be forfeited to the board.

A receiving order was made against the contractors.

A notice requiring the work to be proceeded with given to the trustee was not complied with, and the board took possession of the plant.

Held, that at the date of the bankruptcy the plant and materials were not the property of the school board, but of the bankrupts; and that sect. 44, sub-sect. 3, of the Bankruptcy Act 1883 did not apply.

Quære, whether the bankruptcy of the builders would vest the property in the building owner.

THIS was an appeal by the Bristol School Board from a judgment of His Honour Judge Beresford, the judge of the County Court of Somersetshire holden at Bridgwater, dated the 15th Nov. 1901.

The bankrupts were builders, and on the 4th Sept. 1899 they entered into a contract with the school board of the city of Bristol to erect on land belonging to the board a school for 11,437*l.*

The material clauses of the contract were as follows:

Clause 10. All plant, work, and materials brought to and left upon the ground by the contractor or by his order for the purpose of carrying out the contract or of forming part of the works shall be considered to be the property of the board, and the same shall not on any account whatever be removed or taken away by the contractor or by any other person without the express licence in writing of the architect, but the board shall not be in any way answerable for any loss or damage which shall happen to or be in respect of any such plant or materials either by the same being lost, stolen, or injured by weather or otherwise.

Clause 20. If the contractor become bankrupt, arrange with or make any assignment for the benefit of his creditors, or shall suspend or delay the performance of the contract, the board by the architect shall be at liberty to give to the contractor, his executors or administrators or his assignee or trustee, as the case may be, notice in writing requiring the works to be proceeded with, and in case the contractor or his executors, adminis-

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.]

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trators, assignee, or trustee shall not within seven days proceed with the work to the satisfaction of the architect no further sum of money shall be paid on account of the contract by the board, and all plant and materials upon the property shall be forfeited to the board, and in such event it shall be lawful for the board by the architect to enter upon and take possession of the works and to employ any other person or persons to carry on and complete the same, and the costs and charges in any way incurred in carrying on and completing the said works shall be paid to the board by the contractor, or may be set off by the board against any moneys which, if not for this clause, would be due to the contractor under this contract, and if after the completion of the works such last-mentioned moneys are not sufficient for the purpose, the deficiency shall be forthwith made good by the contractor, his executors or administrators or his assignee or trustee.

On the 16th Feb. 1900 a receiving order was made against the contractors, followed on the 1st March by an order of adjudication.

On the 21st or 22nd Feb. 1900 the school board gave notice under clause 20 of the contract to the bankrupts and to the official receiver to proceed with the works. This notice was not complied with.

The school board took possession of the plant and materials on the ground, and completed the buildings.

The trustee in bankruptcy claimed the plant and materials on the ground at the date of the commencement of the bankruptcy, and on a motion by him the County Court judge made an order declaring the trustee entitled to the return of the plant, &c., or the payment of 270*l.*, its value.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44, sub-s. (iii.), provides as follows :

The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise the following particulars: All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.

H. Reed, K.C. and *F. E. Weatherly* in support of the appeal.—These goods were not in the order and disposition of the bankrupts. They were not on their property, they could not remove them, and they could only deal with them for the purposes of the contract. [BIGHAM, J.—Was there any provision in the contract for the reversion of these goods in the builders?] No; the building owners had no property in them rendering a reconveyance necessary—the words in the contract are “shall be considered to be the property of the board.” The true and reputed owners were the same—the builders—and it was not till after the bankruptcy that, by the neglect of the trustee to proceed with the works, these goods passed to the board under the provisions of clause 20 of the contract. Clauses such as these are usual in every building contract; everyone dealing with builders is aware of them. The trustee took no higher title than the bankrupts. They referred to

Reeves v. Barlow, 50 L. T. Rep. 782; 12 Q. B. Div. 436;

Ex parte Newitt; Re Garrud, 44 L. T. Rep. 5; 16 Ch. Div. 522;

Ex parte Dickinson; Re Pollard, 38 L. T. Rep. 860; 8 Ch. Div. 377.

Muir Mackenzie and *Vachell* for the trustee in bankruptcy.—Whether these goods were the absolute or only the qualified property of the school board, they were at the date of the receiving order in the order and disposition of the bankrupts :

Brown v. Bateman, 15 L. T. Rep. 658; L. Rep. 2 C. P. 272.

By virtue of the agreement which allowed the bankrupts to use these goods in such a way as to obtain credit on them, the reputation of ownership attached, and they are within sect. 44, sub-sect. 3, of the Bankruptcy Act 1883. It is not necessary that the school board should possess the legal ownership; an equitable ownership is sufficient. At the time of the bankruptcy the school board had some right to these goods—an equitable interest—that is, an interest which required something to be done to perfect it, and that interest was something more than a mere right to prevent removal :

Shuttleworth v. Hearnman, 1 De G. & J. 322.

The fact that under the contract the school board was bound to leave these goods in the possession of the builders for the purposes of the contract makes no difference, if the possession by the bankrupt is a possession by the consent of the true owner under such circumstances as to raise in the bankrupt the reputation of ownership :

Re Ginger; Ex parte The London and Universal Bank, 76 L. T. Rep. 808; (1897) 2 Q. B. 461.

Either these goods were the goods of the debtors and pass to his trustee, or they were in their possession under circumstances which raise the reputation of ownership.

No reply was called for.

WRIGHT, J.—In this case the school board were not, on the proper construction of this agreement, the owners of the plant or materials at the date of the bankruptcy. The agreement in this case is wholly different in its language from the agreement in *Reeves v. Barlow* (*ubi sup.*). What the interest of the school board was, it is not very easy to say or to put into language. They had a contractual right, which, as far as I can see, was legal just as much as equitable, to have these things remain on the land, for use by the builder on the land, for the benefit of the school board, for or in the construction of the building. That right, whether properly described as a legal or an equitable right, so far as it was a contractual right vested in the bankrupts before the bankruptcy, and was a right which would not be overridden by the bankruptcy alone, but it was a right which might be overridden under the provisions of sect. 44, sub-sect. 3, of the Bankruptcy Act 1883 if the facts established a case of reputed ownership. But in order to establish a case of reputed ownership three things must be shown. First, that the goods remained in the possession of the builders. They did remain in their possession in one sense, but it was an ambiguous possession and a possession which they could not make use of to remove the goods from the premises. It might be said, I think, in some sense that the school board had an interest in the nature of an interest in the possession as well as the builders, because without the consent of the school board the builders could not remove the goods or use them in any way except for the purpose of the buildings. Secondly, it must be

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shown that there was a consent by the school board to the builders being in possession; and thirdly, I think, it must be shown that in some sense there was a consent by the school board to the reputation of ownership. That used to be the law, and, so far as I know, it is the law still. Now it seems to me that there is no room for those inferences of consent to be drawn, if, from the very nature of the right, the school board had no power to withdraw the goods from the possession and apparent ownership of the builders. That would be so if these materials were placed in their hands, as I think they were, for a specific purpose, for the purpose of being placed by the builders in the building so as to become part of the building. Here there was no consent by the school board that the builders should be the reputed owner of that which they were in reality not the owners. They were entitled to be in the position of owners of these goods so long as the buildings went on for the purpose of using them in the building, and beyond that the consent of the school board did not go in any way. They merely consented that they should remain on the land for the very purpose for which they were placed there. It has been said in some cases that the true owner is not to suffer under this section of the Bankruptcy Act unless there is something which might be described as unconscientious in the way the goods have been left in the debtor's possession. Here there was certainly nothing unconscientious and nothing which would work any wrong in the event of bankruptcy. I do not know what else the school board were to have done, and I do not see what kind of notice they could have given. The builders would certainly not have allowed them to stick up a notice to the effect that the goods were not removable in the event of bankruptcy. The case of *Shuttleworth v. Hernaman* (*ubi sup.*) seems to me to be quite a different one. There the landlord had no need to leave the machinery on the premises at all. The tenant had covenanted with his landlord to keep a mill and certain machinery as security for the rent. Then the landlord resisted its removal by the official assignee on the ground that the tenant had given him a lien upon it. It is obvious, however, that supposing the landlord had a right to the machinery, the leaving it on the premises was not a furtherance of the object for which it was placed there, and it is quite a different case from leaving materials on the ground when the whole object of the arrangement is that the materials shall be used in the building. I think that there is no reputed ownership in this case.

BIGHAM, J.—I am of the same opinion. At the date of the receiving order these chattels were the property of the bankrupts, although it is true to say that they were on the grounds, upon the terms, as between the bankrupts and the building owners, that they should remain there during the progress of the works, in order that they might be used for the purpose of the works. I think clause 10 of the contract sufficiently shows that. The expression used in that clause, is that all plant, work, and materials brought to and left upon the ground by the contractors shall be considered to be the property of the board. That is an ambiguous expression, but when it is read with reference to the other part of the clause,

and with reference to the whole purpose and scope of the contract, it becomes clear. If one goes on with the clause, "and the same shall not on any account whatever be removed or taken away by the contractor or by any other person without the express licence in writing of the architect," its meaning is plain. There would be no occasion whatever for those words if the property in the goods had vested entirely, as it is suggested it had, in the school board. And the clause then goes on to say that the board shall not in any way be answerable for any loss or damage which may happen to the goods while they are upon the property. If the goods were already the goods of the school board such words would be unnecessary. Not only do the words of the clause show, in my opinion, that the property in the goods was not in the school board, but the fact that when the works are completed the goods (as we all know) can be taken away by the builders without any further act by the building owner shows of itself that the property in the goods had never passed out of the builders. At the end of the contract they take away the plant and surplus materials as a matter of right, without any further act being necessary to vest or re-vest the property in them. Why do they take it away? Because it is their own property. But though the goods were at the date of the receiving order the goods of the builders, there was by the contract a contingency on the happening of which the property might pass to the school board. That contingency is to be found in clause 20, and the trustee, when his title supervened, took the goods which were the goods of the bankrupts subject to that contingency. He could have no better title to them than they had, and their title was a defeasible title. Then that happened afterwards which was contemplated by clause 20—viz., the contingency which transferred the property in the goods from the builders into the building owners, the school board. In my opinion, reputed ownership has nothing at all to do with this case. Perhaps I ought to add that possibly the contingency of bankruptcy happening is one which would not vest the property in the school board, but the contingency contemplated by clause 20 is the trustee not electing to go on to complete the works. He did not elect, and in my opinion the property thereupon vested in the building owners.

Appeal allowed. Leave to appeal given.

Solicitors: *Burdett and Gamlen*, for Brittan, Livett, and Miller, Bristol; *Wansbrough, Dickinson, Robinson, and Tayler*, Bristol.

Monday, March 10.

(Before WRIGHT, J.)

Re WALLIS; *Ex parte* THE TRUSTEE v. WALLIS. (a)

Bankruptcy—Property of bankrupt—Chose in action—Assignment—Notice—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44.

The bankrupt prior to the bankruptcy had borrowed money from his wife, and had deposited with her a life policy as security for the loan. The trustee in the bankruptcy had given

(a) Reported by J. ARWYL THEOBALD, Esq., Barrister-at-Law.

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notice of the bankruptcy to the insurance company before the wife gave notice of her claim. Held, that the fact of the trustee being the first to give notice to the insurance company did not affect the title of the bankrupt's wife as an incumbrancer for value prior to the bankruptcy.

THIS was a motion by the trustee in the bankruptcy of A. Wallis for a declaration that he was entitled to a policy of insurance for 500l. on the life of the bankrupt.

Prior to the bankruptcy the bankrupt had obtained a loan from his wife out of her separate estate, and had deposited with her the policy in question as security for the loan. She kept the policy at her bankers, but did not give the insurance company notice of her charge till after the bankruptcy.

The receiving order was made on the 11th Oct. 1901, and on that day the debtor gave information to the official receiver of the existence of the policy, and of the fact that it had been deposited with his wife as security for a loan.

On the 16th Oct. the official receiver gave notice of the making of the receiving order to the insurance company.

On the 3rd Jan. 1902 Mrs. Wallis gave the company notice of her charge.

The trustee having been appointed launched this motion.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44, provides:

The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise the following particulars: (i). All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and (ii.) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge.

Eve, K.C. and R. Neville for the trustee.—No title to the policy was given to Mrs. Wallis by delivery:

Houses v. Prudential Assurance Company, 49 L. T. Rep. 133;

United Kingdom Life Insurance Company v. Dixon and Hay, 16 Ct. of Sess. Cas. 1277.

The trustee was the first to give notice of the assignment, and he is therefore entitled to this policy.

Reed, K.C. and Frank Mellor for Mrs. Wallis.—A policy of insurance is a *chose in action*, and no notice is required to take it out of the reputed ownership of the bankrupt:

Re Moore; Ex parte Ibbetson, 39 L. T. Rep. 1: 8 Ch. Div. 519.

Mrs. Wallis is an incumbrancer for value and the trustee is not; she has therefore a better equitable title. When the official receiver gave notice of the receiving order to the company he was aware of the incumbrance, and therefore his notice did not give him any priority by reason of its being prior to the notice given by Mrs. Wallis:

Newman v. Newman, 28 Ch. Div. 674.

Eve, K.C. replied.

WRIGHT, J.—It is singular that there should be no express authority on this point, but it seems plain enough to me that at the date of the bank-

ruptcy Mrs. Wallis had a good equitable charge for value upon the policy in question. Now, the property of the bankrupt only vests in the trustee subject to such incumbrances for value as may have become attached to it prior to the bankruptcy. The rights of an incumbrancer for value cannot therefore be affected by the trustee giving such a notice as he has given in this case. I also agree that as an incumbrancer for value Mrs. Wallis has a better title in equity to this policy than the trustee, and I am of the opinion that she is entitled to succeed in this motion.

Motion dismissed.

Solicitors: *Piesse and Son; Wood and Wotton.*

Monday, March 17.

(Before WRIGHT and PHILLIMORE, JJ.)

Re DAY; *Ex parte* HAMMOND. (a)

Bankruptcy—Deed of assignment for the benefit of creditors—Notice—Delay in presenting petition.

A creditor, by his agent, attended a meeting of creditors held on the 4th Nov. 1901, at which a resolution was carried approving a deed of assignment for the benefit of creditors. The agent neither assented nor dissented, but stated that he must consult his principal, and expressly reserved his right to take bankruptcy proceedings. On the 30th Nov. he wrote to the trustee under the deed saying he was not satisfied with the debtor's affairs, and that he still reserved his right to take steps in bankruptcy. The trustee in reply asked him if he intended to proceed in bankruptcy to do so at once in order to save trouble and expense. No further communication was made to the trustee till after the filing of the petition on the 27th Jan. 1902. The petition was dismissed on the authority of *Re Carr; Ex parte Jacobs* (85 L. T. Rep. 552).

Held (allowing the appeal), that there had been no acquiescence or unexplained delay. The case of *Re Carr; Ex parte Jacobs* (ubi sup.) only applies to the case of a petitioning creditor who has been "sitting on the rail."

Re Carr; Ex parte Jacobs (85 L. T. Rep. 552) distinguished.

THIS was an appeal by the petitioning creditor from the decision of the registrar of the County Court of Norfolk, holden at Great Yarmouth, who had dismissed the petition.

On the 4th Nov. 1901 a meeting of the debtor's creditors was held, and a resolution was carried approving a deed of assignment for the benefit of creditors executed on the 30th Oct.

The petitioning creditor was represented at that meeting by a solicitor, who neither assented nor dissented, but stated that he must consult his client, and that he reserved the right to take proceedings in bankruptcy.

On the 30th Nov. the solicitor wrote to the trustee under the deed, informing him that the petitioning creditor was not satisfied with the debtor's position, and asking for a report of the debtor's affairs. It also stated that the right to take steps in bankruptcy was reserved. The trustee's letter in reply concluded as follows:

If, however, your client has a desire to make the man a bankrupt, I should prefer his doing so now, and so save

(a) Reported by J. ARWYL THROBOLD, Esq., Barrister-at-Law

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further time, trouble, and expense on the part of myself and staff.

No reply was written to that letter, and the next communication received by the trustee was a notice that a bankruptcy petition was filed.

The petitioning creditor lived at a great distance from the district of the court.

The petition was filed on the 27th Jan. 1902, and was heard on the 14th Feb., when the registrar held that the delay in presenting the petition was not satisfactorily explained, and, on the authority of *Re Carr; Ex parte Jacobs* (85 L. T. Rep. 552), dismissed the petition.

Muir Mackenzie, in support of the appeal, referred to

Re Martin; Ex parte Board of Trade, 58 L. T. Rep. 118; 21 Q. B. Div. 35.

F. Low, for the debtor, submitted that the facts were the same as in *Re Carr; Ex parte Jacobs* (85 L. T. Rep. 552), and that the petition was rightly dismissed.

WRIGHT, J.—In this case the registrar dismissed the petition on the ground that he was bound by the case of *Re Carr; Ex parte Jacobs* (*ubi sup.*). That case, however, does not go to the length suggested. In *Carr's* case the facts were different, and the delay was unexplained. Here the agent expressly stated that he reserved all his rights, including the right to take bankruptcy proceedings, and at no time did the petitioning creditor acquiesce in any way in the deed for the benefit of creditors. The petitioning creditor did not do in this case what we thought he had been doing in *Carr's* case—sit on the rail.

PHILLIMORE, J.—I agree.

Appeal allowed. Receiving order made.

Solicitors: Gribble, Oddie, and Co.; J. W. C. Daynes, Norwich.

House of Lords.

Feb. 4 and 6.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON, and LINDLEY.)

LEIGH AND OTHERS v. TAYLOR AND OTHERS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Tenant for life and remainderman—Chattels—Annexation to freehold—Ornament—Removal—Tapestry.

Whether a chattel is so annexed to the freehold as to be intended as an improvement to it, and to pass with it, or is annexed only for the purpose of temporary use or ornament, so as to be removable, is a question to be decided upon the facts of the case.

Valuable tapestries belonging to a tenant for life were fastened to the walls of the drawing-room in a mansion-house by fixing small strips of wood by means of nails and screws to the wood with which the walls were lined; canvas was then stretched over the strips of wood and nailed to them, and the tapestries were fastened to the canvas by very small tacks. Mouldings were fixed round the strips of wood by thin nails and

screws, some of which penetrated the face of the wall. The tapestries were an essential feature of the general scheme of decoration of the room. Held (affirming the judgment of the court below), that the tapestries were fixed for purposes of ornament in the only way in which it was possible to use and enjoy them, and did not pass to the remainderman on the death of the tenant for life, but were removable by her executors.

THIS was an appeal from a judgment of the Court of Appeal (Rigby, Williams, and Stirling, L.JJ.), reported 84 L. T. Rep. 273; (1901) 1 Ch. 523, who had reversed a judgment of Byrne, J.

The case is reported under the name of *Re De Falbe; Ward v. Taylor*.

Mme. de Falbe, before her marriage with his Excellency Christian Frederik de Falbe, the Danish Minister, in Dec. 1883, had been the wife of Mr. John Gerard Leigh, of Luton Hoo Park, who died in 1875, and by his will, dated the 15th July 1872, he bequeathed his personal estate to his wife, and gave all his freehold, copyhold, and leasehold estates and hereditaments to his wife for life, and after her death to such person or persons as should at her decease be his heir-at-law. Some time before 1886 Mme. de Falbe redecorated the drawing-room at Luton Hoo, and affixed seven tapestries—said to be worth about 7000*l.*—which were the subject of appeal to the Court of Appeal and to the House of Lords. There was some difference in the statements of the parties as to the degree of interference with the structure caused by the affixing and the subsequent removal of the tapestries, but it was not contended that any serious damage was done to the walls of the drawing-room. The appellants in their case stated that the seven tapestries were an essential part and, in fact, the most characteristic feature in the decoration of the drawing-room; that they were stretched in frames covered with canvas, and such frames were firmly fixed to the walls by nails and screws, the tapestries being inclosed and fitted into recesses or spaces formed by wooden pilasters and mouldings permanently fixed to the walls of the room and forming the main architectural design of the room. Straight and scroll mouldings were fixed round the tapestries by being nailed to the wooden frames, and in some cases through the wooden frames into the plaster and brickwork of the walls. M. de Falbe died in 1896, and Mme. de Falbe died on the 16th Dec. 1899, and the respondent, Mr. St. John Stewardson Taylor, was her executor. At her death Mr. Henry Gerard Leigh, who died on the 7th Jan. 1900, was heir-at-law to Mr. John Gerard Leigh, whose estates were included in the former's marriage settlement, dated the 23rd Oct. 1886; and the appellants claimed the tapestries under that settlement.

Byrne, J. decided that the tapestries were affixed to the freehold, and passed to the heir-at-law, but his judgment was reversed as above mentioned.

Asquith, K.C., Levett, K.C., and Methold appeared for the appellants, and contended that the tapestries passed to the heir-at-law. It is a question of the degree, and intention of the annexation. Here the whole scheme of the decoration of the room was altered to suit the tapestry, and it became part of the house and was intended

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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as an improvement of the freehold. Tapestries have been considered in *D'Eyncourt v. Gregory* (L. Rep. 3 Eq. 382) and *Norton v. Dashwood* (75 L. T. Rep. 205; (1896) 2 Ch. 497), where they were held to go with the house. See also the case of fire-grates—*Monti v. Barnes* (83 L. T. Rep. 619; (1901) 1 Q. B. 205) and *Holland v. Hodgson* (26 L. T. Rep. 709; L. Rep. 7 C. P. 328) there referred to. The older cases go upon the idea of encouraging trade by allowing the removal of trade fixtures. See

Cave v. Cave, 2 Vern. 508;
Herlakenden's case, 4 Rep. 62a;
Squier v. Mayer, *Friesman's Ca.* C. 248;
Beck v. Ribow, 1 P. Wms. 94;
Harvey v. Harvey, 2 Str. 1141;
Lawton v. Lawton, 3 Atk. 13;
Dudley v. Wards, Amb. 112;
Fisher v. Dixon, 12 Cl. & F. 312.

Things fixed are part of the freehold unless there is a presumption of law that they are not intended to go with the freehold, or an implied contract that they may be removed as in the case of trade fixtures. But the rule as to trade fixtures only applies as between landlord and tenant, or tenant for life and remainderman, not as between heir-at-law and executor. See the notes to *Elves v. Mawe*, in 1 Smith's L.C., and the recent case of *Viscount Hill v. Bullock* (77 L. T. Rep. 240; (1897) 2 Ch. 782).

Norton, K.C. and T. L. Wilkinson, who appeared for the residuary legatees under Mme. de Falbe's will, and H. B. Howard for the executor, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: In this case we have had a long and learned argument by the counsel who have appeared for the appellants. I am not certain that I quite understand the conflict between the two propositions, or that I quite understand on what principle one is supposed to decide these cases apart from the facts of each particular case. One principle, I think, has been established from the earliest period of the law down to the present time—namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house. That seems logical enough. Another principle appears to be equally clear—namely, that where it is something which, although it may be attached in some form or another (I will say a word in a moment about the degree of attachment, to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor. We have heard something about a suggested alteration of the law; but those two principles appear to have been established from the earliest times, and they are principles still in force. But the moment one comes to deal with the facts of each particular case, I quite agree that something has changed very much. I suspect that it is not the law or any principle of law, but it is a change in the mode of life, the degree in

which certain things have seemed susceptible of being put up as mere ornament, whereas at an earlier period the ruder constructions rendered it impossible sometimes to sever the thing which was put up from the realty. If that is true, it is manifest that you can lay down no rule which will in itself solve the question; you must apply yourself to the facts of each particular case; and I am content here to apply myself to the facts of this case. Here are tapestries which, it is admitted, are worth a great deal of money. I put the case: Suppose this had been a tenant from year to year, and she put up these things, is it conceivable that a person would for the purpose of a tenancy from year to year put up these things exactly in this way if thereby they made a present of 7000*l.* to the landlord? Counsel for the appellants would not acquiesce in that; but in logic I am unable to sever the two sets of facts which I suggest. It is all very well to say that there is a difference between the cases of an heir and an executor on the one hand, and a landlord and a tenant on the other; but if you grant the proposition that it must depend upon the purpose of the annexation, and you must attend to the degree of the annexation, I am wholly unable to frame a hypothesis of a state of things in which these two principles will not decide the question, whether you are dealing with a landlord and tenant, or whether you are dealing with a tenant for life and a remainderman, or with people standing in any other relation to these things in the way in which Mme. de Falbe did as tenant for life to the remainderman. We come then, in my view, to the determination of the question upon the principles which I have pointed out, applying them to the particular facts of this case. What are they? Here we have objects of ornamentation of very great value. Undoubtedly their only function in life, if it may be so called, is the decoration of a room. Suppose the person had intended to remove them the next month or the next year or what not, I do not know, notwithstanding the ingenious effort that has been made by counsel for the appellants, in what other way they could have been fastened than that in which they were. We have seen the hard matchboard to which they were fastened in the first instance; then canvas was stretched on it, and the decoration of the wall as it originally stood was perfectly preserved except to the extent to which the nails were driven into the wall; they were necessarily driven into the wall, because otherwise the tapestry could not have been stretched out firm, as it was. I do not know any other mode by which the large one, for example, 14*ft.* long, could have been placed there as it was. One has immediately before one's mind's eyes cases of pictures of another sort; and after all, although this tapestry is very valuable, as I understand, and very beautiful, it is only a picture made in a particular form—it is a picture, whether woven or worked or what not, made for the purpose of ornamentation. When one looks at it and sees what it is, I should have thought, if ever there was an extreme case in which it would have been impossible to suppose that the person intended to dedicate it to the house, it was the case of these tapestries, which can be, and in fact have been, removed without anything but the most trifling disturbance of the material of the wall. Under

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those circumstances I can entertain no doubt, now that we have had the whole case before us, that there is nothing which points to any intention to dedicate these tapestries to the house. There is nothing in the nature of the attachment which is necessarily permanent. A number of words have been used, such as "only very slightly attached" and "not permanently attached." They really often assume the very question in debate. I do not think that if anybody looked at the piece of boarding on which the canvas was stretched and on which this tapestry went—I can hardly imagine anything more slight as a matter of fact in this particular case than that attachment—he could entertain any doubt on the matter; I do not know how a piece of tapestry of that extent, 14 ft. long, stretched against a wall, could be more slightly attached than this was. Under those circumstances it appears to me that the thing is so easily susceptible of being removed (and it has in fact been removed, without any damage or material injury to the structure of the wall), that in my own mind, so far as it is dependent upon a question of fact in this case, I am of opinion that it never was intended to form part of the structure of this house; and that, after all, is what the meaning of "the benefit of the inheritance" comes to, though expressed in different words. It never was intended to remain a part of the house; the contrary is evident from the very nature of the attachment, the extent and degree of which was as slight as the nature of the thing attached would admit of. Therefore, I come to the conclusion that this thing, put up for ornamentation and for the enjoyment of the person while occupying the house, is not under such circumstances as these part of the house. That is the problem one has to solve in each of these cases. If it is not part of the house, it falls under the rule now laid down for some centuries, that it is a sort of ornamental fixture, and can be removed by whoever has the right to the chattel—whose it was when it was originally put up. For these reasons I am of opinion that this appeal must be dismissed with costs. I only wish to say that I do not want to add to the confusion which it is suggested has been caused by differences of opinion among the learned judges below. My own view is that, going back for some centuries, the real differences of opinion, which apparently on the surface have been entertained by different judges, have not been at bottom differences in the law at all, but the facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealt with. The principle appears to me to be the same to-day as it was in the early times; and the broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir. I am of opinion that this tapestry has not become part of the house, and was never intended in any way to become part of the house; and I am therefore of opinion that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN.—My Lords: I am quite of the same opinion. It seems to me that the only question is, Have these tapestries become part of

the freehold? I think that these tapestries were purely matter of ornament, and not part of the freehold at all. Counsel for the appellants has spoken of the courts changing the law. I do not think that the law has been changed in the very least. It is said that in some cases it has been relaxed. I do not think that it has been altered. What have altered are the habits and customs of the community. The increase of luxury has made many things matters of ornament which which were not so used in former times. I think the only question is, Was this part of the freehold? and I do not think that anybody can say that it was so. I think that the judgment in the Court of Appeal covers the whole ground.

LORD SHAND.—My Lords: I am also of opinion that the decision of the Court of Appeal ought to be affirmed. It may be true, as has been observed by the Lord Chancellor and by Lord Macnaghten, that there has been no change of the law; but I rather think that in the progress of time the law has been developed in the direction of holding what would at one time have been held to be parts of a building to be now temporary fixtures only, removable by the person who attached them to the building or his personal representative, and I think that this later view should be maintained. It appears to me to be a sound principle, and to be the result of the later cases (whatever may have been the older law), that where a tenant for a term or a tenant for life has purchased tapestries or pictures and affixed them to the walls for the purposes of ornamentation, he is entitled to remove them, and his executor has the same right. That principle, as it seems to me, is decisive in this case. There has been an attempt to show that there was here such a degree or character of annexation as to make these tapestries permanent additions to the house. I doubt whether there could have been such annexation by a tenant only as could have had this effect where the purpose of the annexation is ornamental. However firmly a tenant may put up such ornaments as pictures or tapestries upon the walls, I confess that I think him entitled to remove them, if during his tenancy he desires to do so, in order, it may be, to substitute others in their place, or to take them away altogether; and the same would be true at the end of his tenancy, at least where they are not built in so as to be really parts of the permanent building. His position is that of a temporary occupant, having put up things for temporary purposes. He will be bound to take care that no damage occurs to the walls which he does not put right; but that is a different matter from an obligation to leave chattels which have not been built in as additions to the house, and remain so when his tenancy ends. Here, in fact, I think that there was no permanent attachment, and I need not repeat what has been said by the Lord Chancellor as to the character of the attachments. I entirely agree with the judgment of the Court of Appeal, and with the grounds upon which the learned judges unanimously proceeded in giving their judgment.

LORD BRAMPTON.—My Lords: I am of the same opinion. I entirely agree with the exhaustive judgments in the Court of Appeal, and I agree also with all the observations which the Lord Chancellor has made with respect to this

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case. I confess that I see no difficulty about the case myself, and I cannot see in the least how it can be said that these tapestries could ever have formed a portion of the house. It is not as if they had been pictures painted upon the walls of the house as a fresco that could not have been removed. There I can thoroughly understand that it could not be removed, because you could not remove it without removing part of the wall itself—in which case you would probably destroy the fresco and injure the house. But there is no sense in which these tapestries can be said to have been part of the house, nor do I see how any structural injury to the house could really be caused by their removal.

Lord ROBERTSON.—My Lords: I also concur. My view is completely represented by the judgment of Stirling, L.J.

Lord LINDLEY.—My Lords: I am entirely of the same opinion. I cannot bring myself to believe that Mme. de Falbe, when she put up these tapestries, made a present of 7000*l.* to the remainderman. The tapestry remained a chattel from first to last.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*

Solicitors for the residuary legatees, *Hadden-Woodward and McLeod.*

Solicitors for the executor, *Payne, Shaw-Mackenzie, and Lake.*

Dec. 17, 1901, and March 13, 1902.

(Before the LORD CHANCELLOR (Halabury),
Lords MACNAGHTEN, DAVEY, BRAMPTON,
ROBERTSON, and LINDLEY.)

WATNEY, COMBE, REID, AND CO. v. EWART AND
OTHERS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Landlord and tenant — Lease — Forfeiture —
Liquidation—Voluntary winding-up—Convey-
ancing and Law of Property Act 1881 (44 & 45
Vict. c. 41), s. 14.*

*The respondents by lease demised a public-house to
C. and Co. Limited, a firm of brewers, for a
term of thirty years. The lease reserved a
power of re-entry to the lessors if the lessees or
their assigns, being a company, should enter
into liquidation, whether compulsory or volun-
tary.*

*During the continuance of the term C. and Co.,
being then solvent, went into voluntary liquida-
tion solely for the purpose of amalgamating with
two other firms of brewers.*

*Held (affirming the judgment of the court below),
that the liquidation operated as a forfeiture of
the lease, and was within sect. 14, sub-sect. 6,
of the Conveyancing and Law of Property Act
1881.*

*Horsey Estate v. Steiger (80 L. T. Rep. 857; (1899)
2 Q. B. 79) approved and followed.*

THIS was an appeal from a judgment of the
Court of Appeal (Rigby, Williams, and Romer,
L.J.J.), reported under the name of *Ewart v. Fryer*

in 83 L. T. Rep. 501; (1901) 1 Ch. 499, who had
affirmed a judgment of Kekewich, J., reported
82 L. T. Rep. 415.

The action was brought by the respondents
against Frederick James Fryer (who was subse-
quently dismissed from the appeal to the House)
and the appellants, and the question was whether
the respondents were entitled to recover posses-
sion of a public-house at the corner of Com-
mercial-road, in the parish of St. George's-in-
the-East, and known as the Boundary Tavern,
on the ground that the lessees thereof—namely,
Combe and Co. Limited—incurred a forfeiture of
the lease (in pursuance of a provision in the
lease) upon going into voluntary liquidation,
being perfectly solvent at the time, for the pur-
pose of amalgamation with two other companies
in order to form the company now known as
Watney, Combe, Reid, and Co. Limited. The
lease was dated the 26th Oct. 1896, and was for
thirty years from the 25th Dec. 1895. The rent
was 300*l.* a year, and the lessees were to spend
600*l.* in repair, decoration, and improvement.
The lessees were not to assign without the
lessor's consent, but such consent was not to be
arbitrarily withheld. The 600*l.* was expended,
and a premium of 8500*l.* paid for the lease. The
proviso was in the following terms:

Provided that if and whenever the lessees or their
assigns, being a company, shall enter into liquidation,
whether compulsory or voluntary, then and in any such
case it shall be lawful for, but not obligatory upon, the
lessor, or any person or persons duly authorised by him in
that behalf, into or upon the said demised premises, or
any part thereof in the name of the whole, to re-enter,
and the said premises peaceably to hold and enjoy thence-
forth as if these presents had not been made, without
prejudice to any right of action or remedy of the lessor
in respect of any antecedent breach of any of the coven-
ants by the lessees hereinbefore contained.

Fryer was the under-lessee for twenty-nine and
a quarter years, from the 24th June 1896; he
paid a premium of 8000*l.* and was to pay a rent
of 800*l.* reducible to 300*l.* so long as he procured
his beer and other malt liquor from the appel-
lants. The resolutions for the amalgamation of
the appellants with the other companies were
passed in Dec. 1898, and confirmed and registered
in the following January. It was contended
that there had been a waiver of the forfeiture
by the acceptance of rent after the date of the
resolutions and their publication in the *London-
Gazette*.

The courts below held that the question of
whether there was a forfeiture under the cir-
cumstances was governed by the decision of the
Court of Appeal in *Horsey Estate v. Steiger* (80
L. T. Rep. 857; (1899) 2 Q. B. 79), and the argu-
ments in the courts below were chiefly on the
point as to whether there had been a waiver of
the forfeiture, and the relief to which Fryer, the
sub-lessee, was entitled. He was a party to the
appeal in the first instance, but afterwards with-
drew, and the appeal was argued as between the
lessees and the lessors only.

Warmington, K.C. and *J. D. Davenport*, for the
appellants, argued that, though the courts below
were bound by the decision in *Horsey Estate v.
Steiger* (*ubi sup.*), it was not binding on this
House. A voluntary liquidation of a solvent
company for the purpose of reconstruction is
not within the proviso; or, if there was a for-

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

feiture, it was waived by the receipt of rent after notice. If there was a forfeiture, and no waiver, sect. 14, sub-sect. 1 of the Conveyancing and Law of Property Act 1881 applies, and sect. 14, sub-sect. 6, does not apply. They cited

Lock v. Pearce, 68 L. T. Rep. 569; (1893) 2 Ch. 271;

Skinnars' Company v. Knight, 65 L. T. Rep. 240; (1891) 2 Q. B. 542.

Neville, K.C., T. B. Warrington, K.C., and Methold, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships took time to consider their judgment.

March 13.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: It is not denied that the lessees, being a company, went into voluntary liquidation, and the first point raised is that if the liquidation was for the purpose of reconstruction, and not by reason of insolvency, the words above quoted do not apply. It is asserted, and admitted by the respondents, that here the liquidation was simply to reconstruct, and was not in any degree due to insolvency. I am, however, unable to see that this makes any difference. I am not entitled to introduce words into the instrument which the parties have not put there. This was a voluntary liquidation, and whatever the motives might be for entering into it, the lessees did the very thing which by plain and unambiguous language was agreed to give a right of re-entry. But for the able and persistent argument of the learned counsel, I should have thought the language of the instrument too plain to be susceptible of argument. The other point, to my mind, is equally plain. It is, speaking broadly, whether the code concerning forfeiture contained in sect. 14 of 44 & 45 Vict. c. 41 has any application at all to the forfeiture, which, as I have said, was very plainly incurred by the liquidation. That depends on the interpretation which is to be given to the words of sub-sect. 6 of the code in question, which sub-section expressly enacts that the section, which, as I have said, embraces a code for relief against forfeiture, is not to extend to a condition of forfeiture upon the bankruptcy of the lessee. Of course, but for the artificial and extended meaning given to the word "bankruptcy," this would not be such a condition; but it seems to me that when one reads that extended meaning given to the word "bankruptcy," one cannot doubt that liquidation by a company comes within it. The words are these: "Bankruptcy includes liquidation by arrangement," which, I think, does not refer to liquidation by a company in this sense. But then come the words "and any other act or proceeding in law having under any Act for the time being in force effects or results similar to those in bankruptcy." What could be more apt to describe the *cessio bonorum* which in effect takes place, and the payment by some constituted authority of the creditors of the trading concern, and the distribution of its surplus property to its members, so that, except for the purposes of winding-up, it ceases to be a trading concern at all? This was decided in 1899 by the Court of Appeal (*Horsey Estate v. Steiger*, 80 L. T. Rep. 857; (1899) 2

Q. B. 79), and, I think, rightly decided; and, if so, we are remitted to the first point, whether a forfeiture has been incurred. Other questions have been raised with which I do not propose to deal, inasmuch as what I have said disposes of this appeal, subject to one question of fact, which I only notice to say that, so far as that question of fact—namely, "waiver"—is concerned, I am entirely satisfied with the judgment upon it by Kekewich, J. and the Court of Appeal, and under these circumstances I move your Lordships to dismiss this appeal with costs.

Lord MACNAGHTEN.—My Lords: In *Horsey Estate v. Steiger* (80 L. T. Rep. 857; (1899) 2 Q. B. 79) it was held by Russell, C.J. and Smith and Collins, L.J.J. that a similar proviso in the lease then under consideration was "a condition for forfeiture on the bankruptcy of the lessee" within the meaning of sect. 14, sub-sect. 6, of the Conveyancing and Law of Property Act 1881, a condition to which, as sub-sect. 6 itself declares, sect. 14 "does not extend." Then comes the question, Was the Court of Appeal right in *Steiger's* case? Is the liquidation of a limited company "bankruptcy" within the meaning of that expression as used in the Act of 1881? I think it is. In the Act of 1881, if I am not mistaken, the expression "bankruptcy" occurs only in the interpretation clause, sect. 2, and in sub-sect. 6 of sect. 14. Sect. 2, sub-sect. (xv.), is in these words: "Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having under any Act for the time being in force effects or results similar to those of bankruptcy, and bankrupt has a meaning corresponding with that of bankruptcy." The expression "liquidation by arrangement" refers, of course, to liquidation by arrangement under the Bankruptcy Act 1869, which was then in force. But it seems to me that the words which follow plainly include the liquidation of a limited company under the Companies Act 1862. Having regard to the Companies Act 1862 and sect. 10 of the Judicature Act 1875, it is impossible to deny that the liquidation of a limited company has "effects or results similar to those of bankruptcy," and it is to be borne in mind that it has been held that the provisions of the Judicature Act, sect. 10, must be treated as applicable to every company in liquidation unless and until it is shown that its assets are in fact sufficient for the payment of its liabilities and the costs of winding-up: (*Re Milan Tramways Company*, 50 L. T. Rep. 545; 25 Ch. Div. 587). And therefore, where the condition of forfeiture is the entering into liquidation, the result of the liquidation is immaterial. This conclusion is sufficient to dispose of the present case. Sect. 2 of the Conveyancing and Law of Property Act 1892, which qualifies sub-sect. 6 of sect. 14 of the Act of 1881, and applied in *Steiger's* case, does not apply to any lease of a public-house. There were two other points suggested on behalf of the appellants—(1) that without proof of actual notice publication in the *Gazette* is notice to all the world, as Lord Romilly, M.R. seems to have held, and that therefore receipt of rent after the winding-up resolution appeared in the *Gazette* was a waiver of the forfeiture (*Emerson's* case, 14 L. T. Rep. 457, L. Rep. 2 Eq. 231); and (2) that liquidation is only voluntary liquidation, within the meaning of that expression as used in the lease to Combe and Co.,

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when it is entered into unwillingly owing to the pressure of pecuniary embarrassment. These points were only faintly argued, and hardly require serious consideration. I agree that the appeal must be dismissed with costs.

LORD DAVEY.—My Lords: I have had an opportunity of reading and considering the judgments which have already been delivered, and that which has been prepared by Lord Lindley, and, as they express my own view, I do not trouble your Lordships by delivering a judgment of my own. I only desire to add that no distinction is made in the Companies Acts between one voluntary liquidation and another. In my opinion it is not legitimate, for the purpose of construing either a lease or the Conveyancing Act, to inquire into the motives or objects which actuated the members of the company in entering into a voluntary liquidation.

LORD BRAMPTON and **LORD ROBERTSON** concurred.

LORD LINDLEY.—My Lords: Mr. Warmington, in his argument for the appellant, endeavoured to establish—(1) that there was no forfeiture; (2) that, if there was, it had been waived; (3) that sect. 14, clause 1, of the Conveyancing Act 1881 applied to the case if there was a forfeiture which had not been waived; (4) that clause 6 of sect. 14 of the same Act did not apply. Mr. Warmington did not ask the House to vary the terms on which relief had been granted by Kekewich, J. and the Court of Appeal under sect. 4 of the Conveyancing Act 1892; he based his case on the broad ground that the lessors were not entitled to eject their tenant. The first question turns entirely on the construction of the proviso for re-entry, and this is too plain to present any difficulty. The lessees were a company, and they did enter into voluntary liquidation by passing a resolution to wind-up voluntarily. What their object was is quite immaterial; it was in this case with a view to reconstruction; it might have been for some other purpose. Whatever the object of entering into liquidation was, it is impossible to deny that one of the events on which the lessors stipulated for a right to re-enter indisputably happened. Similar language had to be construed in *Horsey Estate Limited v. Steiger* (79 L. T. Rep. 116; (1898) 2 Q. B. 259), and both Hawkins, J. (who tried the case) and the Court of Appeal held that the language was too plain to be got over. The second question turns on the acceptance of rent after the forfeiture and on the correspondence which took place between the solicitors of the parties. This part of the case was very carefully gone into by Kekewich, J., and he came to the conclusion that the plaintiffs had no such knowledge of what had taken place as to establish a waiver of their rights. The Court of Appeal took the same view, and on this point did not think it necessary to hear the other side. It is unnecessary to do more than say that, having attentively followed counsel's observations on this question of waiver, I see no reason to think that the conclusion thus arrived at is erroneous; I think that it was right. The third question does not appear to have been raised in the courts below. At all events it is not noticed in the judgments as printed; it is a very important one, but it is unnecessary to decide it. I therefore refrain from saying more about it. But I do not

wish to be understood as assenting to the argument addressed to us upon it. This brings me to the fourth question argued by Mr. Warmington—viz., whether a voluntary winding-up of a solvent company with a view to a reconstruction is equivalent to a bankruptcy as defined by sect. 2 (xv.) of the Conveyancing Act 1881. Unquestionably there are some very marked distinctions between bankruptcy (even as defined in sect. 2, clause xv., of the Conveyancing Act 1881) and a winding-up, whether compulsory or voluntary. The main distinctions are as follows: (1) In bankruptcy (and also in liquidations by arrangement under the Bankruptcy Act 1869) the property of the debtor is divested from him and vested in a trustee for his creditors, whilst in a winding-up the property of the company is not divested from it; (2) the doctrine of the relation of the title of a trustee in bankruptcy back to the act of bankruptcy does not apply to a winding-up; (3) the doctrine of reputed ownership does not apply to a winding-up; (4) a trustee in bankruptcy can disclaim onerous property, including a disadvantageous lease, but in a winding-up there is no similar power to disclaim. This is a very important practical difference when considering the position of lessors and lessees. But, notwithstanding these differences, the Court of Appeal held, in the case of *Horsey Estate Limited v. Steiger* (*ubi sup.*) that a voluntary winding-up was included in the word bankruptcy as used in the Conveyancing Act 1881. There is much to be said in favour of this view; sect. 2, clause xv., of that Act gives a very wide meaning to the word bankruptcy; it includes "any proceeding in law having under any Act for the time being in force effects or results similar to those in bankruptcy." Winding-up has many effects or results similar to those in bankruptcy. The following are the most important and striking: (1) The cessation of the business of the company, except with a view to wind-up its affairs, and the appointment of persons whose duty it is to take the control of all the company's assets and realise them so far as may be necessary to pay the debts and liabilities of the company; (2) the debts provable, those entitled to preference, the rules as to set-off, as to secured debts, as to fraudulent preference; (3) the fundamental doctrine that all creditors (with a few exceptions) are to be paid *pari passu* out of the assets. Further, it must not be forgotten that formerly trading companies could be made bankrupt (7 & 8 Vict. c. 111), and that by degrees the administration of the estates of companies being wound up has been made more and more similar to the administration of estates in bankruptcy. Still, I was impressed by Mr. Warmington's argument that a voluntary winding-up of a solvent company with a view to reconstruction was not a bankruptcy within the meaning of the Conveyancing Act 1881. I am not, however, prepared to say that the Court of Appeal was wrong in deciding that it was, and I accept their solution of what I think a very doubtful question. Even if, therefore, Mr. Warmington was right in contending that this case came within sect. 14, clause 1, he was wrong in contending that it did not fall within clause 6 of that section. As the property leased is a public-house, it is unnecessary to consider the effect of sect. 2, clause 2, of the Conveyancing Act 1892, for its application to this case is ex-

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cluded by sect. 3 of the same Act. The appeal ought to be dismissed with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Bischoff, Bompas, Dodgson, Coze, and Bompas.*

Solicitors for the respondents, *Bolton and Co.*

Judicial Committee of the Privy Council.

Feb. 19, 22, and March 12.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.)

CHAN KIT SAN AND ANOTHER v. HO FUNG HANG. (a)

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Law of Hong Kong—Statute of Limitations (Ordinance No. 13 of 1864)—Administrator—Right to sue—Vesting of intestate's property in registrar of court.

H., who carried on business in partnership with the appellants, died intestate in 1880. In 1886 a will was produced, and probate was granted to the executor named therein. In 1896 the probate was revoked on the ground that the alleged will was a forgery. In 1897 letters of administration were granted to the respondent, and in 1899 he brought an action against the appellants for an account.

Held (affirming the judgment of the court below), that the Statute of Limitations only began to run from the grant of letters of administration in 1897, and that the action was not barred.

By Ordinance No. 8 of 1860 and Ordinance No. 9 of 1870 the property of intestates is vested in the registrar of the Supreme Court until administration is granted, and he is given power to get in and protect the estate, but no power to sue is conferred upon him.

Held, that no right of action accrued to the registrar on the death of the intestate which would make the statute run from that date.

THIS was an appeal from a judgment of the Supreme Court of Hong Kong (Carrington, C.J. and Wise, J.) in its appellate jurisdiction, affirming a judgment of Goodman, acting C.J., in favour of the respondent, the plaintiff below.

The action was brought by the respondent as administrator of one Ho I. Shek, deceased, for an account of certain alleged partnership transactions between the deceased and the appellants, under circumstances which appear in the head-note above, and from the judgment of their Lordships.

Upjohn, K.C. and *E. Clayton* appeared for the appellants, and argued that the courts below held that the case was governed by *Murray v. East India Company* (5 B. & Ald. 204), which is distinguishable. Either the registrar of the Supreme Court could have sued on the death of the intestate in 1880, or the executor under the probate granted in 1886 could have sued before the grant was revoked (see *Allen v. Dundas*, 3 T. R. 125), and in either case the present action is barred by the statute. A

debtor has no means of compelling administration to be taken out, and thus a cause of action may be kept alive indefinitely. The executor in 1886 was estopped from asserting that the alleged will was a forgery.

Morton Smith, for the respondent, maintained that though a payment to the executor under the forged will would have been a good discharge, when once the probate was revoked it was as though it had never existed. The registrar had no power to sue. He was only in the position of a receiver to protect the property till a personal representative was constituted. The statute only begins to run from the grant of letters of administration. He cited

Re Ivory, 39 L. T. Rep. 285, 611; 16 Ch. Div. 372;

Partington v. Hawthorne, 52 J. P. 807.

Upjohn, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 12.—Their Lordships' judgment was delivered by

LORD DAVEY.—In this case the respondent as administrator of the estate and effects of Ho I. Shek, deceased, on the 13th Jan. 1899 commenced an action in the Supreme Court of Hong Kong against the appellants for an account of certain alleged partnership transactions between the deceased and the appellants. The appellants (defendants in the action) pleaded the Statute of Limitations. An order was made on the 1st Dec. 1899 that the issue of law with regard to the Statute of Limitations be tried before any other issues in the suit. The terms of the issue were, "assuming that all the facts stated in the petition are true, is or is not the plaintiff's claim herein barred by the Statute of Limitations?" The material facts and dates thus admitted for the purpose of argument are the following: (1) Ho I. Shek died intestate on the 19th June 1880. (2) No administration to his estate was taken out until Nov. 1886, when probate of an alleged will was granted by the Supreme Court in its probate jurisdiction to Ho Chik Fuk, the person named as executor in such alleged will, but Ho Chik Fuk did not intermeddle with the shares claimed in the alleged partnership transactions. (3) On the 17th Nov. 1896 the alleged will was declared to be a forgery, and the probate was revoked. (4) On the 21st June 1897 administration was granted to the respondent. The relevant Statute of Limitations is contained in sect. 8 of Ordinance No. 13 of 1864, whereby it was enacted that all actions of account must be commenced within six years after the cause of such actions. These are the same words as those of 21 Jac. 1, c. 16. It was not seriously and could not be successfully disputed that according to the well-established rule in English law the statute runs against an intestate's estate from the date of the grant of letters of administration only. But the appellants contended (1) that according to the law of the colony a right of action accrued on the intestate's death to the registrar of the court, and the statute therefore ran from that date; or, alternatively (2) that the statute began to run from Nov. 1886, when the grant of probate of the forged will was made to Ho Chik Fuk. On the trial of the issue, the Supreme Court (Original Jurisdiction) decided

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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in favour of the respondent, and its decision was affirmed by the Supreme Court (Appellate Jurisdiction). The present appeal is from the order of the latter court, dated the 14th March 1900. The argument of the present appellants in the first court was based chiefly on the grant of the probate of the forged will. Now, it is quite true that so long as that probate was in existence the title of the grantees could not be impeached in any common law court, and he could have sued for and given a good discharge for any debt due to the deceased. It is, indeed, questionable whether in the present case the alleged executor could have maintained an action against the present appellants, because the title of an executor is derived not from the probate, but from the will, and the probate when granted relates back to the death. As more than six years had elapsed between the date of the death and the grant of the probate, any right of action by Ho Chik Fuk under his probate would, it is said, have been barred. The acting Chief Justice decided in the respondent's favour on this ground. It is replied by counsel at their Lordships' Bar that the cause of action vested though the right to sue was barred. Without giving any opinion on this somewhat subtle point, their Lordships think that the general argument may be disposed of on a broader ground. By the revocation the grant of probate was made void *ab initio*, for there was not in fact any will to be proved. It is now known that the apparent title of the so-called executor, although it could not be impeached in any court except the Court of Probate, was founded on a fiction and a fraud, and for the purposes of the present argument the probate must be treated as a nullity and as never having had any real existence. When the facts are known, the court cannot be bound to take notice of an apparent right of action obtained by fraud. In the Court of Appeal no reliance appears to have been placed on this point, though it has been resuscitated before their Lordships. The point there argued was the first contention of the appellants, that a right of action vested in the registrar on the death of the intestate. This depends on certain sections of the Ordinances. By sect. 39 of Ordinance No. 8 of 1860, which was the one then in force, it was enacted that from and after the decease of any person dying intestate, and until letters of administration should be granted in respect of his estate and effects, the personal estate and effects of such person should be vested in the registrar of the Supreme Court. By sect. 1 of Ordinance No. 9 of 1870 it was declared that the registrar of the Supreme Court was *ex officio* official administrator under Ordinance No. 8 of 1860. And by following sections large powers were given to the official administrator for the purpose of enabling him to get in and protect the estate of the deceased pending the grant of letters of administration, but no power to sue was conferred on him. It was argued that by these Ordinances all the rights of action included in the estate of the deceased were vested in the registrar or official administrator, and he therefore had, by implication, a statutory right to enforce them by action. But their Lordships think that there is nothing in the sections to which they have been referred to overrule the established rule of law that no action can be maintained in respect of the estate of a

deceased person except by a duly constituted administrator or executor. The sections referred to seem to place the registrar, pending the grant of letters of administration, in the position of a receiver, and to give him powers incident to such an office, but nothing more. And the result of the inquiry made by the Chief Justice as to the practice under sect. 39 of the Ordinance of 1860 confirms this view. Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed, and the appellants will pay the costs of it.

Solicitors for the appellants, *Harston and Bennett*, for C. Ewens, Hong Kong.

Solicitors for the respondent, *Trass and Enever*, for *Dennys and Bowley*, Hong Kong.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 24, 27, 28, and Feb. 17.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re HANDMAN AND WILCOX'S CONTRACT. (a)

APPEAL FROM THE CHANCERY DIVISION.

Settled land—Lease—Tenant for life—"Best rent"—Personal claim of lessee against tenant for life—Waiver—Reduction of rent—Purchaser for value without notice—Doubtful title—Settled Land Act 1882 (45 & 46 Vict. c. 38), s. 7, sub-s. 2, s. 54.

A lease granted by a tenant for life under the Settled Land Act 1882 was expressed to be made in consideration of a rent thereby reserved, but there was evidence that the tenant for life had been influenced by the abandonment by the lessee of a money claim against the tenant for life personally, and that the best rent that could be obtained had not been reserved. Six years afterwards the lessee sold the lease to H., who soon after entered into a contract to sell it to A. It was not proved that H. had any notice of any arrangement between the tenant for life and the original lessee.

Held, the title was not such as the court would force on a purchaser, as it depended on disputed questions of fact upon which the decision of the court would not bind the remaindermen.

Decision of Buckley J. affirmed.

THIS was an appeal from a decision of Buckley, J. In April 1894 a lease was granted by G. Haynes under the powers of the Settled Land Act 1882 to W. Nye of some vacant land at Ealing, for ninety-nine years, at a rent of 4l., the lessee covenanting to expend at least 400l. in building on the land. Nye afterwards became bankrupt, and in July 1900 this leasehold property was sold by his trustee in bankruptcy by auction and purchased by Handman for 150l. In Oct. 1900 Handman agreed to sell to Wilcox for 195l. No building had up to this time been erected on the land. A requisition was made on behalf of Wilcox that, having regard to the fact that the lease was now sold for 195l., it must be shown

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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that the rent reserved was the best that could reasonably be obtained. The vendor replied that this was impossible, but it was undoubtedly the best obtainable at the time.

A summons was afterwards taken out by Wilcox under the Vendor and Purchaser Act 1874 (37 & 38 Vict. c. 78), for a declaration that a good title had not been shown.

There was evidence that the lease was granted by Haynes to Nye not at the best rent, but at a reduced rent in consideration of the waiver by Nye of a claim for damages against Haynes, but it was not proved that Handman was aware of this at the date of the contract of Oct. 1900, and he and his advisers alleged they were not.

Buckley, J. held that the lease was void and not voidable, and, therefore, if Handman was a purchaser for value without notice, he could not give a good title to the property.

The vendor appealed.

Vernon Smith, K.C. and Stewart-Smith for the appellant.—Sect. 7, sub-sect. 5, of the Settled Land Act 1882, construed with reference to the earlier sections, together with sect. 20, show that the legal estate passed to the lessee, although the provisions of the Act had not been complied with. The provisions of sect. 7, sub-sects. 1, 2, and 3, are not conditions, they are only directions. If the best rent was not obtained, a person taking with knowledge of the infirmity might be liable to have the lease set aside, but a subsequent purchaser for value without notice would obtain a good title. If the tenant for life improperly grants a lease under the Act, he alone is responsible to those entitled in remainder, as he is in the position of and has the duties and liabilities of a trustee for them under sect. 53 of the Act of 1882:

Re Marquis of Ailesbury's Settled Estates, 65 L. T. Rep. 830; (1892) 1 Ch. 506.

Under sect. 54 a lessee, dealing in good faith with a tenant for life, is to be conclusively taken, as against all parties entitled under the settlement, to have given the best rent that could reasonably be obtained by the tenant for life. Here Nye did not know the provisions of the Settled Land Act 1882; he had no legal advice as to the alleged agreement as to his claim for damages being illegal. When the bargain was struck Nye did not know Haynes was only tenant for life of the land. He bargained with him as an ordinary owner, and dealt in good faith with the tenant for life within that section. The case of *Mogridge v. Clapp* (67 L. T. Rep. 100; (1892) 3 Ch. 382) supports the contention of the appellant. There Lindley, L.J. said (67 L. T. Rep. 102; (1892) 3 Ch. 395) that "if the plaintiff had, by conniving at a breach of trust, done the remainderman an injury, he would personally be liable to him for it, but a purchaser from him would, I think, be safe. . . . The doctrines of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bona fide* with tenants for life when exercising their powers under the Settled Land Act." Therefore, even if Nye did not obtain a valid lease it is voidable only, and a purchaser from him without notice obtains a good title. There is no evidence that Handman had any notice of this defect in the title. The case of *Chandler v. Bradley* (75 L. T. Rep. 581; (1897) 1 Ch. 315) is not in point. It

was held there that the legal estate had not passed to the lessee, and that he had not acted in good faith. In *Dowager Duchess of Sutherland v. Duke of Sutherland* (69 L. T. Rep. 186; (1893) 3 Ch. 169) Romer, J. considered the whole transaction was a sham. They also referred to

Lowther v. Carlton, 2 Atk. 241;

Settled Estate Act 1877 (40 & 41 Vict. c. 18), s. 4.

[WILLIAMS, L.J. referred to *Re Gladstone*; *Gladstone v. Gladstone* (82 L. T. Rep. 515; (1900) 2 Ch. 101), and *Re Chawner's Settled Estates* (66 L. T. Rep. 745; (1892) 2 Ch. 192).]

Micklem, K.C. and E. Clayton for the respondent.—It is reasonably plain on the evidence that this lease was granted at an under-value. It is therefore void, and a purchaser for value without notice does not obtain a title. The statutory power of leasing is given to the tenant for life by sects. 6 and 7 of the Act of 1882. If all those provisions are not complied with strictly, the legal estate does not pass to the lessee. Sect. 20 only refers to the completion of contracts which have been made in accordance with the Act. Sub-sect. 2 must be read in connection with sub-sect. 1. Sub-sect. 2 does not enlarge sub-sect. 1. Sect. 54 only applies to a lease which in all respects complies with the other provisions of the Act. It cannot be said that this lease was made *bona fide* within sect. 2 of 12 & 13 Vict. c. 26, and the court cannot relieve against any defective execution of the power:

Sugden on Powers, 564;

Farwell on Powers, 2nd edit., p. 345, 355;

Moffett v. Lord Gough, 1 L. Rep. Ir. 331.

But the court will not force such a doubtful title as this on an unwilling purchaser. It depends on questions of fact which are in dispute, and it might be necessary for him to produce evidence that the vendor had no notice that the best rent was not reserved, which he could not do. The persons interested in remainder under the settlement would not be bound by the decision in this case:

Re Briggs and Spicer, 64 L. T. Rep. 187; (1891) 2 Ch. 127;

Re New Land Development Association and Gray, 66 L. T. Rep. 694; (1892) 2 Ch. 138;

Re Hasle's Settled Estates, 52 L. T. Rep. 947; 29 Ch. Div. 78, 83.

[STIRLING, L.J. referred to *Bailey v. Barnes* (69 L. T. Rep. 542; (1894) 1 Ch. 25). COZENS-HARDY, L.J. referred to *Freer v. Hesse* (4 De G. M. & G. 495).]

Vernon Smith, K.C. in reply. Cur. adv. vult.

WILLIAMS, L.J.—This is an appeal from a decision of Buckley, J. The question is raised on a summons under the Vendor and Purchaser Act 1874, and is whether the vendor has made such a title as can be forced upon the purchaser. [His Lordship then referred to the facts, and continued:] Nye's trustee in bankruptcy sold the lease, and the present vendor purchased at the price of 150*l.* I think, at all events, that a very substantial price when one considers that the rent reserved was only 4*l.* It is a price which, to my mind, would have been much more likely the commercial price in case the rent reserved had been what it ought to have been. It may very well be that the purchaser had no means of

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knowing that the best rent had not been obtained and did not in fact know it, but we have not really sufficient evidence to enable us to judge of that. Now he has entered into a contract for the sale of this lease, and the present purchaser declines to accept the title. The title is a doubtful title because there are really material facts which are in doubt. These facts are such that not only is it theoretically possible that they may be put in issue as was the case in *Mogridge v. Clapp* (*ubi sup.*) and as was pointed out by Lindley, M.R., but it is extremely probable that the validity of this lease may be hereafter questioned by those who are entitled in remainder, and the success of that action by the remaindermen may depend upon facts which are too much in doubt to make it right to force the title on the purchaser. Under these circumstances we think the decision of Buckley, J. must be affirmed and the appeal dismissed.

STIRLING, L.J.—In this case I take the same view of the facts as Buckley, J. I think that on the evidence as it now stands it must be taken that the lease which is the subject-matter of the contract was granted not merely in consideration of the annual rent of 4l. thereby reserved, but of the abandonment by the lessee of a money claim against the lessor personally. The lease was granted by the lessor under the powers conferred by the Settled Land Acts; and this I think the lessee must be taken to have known. In my opinion, therefore, the lease did not reserve the best rent that could be obtained, and the lessee did not deal in good faith with the lessor within the meaning of sect. 54 of the Settled Land Act 1882. It follows that the lease was either void or voidable as against the parties entitled under the settlement other than the lessor. If the lease was void, as the purchaser contends, then the title of the vendor is bad. If the lease was voidable only, as it is contended on behalf of the vendors, then it might be supported on the ground that the vendor was a purchaser for value without notice. It was, however, decided by the Court of Appeal in Chancery in *Freer v. Hesse* (*ubi sup.*) that such a title ought not to be forced on a purchaser, and from that decision I do not see my way to depart. On these grounds I am of opinion that the appeal ought to be dismissed.

COZENS-HARDY, L.J.—This appeal raises questions of difficulty and importance as to the true effect of the Settled Land Act 1882. [His Lordship then stated the facts, and continued:] But it is said that Handman was not aware of this arrangement between Haynes and Nye, and that although the lease might not be good in the hands of Nye, or of anyone claiming through him with notice of the defect, it is good in favour of Handman as a purchaser for value without notice, and that he can pass it on to Wilcox. Now, two points arise for consideration: (1) Is the lease void or only voidable? (2) Is the title such as ought to be forced upon a purchaser? Having regard to the view which I take on the second question, it is not necessary and perhaps not desirable that I should state the conclusion at which I have arrived on the first point. Assuming in favour of the vendor that the lease to Nye is only voidable and not void, I do not think the title such as ought to be forced upon a purchaser. In that view everything would depend

upon whether Handman had notice of the defect. In *Freer v. Hesse* Knight-Bruce, L.J. says (4 De G. M. & G. 503): "No doubt generally speaking, if not universally, a purchaser with notice from a vendor without notice is entitled to the same protection as the vendor was entitled to; but this is a question not between incumbrancers claiming rights against the estate—it is one arising in a suit for specific performance between the person in possession, who wishes to sell the estate, and the person to whom he wishes to sell it, and the safety of the title depends for this purpose on the point whether the vendor had notice of the incumbrance. The vendor says that he had not. His agents say they had not. This is, perhaps, true; but I am not aware of any instance, and counsel has not been able to supply any to the court, of a title depending upon such a fact being forced on a purchaser." I think that is still good law. I should not hesitate to force upon a purchaser a title depending upon the construction and effect of a general statute, even though my view differed from that of the court below. A striking instance of this is furnished by *Re Carter and Kenderdine's Contract* (76 L. T. Rep. 476; (1897) 1 Ch. 776), where the Court of Appeal compelled a purchaser to take a title which depended upon the true construction of sect. 47 of the Bankruptcy Act 1883, although Stirling, J. in *Re Briggs and Spicer* (*ubi sup.*) had held a title bad which depended upon precisely the same point. But different considerations apply where the title depends upon the proof of a fact, such as notice or want of notice. The decision of the court in such a case based upon the evidence before it would not be binding upon, or indeed in any way influence, the court in a litigation between other parties where different evidence might be adduced. I am not satisfied that Handman may not be affected with notice of the defect. The result is that I think the judgment of Buckley, J. is correct, and that the appeal must be dismissed with costs.

Solicitors: James Morley; S. L. MacAndrew.

Feb. 20 and 21.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

OLIVER v. GOVERNOR AND COMPANY OF THE BANK OF ENGLAND. (a)

APPEAL FROM THE CHANCERY DIVISION.

Principal and agent—Power of attorney—Implied warranty of authority—Forged signature—Transfer of stock—Liability of innocent attorney.

One of two trustees of two sums of stock standing in their names in the books of the Bank of England sold them out under powers of attorney to which the signature of his co-trustee had been forged, a stockbroker who had no knowledge of the forgery acting under the powers and executing the transfers.

Held, that the stockbroker having demanded to act under the powers was liable, under an implied warranty that he had the authority of both trustees, to indemnify the bank for the loss they had sus-

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

tained by being ordered in an action brought by the other trustee to replace the stocks.

Held, also, that the case was within Collen v. Wright (8 Ell. & Bl. 647), which is not limited to cases of contract.

Held, also, that a "transaction" had taken place between the stockbroker and the bank within the rule stated by Lord Esher, M.R. in Firbank's Executors v. Humphreys (56 L. T. Rep. 36; 18 Q. B. Div. 54, 60).

Decision of Kekewich, J. (84 L. T. Rep. 253; (1901) 1 Ch. 652) affirmed.

Per Williams, L.J.: *Collen v. Wright* (ubi sup.) has not been affected by *Derry v. Peek* (61 L. T. Rep. 265; 14 App. Cas. 337).

THIS was an action by Edgar Oliver against the Bank of England claiming a declaration that the transfers of a sum of 2633*l.* 12*s.* 6*d.* Consols. and a sum of 147*l.* 5*s.* 4*d.* Bank of England stock to which he was entitled as surviving trustee, were void on the ground that his signature was forged to the powers of attorney under which the transfers were made; and an order directing the bank to replace the stocks and pay the back dividends, or pay the value and interest at 4 per cent. The bank had served Messrs. Starkey, Leveson, and Cooke, who or some of whom had transacted the business, with a third-party notice under Order XVI., r. 48, claiming to be indemnified by the defendants or each of them against all loss which might accrue to the bank by reason of any transfer of stock, or payment, which the bank might be ordered to make in the action, and against all costs, and claiming judgment accordingly.

In Dec. 1857 the two sums of stock above-mentioned were standing in the names of the plaintiff Edgar Oliver and his brother Frederick William Oliver, a solicitor, as trustees.

At the request of Frederick William Oliver alone, Messrs. Starkey, Leveson, and Cooke applied for and obtained a power of attorney dated the 20th Dec. 1897, purporting to appoint William John Starkey and Edward John Leveson attorneys for the purpose of selling and transferring the Consols.

On the 23rd Dec. 1897 the Bank of England, under the power of attorney, which purported to be executed by both the trustees, transferred the Consols to other persons.

On the 8th March 1898 the bank under precisely similar circumstances transferred the bank stock to other persons.

Mr. Starkey in both cases alone demanded to act and acted on the powers of attorney.

On the 7th July 1899 Frederick William Oliver died, and the plaintiff for the first time heard of the transfers and found that his signature to the powers of attorney had been forged.

At the trial of the action the forgery of the powers of attorney was proved, and Kekewich, J. gave judgment for the plaintiff in the terms of the statement of claim.

The defendants, the Bank of England, based their claim against the stockbrokers on the representations made in the powers of attorney and the transfers that they were authorised by both the trustees, and on an implied warranty that the signatures were genuine.

The stockbrokers denied making any representations as to their authority, and said the bank

made their own inquiries, and had the signatures examined by experts, and passed them as genuine.

Kekewich, J. held (84 L. T. Rep. 253) that Mr. Starkey was liable, under the implied warranty that he had the authority of both trustees to execute the transfer, to indemnify the bank, and Mr. Starkey appealed.

Sir R. T. Reid, K.C., Upjohn, K.C., and Stewart-Smith for the appellant.—There was no implied warranty by the appellant as to the signatures to the power being genuine. The bank and the brokers had the documents before them. The bank made their own inquiries, and did not rely on any representations made by the broker; the signatures to the powers were examined and passed by their own experts. The broker had not such good means of judging, and the doubt which some of the bank officials had as to the signature of Edgar Oliver being genuine was not communicated to the broker, who had no means of discovering the fraud. The case of *Collen v. Wright* (8 Ell. & Bl. 647) does not apply to this case, as it only applies to cases of contract—that is, where one person, professing to have the authority of another to do so, induces a third person on the faith of that representation to enter into a contract with the supposed principal. In such a case the person purporting to act as the agent is liable to the third person. An agent who is not aware that he has no authority is not liable. *Dickson v. Reuter's Telegram Company* (37 L. T. Rep. 370; 3 C. P. Div. 1) is in favour of the appellant. The circumstances of this case do not amount to a "transaction" within the rule stated by Lord Esher, M.R. in *Firbank's Executors v. Humphreys* (56 L. T. Rep. 36; 18 Q. B. Div. 54, 60). In that case Lindley, L.J. treated the rule of *Collen v. Wright* as an exception to the general rule. *Randell v. Trimen* (18 C. B. 786) shows what amounts to a "transaction." Unless *Collen v. Wright* is confined to cases of contract, it is overruled by *Derry v. Peek* (61 L. T. Rep. 265; 14 App. Cas. 337); and *Low v. Bouverie* (65 L. T. Rep. 533, 537; (1891) 3 Ch. 82, 100) shows that cases analagous to *Collen v. Wright* have been treated as overruled. In *Polhill v. Walter* (3 B. & Ad. 114, 124; 37 R. R. 344) Lord Tenterden said: "If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted on a power of attorney which he supposed to be genuine, but which was in fact a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false." They also referred to

Smout v. Ilbery, 10 M. & W. 1, 9;

Jenkins v. Hutchinson, 13 Q. B. 744;

Bloomenthal v. Ford, 76 L. T. Rep. 205; (1897) A. C. 156;

Nickalls v. Merry, 27 L. T. Rep. 12; 32 L. T. Rep. 623; L. Rep. 7 Ch. App. 733; 7 E. & I. App. 530;

Lewis v. Nicholson, 18 Q. B. 503, 515;

Weeks v. Probert, L. Rep. 8 C. P. 427.

H. D. G. Greene, K.C., Latham, K.C., and Howard Wright, for the bank, were not called on.

WILLIAMS, L.J.—In this case the facts are very simple indeed. There was produced before the officials of the Bank of England by the appellant, a stockbroker, a power of attorney which purported to be executed by two persons, Frederick William Oliver and Edgar Oliver. There were

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some Consols which were standing in the names of Frederick William Oliver and Edgar Oliver, and the broker had been instructed by Frederick William Oliver, on behalf of himself and Edgar Oliver, to sell some of these Consols. In the ordinary course the broker had to apply for a proper form of power of attorney, and having applied for that and got the form, the authority would then be executed by the two persons in whose names the Consols were standing, and the broker would in the ordinary course produce at the Bank of England the executed authority. Sad to say, the name of Edgar Oliver was forged by his brother Frederick William Oliver. As I say, the broker produced this authority, and upon the production of it he demanded—I say “demanded” because that is the actual word used in the formal application—that the Bank of England should perform their statutory duty. The Bank of England acting on that demand, did, in pursuance of this power of attorney, perform their statutory duty. The whole thing we have to decide here is whether or no, as the law stands at the present moment, there is raised by implication of law a warranty by the broker of the authority on which he demanded that the bank should act. He purported to act as the agent of these two gentlemen. By reason of this forgery he had not the authority of these two gentlemen. In my judgment the law does raise an implied warranty as against the broker. We have heard a very interesting argument from counsel for the appellant, but in my judgment that argument invited the court to deal with questions which are not raised for our decision in this case. Ingenious propositions were put before us, and the question was raised as to what was the principle of the decision in *Collen v. Wright* (*ubi sup.*), and how far that decision extended. We have not to decide that; we have simply to decide, in the first place, whether the present case comes within the decision of *Collen v. Wright*; and, in the second place, assuming that it does, has there been any decision which has made *Collen v. Wright* cease to be good law; and perhaps, in the third place, have any of the decisions which have been given since *Collen v. Wright* so narrowed that decision as to prevent it applying in the present case? Now, in my judgment, none of the decisions have had that effect. On the contrary, they have had just the contrary effect—that is to say, they seem to me to show, and to show to demonstration, that the present case is governed by that decision. Now, with reference to the decision in *Collen v. Wright* itself, I wish to point out, before I deal with the actual judgments, that the weight of this decision is very much enhanced by the fact that in the Exchequer Chamber Cockburn, C.J. was a dissentient judge, and in the reasons given for his judgment he put forward a great many of those considerations which have been urged upon us by counsel for the appellant. The decision in *Collen v. Wright* was delivered by Willes, J., and the judges who concurred with the judgment of Willes, J. were Pollock, C.B., Vaughan Williams, J., and Bramwell, Watson, and Channell, BB. The judgment of Willes, J. is very short, and the material statements in it, to my mind, are these: After referring to the case of an agent professing to act for a third party for whom he was not authorised, but, so professing, honestly induces somebody else to

contract with him as the agent that he professed to be, Willes, J. says (8 Ell. & Bl. 657): “The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises, the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does, in point of fact, exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise.” Now, Cockburn, C.J. did not agree with the proposition there stated by Willes, J. He thought that no such implied contract ought to be raised. He pointed out that as a matter of history it had not been raised, because for a long time it had been supposed, first, that a person who honestly made a statement might have an action brought against him upon the ground that although he had made the statement honestly, yet that it was a statement as to which he had a duty to inform himself of the fact, and under such circumstances an action would lie against him in the nature, as it was called, of an action for deceit. That had ceased to be the law. Secondly, for a long time it was supposed if a man professed to act as an agent for another to make a contract, that in the event of his turning out not to be an agent, although he honestly supposed he was, of that person, he could be made liable as principal on that contract. That, again, had ceased to be the law. Cockburn, C.J. thought that the fact that the previous decisions had left the person who acted upon the honest misrepresentation without a remedy was no ground for inventing a new fiction of law in order to give him a right. But, notwithstanding that, Willes, J. and his brethren had no doubt but that an implied warranty was raised in such a case. Now, I agree that so far as the decision in *Collen v. Wright* is concerned, it is really only a decision upon cases in which you have someone professing to be acting as the agent of another. Cases were put to us in argument of other representations being made; I mean cases where the representation was not of agency, but a representation of something else, as, for instance, a representation, as in *Derry v. Peek* (*ubi sup.*), that the company were entitled to use steam machinery. But for the purposes of this judgment I can only assume that the decision in *Collen v. Wright* is a decision which is applicable to the case of a person who is professing to act as the agent of another, who makes a representation for the purpose of inducing a third person to act upon the truth of that representation, and who makes such representation in the matter of business. But counsel for the appellant was not content that the court should limit *Collen v. Wright* to cases where there is a profession to act as agent for another. It is said the case only applies to the case where the professing agent proposes to make a contract on behalf of his alleged principal. If you take the actual facts of *Collen v. Wright*, that is true; but I see nothing in the judgment of Willes, J. in the slightest degree to lead one to suppose that he intended thus to limit the operation of his judgment; on the contrary; such observations as he does make upon the subject of the consideration for the promise given to the professed agent lead me rather to come to a con-

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trary conclusion. Now, that being so, under the circumstances one has to look at the later cases to see whether there is anything to justify such a limitation. The first of those cases in point of date was *Dickson v. Reuter's Telegram Company* (*ubi sup.*), and the second is *Firbank's Executors v. Humphreys* (*ubi sup.*). As the latter case is nearer to the question of the existence of this limitation suggested by counsel for the appellant, I propose in the first instance to deal with that case. Firbank was a railway contractor, and he was entitled to be paid in cash, but, the company not being in the position to pay cash, an agreement was made during the progress of the works by which he agreed to accept debenture stock in lieu of cash. Under those circumstances the defendants, who were directors of the company, issued to Firbank certificates for the debenture stock which he had already agreed by a binding agreement with the company that he would take in lieu of cash. Unfortunately, it turned out that, when these debentures or certificates of debenture stock were issued, the power of the company to issue debentures or debenture stock had already been exhausted, and that therefore the directors who purported to issue the certificates had no authority so to do. I am not quite sure whether the power was exhausted at the time the agreement was made by the contractor to take the debenture stock instead of cash, but I am assuming for the purposes of my judgment that it had been exhausted at the time when the company made the agreement, though I do not think it makes the slightest difference in the conclusion. Thereupon Firbank proceeded to sue the directors who issued this stock really upon the warranty of authority which must be implied from their acts. In the argument which is attributed to counsel for the directors (18 Q. B. Div. 56), after pointing out that there was a contract binding the company in existence, and that all the directors had done was to issue these debentures after that binding contract had been made, they say: "To make the defendants liable under these circumstances would be to extend the principle of *Collen v. Wright* (*ubi sup.*) far beyond any of the recorded cases." Then they point out in a number of other cases like *Collen v. Wright* no contract existed, as in this case, binding on the principal. Then in his judgment Lord Esher refers to the argument upon either side, and says (18 Q. B. Div. 59): "On the one side it is said that, according to the rule in *Collen v. Wright* (*ubi sup.*), Firbank had a right to sue the directors. The way in which it is put is, that the directors were agents of the company, and had authority to issue debenture stock binding on the company, provided the powers of issuing such stock had not been exhausted; but they had no authority to make any over-issue so as to bind the company. By issuing these certificates it is said that it must be implied that they had affirmed that they had authority to issue them, and that Firbank accepted them, relying on that affirmation of authority, and, as by reason of want of authority he has been damaged, the defendants have made themselves personally liable within the rule laid down in *Collen v. Wright*. On the other hand, it is said that cannot be so, because this debenture stock was issued in fulfilment of a contract which was binding on the company, whereas in that case the contract which the agent

professed to enter into on behalf of his principal was invalid as against the principal. I think the language used in *Weeks v. Probert* (*ubi sup.*) and *Dickson v. Reuter's Telegram Company* (*ubi sup.*) shows that the principle of *Collen v. Wright* extends further than the case of one person inducing another to enter into a contract." Now, that has been really the whole basis, the beginning and the end, of the argument of counsel for the appellant, that the decision in *Collen v. Wright* does not extend further than the case of one person inducing another to enter into a contract. Then Lord Esher goes on to say what the limits of the decision in *Collen v. Wright* are: "The rule to be deduced is, that where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." It seems to me that those words cover, and of necessity cover, the present case. Counsel endeavoured to show that they do not govern the present case by trying to put some limitation upon the words "to enter into any transaction" which limits them (which can hardly be done, looking at Lord Esher's judgment) to the case where there is an inducement to the person with whom the alleged agent is purporting to act to enter into a contract, or, at all events, it is said some such limitation must be put upon the word "transaction" as would exclude the present case. I cannot conceive really any meaning being given to the word "transaction" which would exclude the present case. Here is, as I have said, a case where the defendant comes and, alleging that he has authority, demands that the bank shall perform its statutory duty; and it is then said that some meaning must be given to the word "transaction" to prevent that being a transaction entered into between the bank and the broker. That being so, I will only say one word more. It is said that there is something in the judgment of Lindley, L.J. in *Firbank's Executors v. Humphreys* which puts the case upon a different basis. I cannot agree. On the contrary, I think that when what Lord Esher said there was spoken of as being a dictum, sufficient importance was not given to the passage that I have just read. It seems to me that it is the whole basis of the decision, and not a mere dictum and a reasoning of one judge. I know it is often said that Lindley, L.J. bases his judgment upon another ground. I cannot agree. I quite agree that he does point out that in his judgment, even if the strictest interpretation is put upon *Collen v. Wright*, it might be that that case came within it, because he says (18 Q. B. Div. 62): "Moreover, they in effect requested him not to insist on payment in cash, and to go on with the works in consideration of receiving debenture stock." That is to say, he mentions a view of the case which imports a new agreement as between the company, the alleged principals of the directors, and the directors. But see how he goes on after having stated that fact: "There is the representation by the directors to the contractor and consideration given by him in the shape of action by him on the faith of such representa-

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tion. Nothing more is necessary to make the principle laid down in *Collen v. Wright* applicable to the case." Then a few lines lower down he says: "Speaking generally, an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well-established exception—viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." Again it seems to me that the present case clearly falls within the very words of that judgment. It seems to me that just as I said of "transaction," that it was impossible to put any definition on the transaction which would exclude what was done as between the bank and the broker, so I think that what was done between the bank and the broker comes within the words of Lindley, L.J. Now, I am only going very shortly to call attention to a word or two in the judgment in *Dickson v. Rewter's Telegram Company* (*ubi sup.*). I wish to point out that in that case what happened was that the defendants, the company, had delivered to the plaintiffs a message which was not intended for them. The plaintiffs then, reasonably supposing that the message came from their agents and was intended for them, acted upon it and incurred loss, and it was held by the Court of Appeal (affirming the decision of the Common Pleas Division) that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of an implied representation by them that the message was sent by the plaintiffs' agents. In his judgment Bramwell, L.J., after saying that he does not think that *Collen v. Wright* is really an exception to the rule that an action will not lie for an innocent misstatement—as to which I do not feel bound to say anything by way of criticism at all, it is not necessary in this case—says: "*Collen v. Wright* (*ubi sup.*) establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: If a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen v. Wright*." Then Brett, L.J. makes a statement which is really to the same effect. He says he has come to the conclusion that the decision in *Collen v. Wright* "was founded upon a different and independent rule, which may be stated to be, that where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation." It does not seem to me that there is anything in those judgments which supports any limitation which it is sought to put upon the rule laid down in *Collen v. Wright*, and we shall accept to-day the interpretation of that

rule which was laid down by Lord Esher in the way in which I have mentioned in *Firbank's Executors v. Humphreys* (*ubi sup.*). Now, I wish to say one word about a suggestion that has been made, first, that *Derry v. Peek* (*ubi sup.*) has in some way or other overruled the decision in *Collen v. Wright*; secondly, that the case of *Low v. Bouverie* (*ubi sup.*) shows that in the Chancery Division cases analogous to the case of *Collen v. Wright* have been treated as overruled. Now, it is not suggested that *Derry v. Peek* in terms overrules *Collen v. Wright*—it is not mentioned in the case from beginning to end—and the real question is whether because it has been finally decided in the House of Lords that no action will lie for what has been called a legal fraud—that is to say, no action will lie for a misrepresentation which is not consciously made—that therefore it follows that there can be no state of circumstances based upon a representation which can raise an implied warranty such as that which is suggested here. The rule, as I have stated, in *Collen v. Wright* is merely that, if a man professes to be an agent and gets another to act in matters of business upon that profession and that acting is to the detriment of the person who is so induced to act, the law raises an implied warranty of the averred authority of the agent. I confess I do not see that *Derry v. Peek* in any way renders it impossible to continue to affirm that *Collen v. Wright* is good law. Then with regard to *Low v. Bouverie* (*ubi sup.*). In the first place, as regards the judgment of Lindley and Bowen, L.J.J., they both use such words about actions based upon warranties as clearly leave it consistent with their judgment that they considered that *Derry v. Peek* left *Collen v. Wright* untouched. Then, as to the judgment of Kay, L.J., although I do not for a moment say that he says anything that would lead one to suppose that he had in his mind as an exception from *Derry v. Peek* the rule in *Collen v. Wright*, yet I do say that it is perfectly plain that he thought that there were certain cases of innocent misrepresentation in which the Court of Chancery had, before the decision of the House of Lords in *Derry v. Peek*, compelled the person making the innocent misrepresentation to make good his words, which still continued to be law notwithstanding the decision in *Derry v. Peek*; and the first instance he gave of that is an instance of estoppel. Of course he goes on to point out that which is perfectly accurate, that estoppel does not touch a case like this—that estoppel, being really a rule of evidence only, can only apply in a case where you seek to make a man liable by preventing him proving the true facts, his conduct having been inconsistent with those true facts and having induced other people to alter their position. For these reasons I think that the judgment of Kekewich, J. is right and should be affirmed.

STIRLING, L.J.—I also think the decision of Kekewich, J. ought to be affirmed. The question is whether the principle which was established in *Collen v. Wright* (*ubi sup.*) is to be applied to the present case or not. The main argument which has been addressed to us on behalf of the appellant is, in substance, that *Collen v. Wright* is a case of extremely limited application, and is only to be followed in a similar class of cases; that is to say, where a person professing to be an agent

for another and to have authority for entering into a contract on his behalf induces a third person to enter into such a contract on the faith of that representation. It seems to me that in this court that argument cannot prevail. It was urged in this court by very eminent counsel in the case of *Firbank's Executors v. Humphreys* (*ubi sup.*), and as I read the judgment both of Lord Esher and Lord Lindley (then Lindley, L.J.) they distinctly negatived that contention, and Lopes, L.J. agreed with them. I accept the rule which is applicable in this court to cases of this description as stated by Lord Esher (18 Q. B. Div. 60): "The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it was made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." Now, that being so, it seems to me the only question to be considered is whether the rule is applicable in the present case. It is contended that there was no "transaction" within the meaning of the rule so laid down. Now, what took place? The defendants, the Bank of England, are by law intrusted with certain duties with reference to the stock in question. The stock is transferable only in the books of the bank, and if the Bank of England neglect to perform their duties they are liable to actions at the instance of the stockholders. Mr. Starkey, who is a broker, came to the bank with a document purporting to be signed by two stockholders whose names are registered in the books, and he formally makes a demand that he should be allowed to exercise the powers which purported to be conferred on him by that document, and to be allowed to make an entry in the book which would have the effect of transferring the stock from the persons in whose name it is standing to another person. To that the Bank of England accede; the entry is made, and they permit him to make the transfer. It turns out unfortunately that the name of one of the stockholders is forged, and he has brought an action and obtained a judgment that the bank should restore him to his former position. Now, did not what took place between Mr. Starkey and the bank, Mr. Starkey professing to act on behalf of his principal, amount to a "transaction"? It seems to me it would be a very narrow reading of the word if it was not a transaction; for the result was that if the power had been well executed—if the purported power had been really valid—there would have been a change in the legal position of the then registered holders of the stock, and that the new transferee would become the legal owner of the stock, and to the new transferee the bank would henceforth have been under the obligation to pay the dividends. It unfortunately turned out that the power was invalid, and the result to the bank I have already stated. The consequence, therefore, of what took place was that the bank changed its legal position with reference to this stock, and very much to their injury, because judgment has been obtained against them. I cannot help thinking that this is a transaction which does fall within the rule. Then the only other point I think I need refer to is this: It was urged that regard

being had to the precautions which the Bank of England take in comparing the signatures to the power of attorney and other precautions with the object of ascertaining whether the powers which are presented to them really emanate from the principals to whom the stock belongs, the warranty ought not in this case to be held to be given. It seems to me that that contention is not well founded. It is not material to show that the Bank of England took precautions unless it is also shown that they rely on those precautions and those alone. It has often been held in actions for misrepresentation, to which, perhaps, for this purpose I may refer, that where a misrepresentation is proved and shown to have been relied upon that is enough, although the person who embarks in the transaction on the faith of the misrepresentation may have also other inducements to make him enter into the transaction. There is an instance of that in the case of *Edgington v. Fitzmaurice* (53 L. T. Rep. 369; 29 Ch. Div. 459). It seems to me that the evidence does not go far enough to enable Mr. Starkey to say that the bank did not act on the faith of his representation of authority, and I think the conclusion which was come to by Kekewich, J. was right.

COZENS-HARDY, L.J.—I so entirely agree with what has fallen from Williams and Stirling, L.J.J. that I think it would be only a waste of time if I were to add anything more.

Solicitors: Morley, Shirreff, and Co.; Freshfields.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 21 and 22.

(Before KEKEWICH, J.)

Re BRADSHAW; BRADSHAW v. BRADSHAW. (a)

Will—Power of appointment—Remoteness—Election—Covenant to exercise power in a particular way—Costs—Rules of Court 1883, Order LXV., r. 27—Rules of Court 1902, r. 10.

By his will, made in 1863, W. B. gave property upon trust for his son A. B., and his children or issue as A. B. should by will appoint, and, in default of appointment, for the children equally. A. B. in 1893, on his second marriage, covenanted with the trustees of his marriage settlement to exercise the power in the manner therein expressed.

By his will A. B., in exercise of the power, made an appointment in favour of his son A. E. B. for life, and at A. E. B.'s decease for his children then living, and a similar appointment in favour of his daughter G. for life, and for her children. The appointment subsequent to the life interest being void for remoteness:

Held, that the plaintiff A. E. B. and the daughter G. were bound to elect as between their life interest in the property of A. B. and the property which would devolve on them in default of appointment; the covenant to exercise the power of appointment in a particular way was void; and the costs of all parties would be allowed out of the estate, "as between solicitor

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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and client." In Kekewich, J.'s opinion those words were still necessary, notwithstanding rule 10 of the Rules of Court 1902.

THIS was an adjourned summons taken out by Arthur Evelyn Bradshaw, the sole executor and trustee of the will of his father, Arthur Bradshaw, to determine the question whether certain appointments made by Arthur Bradshaw under a power contained in the will of his father, William Bradshaw, were valid.

By his will, made the 22nd Jan. 1853, William Bradshaw devised certain property upon trust for his son, Arthur Bradshaw, for life, with remainder to such of his children or remoter issue born within the limits allowed by law, for such estate or estates, and, if more than one, in such proportions and with such limitations over for the benefit of the said children or other issue, or some or one of them, and with such restrictions, and in all respects in such manner as he should by his will or testamentary writing appoint, and, in default of such appointment, in trust for all and every the children and child of him (Arthur Bradshaw) who being a male or males should attain the age of twenty-one years, and who being a female or females should attain that age or marry, equally to be divided between such children, if more than one, as tenants in common, and if there should be but one such child, then the whole for that one.

The testator also devised and bequeathed on the same trusts one ninth share of his residuary real and personal estate and a certain legacy, and directed that, in the event of any of his other eight children dying without issue (which happened in the case of his son William), the share of such child should go over in favour of his other children, and be held upon the trusts declared concerning their original shares.

The will also contained provisions for the accumulation during minority of income not applied in maintenance, and a power of advancement in favour of grandchildren, and a declaration that no grandchild of the testator's who or whose issue should take any share or interest in any of testator's real and personal estate under any such appointment as thereinbefore mentioned should be entitled to any share or interest of or in the unappointed part thereof without the share or interest so appointed to him or her or his or her issue being or being considered to be brought into hotchpot and accounted for accordingly, unless such appointment should contain any express direction to the contrary. The will also empowered testator's children to appoint life interests in favour of any surviving wife or husband.

By a codicil made the 15th May 1855, the testator, after reciting that he had sold certain properties comprised in the schedule to his will, bequeathed the proceeds of sale upon the same trusts as the properties sold.

William Bradshaw died on the 12th July 1855.

Arthur Bradshaw, the surviving trustee of the will of William Bradshaw, by his will, made the 9th April 1896, appointed Arthur Evelyn Bradshaw his executor.

Arthur Bradshaw by his first wife had two children, the plaintiff Arthur Evelyn Bradshaw and the defendant Mrs. Margaret Beatrice Good, who both attained the age of twenty-one years

By his second wife, the defendant Mrs. Maud Alice Letitia Bradshaw, he had two children, the defendants Moey V. F. Bradshaw and William P. A. Bradshaw, both infants.

No settlement was made on the first marriage of Arthur Bradshaw, but prior to his second marriage he executed two documents dated the 7th and 8th Feb. 1893. By the first, which was a deed of covenant, of which the defendant W. G. Bradshaw was trustee, Arthur Bradshaw covenanted that, in addition to the provision he was about to make for his wife and issue of the second marriage, he would in exercise of his testamentary power by will appoint not less than one-third of the property settled upon him and his issue by William Bradshaw in trust for Arthur Evelyn Bradshaw and Margaret Beatrice Good, or one of them, or some or one of their issue. By the second deed, which was a marriage settlement, of which the defendants F. C. D. Smythe, D. F. Loftus, and W. G. Bradshaw were trustees, Arthur Bradshaw appointed to his widow after his decease an annuity of 600*l.* charged upon all the property settled on him and his issue by William Bradshaw, and covenanted that he would in exercise of the power by will appoint that a part or share of the several trust real and personal estates by the will of the testator William Bradshaw directed to be held in trust for Arthur Bradshaw and his children thereinbefore enumerated, and charged with the payment of the annuity of 600*l.*, not being of less value at the time of the decease of Arthur Bradshaw than 6000*l.*, should from his death be held by the trustees of the will upon trust for the child or children or issue of the intended marriage (such issue to be born within twenty-one years from the death of Arthur Bradshaw) in such shares and proportions as Arthur Bradshaw should appoint, but so nevertheless that if the defendant Mrs. Maud A. L. Bradshaw should be living at the death of Arthur Bradshaw, and in receipt of the annuity, all interest payable in respect of the investments of the part or share so appointed and set apart for the benefit of the children of the intended marriage should during the continuance of the annuity be received and taken in part payment of the annuity. Arthur Bradshaw also covenanted not to exercise his power so as to postpone the vesting of that part or share beyond his death, and he specially provided for the appropriation by the trustees of the will of real and personal estate sufficient to satisfy the annuity and the 6000*l.*, and declared that upon any such appropriation the settlement trustees should, if required by the trustees of the will, release the residue of William Bradshaw's estate from such annuity and principal sum.

By his will, made the 9th April 1896, Arthur Bradshaw confirmed the settlement made on his marriage with the defendant Maud A. L. Bradshaw, and directed the same to be carried out and given effect to, and, she being thereby and with her other property sufficiently provided for, he made no other provision for her in his will.

Testator then, in exercise of all powers of appointment in favour of his children and their issue vested in him by the will of William Bradshaw, appointed the whole of the property over which he had such power of appointment, and also devised and bequeathed all other his real and personal estate, as to a freehold house called the

Roebuck, unto M. B. Good for her life, and after her death for her children then living in equal shares, or if only one, then the whole to such one, with remainder over in default of children, and he appointed three-fifths of the rest of the settled property (and of the Roebuck in the event of Mrs. Good dying without children), and of all other his property in trust for the plaintiff Arthur Evelyn Bradshaw for life, with remainder to his children, and in default of children to the defendant Moey V. F. Bradshaw, for life, with remainder to her children in like manner as her two-fifths original share, and as to the remaining two-fifths thereof in trust for the defendant Moey V. F. Bradshaw for life, with remainder to her children, and in default of children to the plaintiff A. E. Bradshaw for life, with remainder to his children in like manner as his original three-fifths share, but with a provision that the defendant Moey V. F. Bradshaw should have 500*l.* out of capital in the event of her marriage. Testator also declared that in the event of any child of either the plaintiff or the defendant Moey V. F. Bradshaw dying during his or her parent's lifetime leaving a child or children surviving, and who should be living at the date of division, such child or children should take by substitution his, her, or their parent's original share.

The court held that the life interests appointed were good, but the appointments in remainder were bad, and that, subject to the life interests, the property passed to the persons entitled in default of appointment.

Two questions were then argued: (1) Whether a case of election arose; (2) as to the effect of the covenants in the deeds of the 7th and 8th Feb. 1893.

Warrington, K.C. and *B. J. Parker* for the plaintiff Arthur Evelyn Bradshaw.—The appointment infringes the rule against perpetuities, and no case of election arises:

Re Warren's Trusts, 50 L. T. Rep. 454; 26 Ch. Div. 208.

J. Gately for the four children of the plaintiff.—I submit that a case of election is raised:

Fitzsimons v. Fitzsimons, 28 Beav. 417;

Woolridge v. Woolridge, Johns, 63;

Woolaston v. King, 20 L. T. Rep. 1003; L. Rep. 8 Eq. 165;

Re Wheatley; Smith v. Spence, 51 L. T. Rep. 681; 27 Ch. Div. 606;

Re Brooksbank; Beauclerk v. James, 55 L. T. Rep. 593; 34 Ch. Div. 160;

Tomkyns v. Blane, 28 Beav. 422.

Hughes, K.C. and *Stewart-Smith* for Moey V. F. Bradshaw.—No case of election arises:

Re Handcock's Trusts, 23 L. Rep. Ir. 34;

Farwell on Powers, 2nd edit., p. 383.

[*KEKEWICH, J.*—*Cooper v. Cooper* (30 L. T. Rep. 409; L. Rep. 7 H. L. 53).]

H. C. Hull for the widow of Arthur Bradshaw and the trustees of the marriage settlement.

Benshaw, K.C. and *Vaughan Hawkins* for Mrs. M. B. Good.

P. O. Lawrence, K.C. and *George Cave* for W. P. A. Bradshaw, the infant son of Arthur Bradshaw by his second marriage.

KEKEWICH, J.—The question I have to determine is whether what has occurred here raises a right or responsibility of election. Although

perhaps it is somewhat elementary, it will be right to consider what that right or responsibility is. Some of the authorities which have been cited assist me in stating what the doctrine is. For instance, in the case of *Re Brooksbank* (*ubi sup.*) Kay, J. says, at p. 163 of 34 Ch. Div.: "It was decided long ago in *Whistler v. Webster* (2 Ves. 367) by the Master of the Rolls, Sir R. Pepper Arden, that when a person purports under a power of appointment to give property which is the subject of the power to persons who are not objects of the power—that is to say, in fact, to exercise a power which he has not got—that if to the person who would be defeated by that gift free disposable property belonging to the testator is given by the same instrument, that raises a case of election. I have always understood that when a person coming to claim under an instrument says, if it be a will, 'Pay me the legacy,' or 'Hand over to me the particular property given to me by that instrument,' the executors have the right to say, 'You must conform to all the provisions of the instrument.' And if the instrument disposes, or purports to dispose, of property which belongs by paramount title to the person claiming under it, a case of election arises, and he cannot take under it the benefit which it gives him unless he is prepared to fulfil the gift which it purports to make of his own property. In short, the rule may be stated in this form—that no one can take under and against the same instrument, but taking under it is bound to fulfil all its provisions." That is the learned judge's account of the doctrine of election, and although different definitions have often been given by other judges in different language, there is no substantial difference, and that of Kay, J. is useful for the present purpose. It is not unimportant to remember on what the doctrine is founded. It has been argued that if the doctrine is applied to this case, the court will in some way or another be managing to uphold a gift which the law declares to be void; and it is said, on the authority of some cases to which I will presently refer, that the court will not do that, and ought not to uphold such a mischievous doctrine as that by means of the application of the doctrine of election a testator may in the result enforce what he has no right to enforce. That view seems to me to be not altogether a correct one. So far as it is correct, it is, in my opinion, disposed of by the following statement of the law by Cairns, L.C. in moving the judgment of the House of Lords in *Cooper v. Cooper*, at p. 67 of 7 H. L.: "The rule, as was said during the argument at the Bar, does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will." I am not going to suppose that this testator wished to fulfil this gift which the law did not enable him to fulfil by applying the doctrine of election or otherwise. If the doctrine of election applies, it is because of those high principles of equity of which Lord Cairns speaks. Now, the testator Arthur Bradshaw had a power to appoint among children; he purported to exercise that power so as to give it to persons to whom the law will not

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allow him to give it because of the rule against perpetuities; and therefore that gift is void. The result is that the property goes to those who take under the original will of William Bradshaw in default of the exercise of the power of appointment. But to those very persons Arthur Bradshaw has by his will given property described by Pearson J. as "free disposable property" which is his own to give in any legal manner as he pleases. The result is that those persons who take in default of appointment are themselves beneficiaries under the will of Arthur Bradshaw. If the doctrine of election applies, it compels them to make good out of what they take the interests which they have defeated by insisting, as they do, that the appointment is void for remoteness. I do not myself see what is the difference between an appointment becoming void for that reason, and an appointment, such as is mentioned by Kay, J., to persons not the object of the power. Whether the appointment fails because it offends against some rule of law or because it offends against the rules of construction, which say that you may appoint to certain persons and no others, seems to me irrelevant. In either case it fails, and the property intended to be appointed goes to those who take in default of appointment. Other judges have, however, thought differently, and, in the absence of a direct expression of opinion by a judge or the Court of Appeal, I am by no means sure that I have got anything binding upon me. The point is noticed by James, V.C., and by him alone, in *Wollaston v. King*, which has been referred to. I need not say that even a dictum of his on a question of equity is entitled to the highest respect. But it is no more than a dictum. The question he had to decide, which is not the same as that in the present case, is very correctly stated in the third paragraph of the headnote at p. 165 of L. Rep. 8 Eq.: "The rule as to election is applicable only as between a gift under a will and a claim *dehors* the will and adverse to it, and not as between one clause in a will and another clause in the same will." But there was an appointment there which was void for remoteness, and it was held that the gift went over to the persons claiming in default of appointment. James, V.C. said, at p. 175 of L. Rep. 8 Eq.: "It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law"; and then he adds: "I apprehend it is not for this court to aid such an attempt, either by the application of the doctrine of election or otherwise." If this were a decision, I should be bound loyally to follow it. But it is not a decision; it is an observation made with reference to a point which was not before him, and I do not think I need regard it as a decision, nor unfortunately do I see my way to agreeing with him. The only other case in which the same point has arisen was that of *Re Warren's Trusts*, before Pearson, J., where, indeed, he had not this point directly before him in the general discussion of the case. At the end it was argued by Mr. Everitt that a case of election arose as to certain of the property, and he stated as counsel that there was no direct authority on the point except this dictum of James, V.C. Then Pearson, J. said, at p. 219 of 26 Ch. Div.: "How can there be any question of election? I must read the will as if the invalid appointment

were not in it at all. The ordinary case of election is when a testator attempts to give by his will property which belongs to someone else. Such a gift is not *ex facie* void. In the present case it is the law which disappoints the appointee." He says quite plainly that the question of election does not apply because he has not got that in the will which raises it, and he says he has not got that because, it being *ex facie* void, he is bound to read the will as if it was not there. With great respect, I cannot help thinking that there was a slip in his conclusion. You cannot say the gift is not in the will; it is in the will, and is void, and because it is void the possibility of raising the question of election occurs. And if I am right in saying that there is no substantial distinction between an appointment to a person not an object of the power and one to a person who the law says cannot take because of the rule against perpetuities, then I think that in each case equally the question of election arises. There was a case in the Irish Court of Appeal of *Re Handcock's Trusts* (sup.) which is a decision of a strong court, and entitled to great respect, distinctly following what was supposed to have been held by Pearson, J. in *Re Warren's Trusts* and by James, V.C. in *Wollaston v. King*. It is my duty not to bind myself by an authority which is not binding on me, if I do not agree with it. I do not agree with it because it seems to me to be founded on a misconception as to what the doctrine of the court is. I think that as in the case of an appointment to a person not an object of the power a case of election can be raised, so here in a case of an appointment void for remoteness a case of election can be raised, and, as the facts admit of it being raised, it is raised.

Warrington, K.C. for the plaintiff.—The second question is whether the covenants to exercise the testamentary power in a particular way are enforceable against the estate of William Bradshaw. I submit that the covenants are void and illegal:

Palmer v. Locke, 43 L. T. Rep. 454; 15 Ch. Div. 294;

Thacker v. Key, L. Rep. 8 Eq. 408.

[KEKEWICH, J.—*Bulleet v. Plummer* (23 L. T. Rep. 753; 6 Ch. App. 160).]

P. O. Lawrence, K.C. for W. P. A. Bradshaw, the infant son of Arthur Bradshaw by his second marriage.—I submit that the covenants are good. This case differs from *Re Parkin*; *Hill v. Schwarz* (67 L. T. Rep. 77; (1892) 3 Ch. 510). Here there was a family arrangement, and there was nothing illegal in it:

Davis v. Huguenin, 1 H. & M. 730;

Coffin v. Cooper, 2 Dr. & Sm. 365.

KEKEWICH, J.—A general power of appointment is distinguishable from property, but in its practical results, in what I may venture to call its market value it is really equivalent to property. A donee may use it as he pleases. He may not only release it, but he may sell it if he pleases—that is to say, sell in his discretion, bind himself to use it in any way he thinks fit—and that is equally true whether the appointment of the power is by deed or will, or by deed, or by will only. In the one case, of course, there is no practical risk, because a man cannot give operation to a will until he is dead; but there is no difficulty in dealing with those cases, and we

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frequently in the course of business have to deal with a case where a man has a general power of appointment and uses it in one way or another, either by covenant or otherwise, so as to treat it as property—that is to say, to treat the subject of the power as something over which he has complete control. When you pass to a special power of appointment, you touch a different subject-matter altogether. What is the object of a special power of appointment? One may confine oneself with convenience to such a case as we have here, a power of appointment among children, though of course there are other special powers of appointment. A power of appointment among children, usually given to the parents and frequently to the father, is intended to enable him not to make a provision for his children if in the ordinary case the children take the property in default of appointment between them, but to determine in what shares and proportions they shall take, whether if married women they shall have it to their separate use without power of anticipation; whether if men it shall be left to them with a defeasible life estate so as to avoid the consequences of bankruptcy and so forth. It is a discretion vested, and intended to be vested, in the parent for the express purpose of his doing his duty as a parent—not providing so much for his children, as to determine what the particular provision for the children shall be. It seems to me so nearly akin to a trust, that it might, I think, fairly be described as a trust; at any rate it is strictly a fiduciary power. Now, is it right that a man having that fiduciary power should bind himself to deal with it in any particular way? If it were a power to appoint by deed, or by deed or will, the argument may be a little more difficult; but where it is a power to appoint by will it seems to me reasonably clear that the intention of the settlement, whether that settlement is created by deed or testamentary instrument, must be that the donee of the power shall keep the ordinary exercise of it under his control until the moment of his death. He may make a will at any time; the will being revocable, he may from time to time alter it, and of course we know well that the exercise of powers is continually altered with reference to the different events of family life. That seems to me to be the object of it, and it seems to me that to say that a parent having that fiduciary power exercisable by will only can, in anticipation of his will, bind himself under any circumstances to say that it shall be exercised in a particular way is to defeat the object of the creation of the power, and to put him in a position to do that which the settlement, I think, must be understood to say he shall not do. There is no real authority on the point, and therefore I have stated what I conceive to be the principle; but there is a certain amount of guide. The first case really bearing on it is *Bulleet v. Plummer* (sup.), where there had been a covenant to exercise a special power, or, as it is sometimes, and from my point of view very aptly, called a power of distribution; and it was held that, notwithstanding that, the power was well exercised. The court did not look into the covenant, which bound the donee morally to say that therefore the exercise of the power consequent on that obligation was bad. Lord Hatherley, L.C., at p. 163 of L. Rep. 6 Ch.

App., said: "I think that to hold such an appointment bad as a device would be to strain the doctrine as to improper instruments too far." He prefaced that with this observation: "A question further arises whether this was a good covenant on which damages could be recovered, as to which I desire to say nothing." All we have there is that the point occurred to a learned judge of very great eminence and experience, and that he thought it was a point which he need not dispose of, and therefore it was unnecessary to say anything on it. It is not an authority; it only shows that the point was not treated by him as absurd. James, L.J. was a party to that judgment, and I do not see that he made any remark on that point, but it had come before him in *Thacker v. Key* (sup.), and there he expressed a distinct opinion on the point. There is no question about what his opinion was; but it was not necessary for decision, and the result was that the learned judge took care not to decide it, but only to express his opinion, as judges are apt to do, with a certain amount of reservation, because he had not heard the full arguments on the point. He says, at p. 414 of L. Rep. 8 Eq.: "Now, if it had been necessary to determine that point, I think I should have had very little difficulty in holding such a covenant to be illegal and void." And then he goes on to say: "The testator is the donee of a testamentary power which was to be exercised by him as a trustee. It was a fiduciary power in him to be exercised by his will, and by his will only. So that up to the last moment of his life he was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merits, and necessities of his children." There is only one other authority or anything which can be called an authority, and which is more like an authority, and that is *Palmer v. Locke* (sup.). That was a case in the Court of Appeal, and there Brett, L.J. made an even more distinct statement of his opinion, though he added that it was unnecessary to decide the point judicially. He says, at p. 302 of 15 Ch. Div.: "It seems to me that although there is no consideration given for the covenant it is not a binding covenant because it would be contrary to public policy to allow a person in the position of a trustee to enter into such a covenant so as to bind himself." That is in support of the view that he had, which he had stated just above, that such a covenant "is a wholly void covenant, and that no remedy could be had upon that covenant against the covenantor." Cotton, L.J. did not concur in that, but he did not differ. He only said that he reserved his opinion because there were difficulties which made him not satisfied that the opinion was good. It is to be remarked that James, L.J. was a party to that decision, and that he says nothing on this point. It is not likely that he had forgotten his own view, but probably the explanation is that the point did not directly arise. James, L.J. gave the first judgment, and what was said upon this point came into the judgment of Brett, L.J. and was remarked upon by Cotton, L.J., but was not commented on by James, L.J. At any rate I have a considerable amount of opinion, or inclination of opinion, in favour of the view which I take myself. It seems to me a safe and right thing to hold that such a covenant as this is, for the reasons which I have

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expressed, bad and cannot be sued upon. Then counsel for the infant son of the marriage makes two remarks which must be noticed. In the first place, he says this is a family arrangement. The court has gone a long way in many cases in upholding family arrangements, and the doctrine goes back to such remote times that I suppose it would be difficult to find when first it was introduced into argument in the Court of Chancery. It is one to which great weight must be given, but the industry of counsel has not found a case in which it has been applied to such a question as this—the bare question whether a covenant of this kind can be sued upon—that if it can be sued upon it is a mere question of damages. Then he called my attention to *Coffin v. Cooper* (sup.), and to the case there referred to of *Davies v. Huguenin* (sup.). It is quite true that it is possible to apply the doctrine of a fiduciary character to a power of this kind; it has been held, and usefully held, that a power of this kind can be released. A man can say in a proper solemn manner, “I will not execute the power at all,” with the result that he does there and then confer upon every one of his children, assuming the limitations to be in the usual form, an equal proportion of the settled estate. It is argued that he does in effect covenant that the power shall be exercised in a particular way. I think that the answer is that a release of power depends upon a foundation of its own. There was a time when there was a question how far a power of this kind could be released. The question has not been raised for a long time, and is incapable of being raised at the present time. It depends upon arguments of its own it is found convenient; but I do not think one ought to carry it further than saying that, because a man can release his power, therefore he can covenant to execute it in a particular way. The point is one of very great importance. I know from my own experience in chambers, where one is continually administering estates, that the point one way or another frequently arises, and one very often gets over the difficulty by a release of the power; but the point how far provision can be made for a particular child in anticipation of the exercise of a power given by will is one stumbling-block in the administration of estates. I apprehend, as has been pointed out, something would have to be brought into hotchpot, and the whole fund would not be covered; yet the amount here is considerable if there are any damages at all.

Warrington, K.C.—The costs of all parties as between solicitor and client will be paid proportionately out of the several estates of William Bradshaw and Arthur Bradshaw?

KEKEWICH, J.—Yes. There is one point that occurs to me. In these cases I have been in the habit for a long time, where I think a fair question has been raised either by the trustees or the parties so that it may be regarded as an application by the trustees, to direct the costs of all parties to be paid as between solicitor and client. But in cases of ordinary litigation we know that the court always directs the taxation to be as between party and party. In the Rules of Court 1902, r. 10, we find this: “Regulation 29 of Order LXV., r. 27, is hereby annulled, and the following regulation is substituted therefor: On every taxation the taxing master shall allow all such costs,

charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses.” The object of the rule was in ordinary taxation to provide that the successful party should have his full costs, but not luxuries—that is to say, the costs which he was liable to pay his solicitor in the ordinary way; so that he should not go away having a verdict for 100l., and then have to pay a large sum to his own solicitor. When a case came before me in chambers recently of this character, I proposed to direct the costs of the parties to be taxed as between solicitor and client and paid out of the estate, and it was suggested by counsel that that was now an unnecessary direction in consequence of the new order. I said no. It seems to me that this does not do away with the necessity of directing on a summons of this kind that the costs should be taxed and paid out of the fund as between solicitor and client. This order I do not think was intended in any way to prevent the necessity of doing that. I doubt very much whether if the costs were simply ordered to be paid out of the estate, the taxing master would under this order allow a party all the costs which he would allow as between solicitor and client. I must leave that question open until it is argued. At any rate, I think it convenient, where a judge orders the costs to be paid, still to direct that the costs shall be taxed as between solicitor and client, and I make that order in this case.

Solicitors: *Kingsford, Dorman, and Co.; Smyth and Brettell.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, Dec. 16, 1901.

(Before BARNES, J.)

In the Goods of ALFRED READE. (a)

Probate—Will—Codicil—Earlier will—Reference to destroyed will—Probate omitting reference.

A testator executed a will and two codicils thereto. Upon the execution of a later will the first three documents were destroyed. Subsequently one codicil was executed which was expressly declared to be a codicil of the second will, and afterwards another codicil which referred to the earlier destroyed will and codicils. Upon motion by the executors probate was granted of the second will and the two codicils subsequently executed, omitting from the latter of the two codicils the words referring to the former destroyed will and codicils.

THIS was a motion by the executors of the testator for probate of a will and two codicils, but omitting from the latter codicils the words of reference to a former destroyed will.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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TWIST AND OTHERS v. TYE.

[PROB.]

The testator, Alfred Reade, late of Salt Hill, Slough, in the county of Buckingham, died on the 15th Oct. 1901.

He executed a will in duplicate on the 10th Jan. 1895, which was prepared by Messrs. Farrer and Co., his solicitors, and in the same year—viz., on the 25th June and the 30th Dec.—he executed two codicils thereto. The former codicil was prepared by Mr. R. H. Barrett, solicitor, of Slough, and the latter by Messrs. Farrer and Co., this one being also in duplicate.

The deceased kept the codicil prepared by Mr. Barrett in his own possession for some months, and then handed it to Messrs. Farrer for safe custody, but he retained one part of the will and the second codicil himself.

On the 2nd March 1898 the testator executed another will, prepared by Messrs. Farrer, which revoked all wills, codicils, and testamentary dispositions theretofore made by him, and on the 22nd Jan. 1899 executed a codicil to the same.

Afterwards, on the 20th July 1900, another codicil, prepared by Mr. Barrett, was executed, which purported to be "a codicil to my will dated the 10th day of January 1895," and at the end of which were the words "in all other respects I confirm my said will as altered by the codicils thereto."

On the death of the testator the will of the 2nd March 1898, and the two codicils, dated the 22nd Jan. 1899 and the 20th July 1900, were found in his dispatch-box.

It appeared that when Messrs. Farrer sent the engrossment of the will of the 2nd March 1898 to the testator, they also wrote a letter to him strongly advising that the former will and the codicil which he had in his possession should be destroyed, and one of their clerks, who attended with the engrossment and took the letter, believed that the documents were destroyed immediately after the execution of the will. Thereupon Messrs. Farrer destroyed the duplicates which they held as well as the original codicil prepared by Mr. Barrett. The latter gentleman, when he prepared the codicil of the 20th July 1900, was not aware that the will of 1895 and the two codicils thereto had been revoked by the will of 1898, nor did it appear that he knew that this second will had been executed.

The court was now moved to grant probate of the will of 1898, and of the two codicils of 1899 and 1900, omitting from the latter the words "dated the 10th day of January 1895." One member of the family was incapable of giving his consent, but it was stated that his share of the residue would only be very slightly reduced if the application was granted.

Priestley for the motion.—A testator cannot confirm a destroyed will. The authority for that proposition is the case of *In the Goods of Steele* (L. Rep. 1 P. & M. 575), in the judgment of which the earlier decision of *Rogers v. Goodenough* (5 L. T. Rep. 719; 2 Sw. & Tr. 340) is cited. The case of *In the Goods of Chilcott* (77 L. T. Rep. 372; (1897) P. 223) is distinguishable, because there the earlier will was actually in existence. He also cited

In the Goods of Stedham, 45 L. T. Rep. 192; 6 P. Div. 205;

In the Goods of Isabella Gordon, 67 L. T. Rep. 328; (1892) P. 228.

BARNES, J.—It is quite clear that the last codicil does not show any intention on the part of the testator to revoke the later of the two wills. I do not see any objection to leaving out the words of reference to the earlier will. It will then run, "codicil to my will." Subject to this, I grant probate of the will of 1898 with the two codicils of 1899 and 1900. That seems to me to be in accordance with the case of *Rogers v. Goodenough*.

Solicitors: Farrer and Co.

Thursday, Dec. 19, 1901.

(Before BARNES, J.)

TWIST AND OTHERS v. TYE. (a)

Probate—Testatrix not of sound disposing mind—Will pronounced against—Executors and residuary legatees—Costs—Practice.

Where executors, who are also residuary legatees, propound the will of a testatrix who is afterwards found by a jury not to have been of sound testamentary capacity at the date of the execution of the will, and the executors themselves have had every opportunity of forming an opinion as to her testamentary capacity and have been fully conversant with her affairs, the court will not interfere with the general rule that costs should follow the event, and the executors will be ordered to pay the costs of the defendant. They will not, however, be called upon to pay the costs of any of the parties cited, if the interests of such parties are practically identical with those of the defendant.

THE plaintiffs, who were executors and trustees and residuary legatees, propounded alternatively two wills.

After a trial lasting several days, before Barnes, J. and a special jury, a verdict and judgment were given against the wills on the grounds that the testatrix was not of sound mind, memory, and understanding at the date of the wills, and that she did not know and approve of the contents of the same.

Applications were then made to the court as to the costs.

Inderwick, K.C., Sir Edward Clarke, K.C., and Barnard for the plaintiffs.—They applied for costs to be paid out of the estate. In any case the plaintiffs ought not to be condemned in the costs. They had only done their duty in taking the opinion of the court and jury upon the wills. They cited

Boughton v. Knight, 28 L. T. Rep. 562; L. Rep. 3 P. & M. 64.

Hammond Chambers, K.C. and Grazebrook for the defendant.—The case cited for the plaintiffs was distinguishable from the present. That of *Brown v. Fisher* (63 L. T. Rep. 465) was in point. Executors who are largely interested as legatees were in no better position as to costs than other litigants.

Kemp, K.C. and J. B. Matthews for the heir-at-law.—They referred to the Land Transfer Act 1897, and cited

Rayson v. Parton, 21 L. T. Rep. 647; L. Rep. 2 P. & M. 88.

They asked for costs.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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TWIST AND OTHERS v. TYE.

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Pritchard and Willock, for various parties cited, also applied for costs.

BARNES, J.—This was a case which was tried before myself and a special jury, in which the plaintiffs, as executors and trustees under the last will of the deceased, propounded a will which had been executed first as a document the 24th March 1896, and secondly as a document dated the 14th April 1896. At the time when these documents were executed the testatrix was an old woman of about ninety years of age. There was really no dispute as to the documents themselves, and the questions to be decided were whether the documents were properly executed, whether the testatrix was of sound mind when they were executed, and whether she knew and approved of their contents. As a result of the trial, the jury found that there had been due execution; but that the deceased was not of sound mind, memory, and understanding, and that she did not know and approve of the contents. By these two documents, which I shall treat for the present purpose as though they were one, the residue of the property of the deceased was left to the three plaintiffs, Mr. Colmore, Mr. Bellamy, and Mr. Twist, and the question to be decided now is what order ought to be made as to the costs. The plaintiffs, who have failed in the action, contend that the costs ought to be paid out of the estate, and that in any case no order should be made against them personally for costs. On the other hand, the defendant contends that the law should take its ordinary course and that the costs should follow the event. It is the general rule, of course, that costs in a case of this character should follow the event, unless adequate reason is shown to the contrary. In this division there are, generally speaking, two classes of cases in which the ordinary rule is departed from. The first is where the litigation has been brought about through the conduct of the deceased, and the second where the parties who have failed have acted reasonably and have been led into litigation by a *bona fide* belief in their case, considering it desirable that an inquiry should be made into the testamentary dispositions of the testator or testatrix. In arriving, therefore, at a decision as to the costs, the court must examine the facts of each case and view them as they have presented themselves to the parties who have failed in the litigation. In the present case it appears that Mr. Colmore had been acting for sometime as solicitor for the testatrix, that Mr. Bellamy had been a trustee since 1890 under a settlement in which she was interested, and that Mr. Twist had acted in a similar capacity since 1892. Each of them was fully aware of her circumstances and her condition. Mr. Colmore knew of the residuary clause in the will. Mr. Bellamy said that he knew nothing of it. It is not certain whether Mr. Twist did or did not know of it; but I do not consider that material. On the 5th March 1896 the daughter of the deceased died, and there can be no doubt that the mind of the deceased was greatly affected by this event. Shortly afterwards Mr. Bellamy, at the request of the testatrix, made out a list of her relatives, and gave it to Mr. Colmore. On the 20th March Mr. Colmore took instructions from the testatrix for the purpose of making the will in question, but as he knew he was to benefit under the will he considered it desirable to hand over the instructions and particulars to

his partner, Mr. Monckton, and it was left to this latter gentleman to draw the will. At the time Mr. Bellamy and Mr. Twist were at the office of Mr. Colmore on business connected with the affairs of the deceased's daughter, who had left a will giving all her property to her mother; but the evidence given was to the effect that they did not remain in the room whilst the instructions were being given. On the 24th March the testatrix again visited the office of Mr. Colmore and the document of that date was executed. Before it was executed Mr. Monckton called in Mr. Colmore to try and persuade the testatrix that the will as drawn was in accordance with the instructions which she had given in the first instance, because she was maintaining that some specific legacies had been introduced into it which were contrary to her instructions, and there was also some confusion in her mind as to the bequest to Lucy and Lily Iliffe, since these were not really the names of the persons who were in the relationship which she must have had in her mind with regard to the legatees, if she was dealing properly with the matter. The document of the 24th March was therefore somewhat altered, and afterwards, on the 14th April, the will was executed in the form in which it now appears. That is a brief history of the manner in which the will came to be executed. Up to the time of her death, in March 1896, the daughter of the deceased had looked after her mother; but after her daughter's death the affairs of the old lady were entirely in the hands of the three residuary legatees, who consulted each other about the management of different matters, and generally arranged for her comfort. For instance, Mr. Bellamy used to fill up her cheques, though the deceased herself used to sign them. The three plaintiffs were fully aware of the state of her affairs, and they must have been aware, at any rate before the period of this litigation, of the existence of certain documents which were put in evidence in the course of the trial, and which had a material bearing upon the condition of the old lady at the time when the wills propounded were executed. These documents are dated the 17th March 1896, the 24th July 1896, and the 3rd Aug. 1896 respectively. There was also evidence that the testatrix was in the habit of writing out documents, in addition to these three, in the nature of wills, and some of these were destroyed by the instructions of Mr. Bellamy as being worthless. But naturally these particular facts were relied upon by counsel for the defendant as showing that the old lady was in such a state of mind that she indulged in will-making of an incoherent and unreasonable character. These facts were not really in dispute at the trial, and they must have been known to the plaintiffs at the time when they had to make up their minds as to litigation. It is not suggested that the plaintiffs were guilty of any impropriety of conduct in what they did, or in the action which they took with regard to the matter. But it is contended against them, on the question of costs, that they were in a position to know and should have known the true position of affairs which has been brought to light in the course of this inquiry, and that, when they had that knowledge, they took the risk of being defeated in propounding this will in view of all the circumstances of the case, and especially the

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In the Goods of THOMAS GARY COWARDIN.

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advanced age of the testatrix when she entered into the transaction. In other words, they backed their own opinion about her and were found, after a full investigation of the matter, to have been mistaken, because the jury came to a decision, after a very few minutes' deliberation, that the documents of March and April 1896 could not stand. Certain authorities have been furnished to me by counsel on both sides. I do not think they have much bearing upon the question, because the rules which I have mentioned are quite familiar to this court, and one must guide oneself by the general application of the principles laid down. The principal case in support of the application of the plaintiffs is *Boughton v. Knight*, in which the court, under the circumstances of the case, ordered that the costs of both sides should come out of the estate. That case was of a peculiar nature, and I think that the summary of the reasons which led the court to make the order it did may be found in the concluding sentence of Sir James Hannen's judgment: "Thinking that Sir Charles was honestly led into this litigation by the fact that the testator seemed to all outward appearance to be capable of managing his affairs, and, in the absence of evidence to the contrary, was justified in bringing the case before the court, I order costs on both sides out of the estate." A perusal of that case, and especially of the reason summarised at the close of the judgment, shows how clearly that is to be differentiated from the present case. It is obvious, from the short recital of the facts which I have given here, that the present plaintiffs cannot be said, in the words that I have read, to have been honestly led into this litigation by the fact that the testatrix seemed to all outward appearance to be capable of managing her affairs, the facts here being quite the contrary. She was a very old woman; she was not managing her own affairs; they were managed for her and by the three plaintiffs. The general circumstances appear to me to point to the conclusion that this is not a case in which it can be said that the testatrix herself was the cause of the litigation, because the plaintiffs themselves were as much parties to the making of the documents as the testatrix. I am speaking of the act of one as the act of the three. They were present and quite able to judge of the state of things, and they were as much concerned in the making of the wills which they set up as she was. I do not say that they acted improperly. They took a view as to the old lady, and in this view the jury have found that they were mistaken. Under the circumstances, the costs of this litigation ought not to be paid out of the estate. The remaining point for consideration is whether the costs ought not to follow the event. When all the facts of the case are considered, and especially the full knowledge of all the affairs of the testatrix which the plaintiffs must have had, it cannot be contended that these three gentlemen were led into the belief that this old lady was capable of managing her own affairs and of making these wills. The truth is, as I have said before, that they took a certain view and acted upon it; and when it came to a fight between themselves on the one side and the persons interested under an intestacy on the other, they stood to win one way and to lose the other. I do not, therefore, see any reason to warrant a departure from the

ordinary rule. Costs must follow the event. Some of the parties, other than the defendant, have applied for a separate order for their costs. I am of opinion that I cannot reasonably accede to their applications. The reason given for the decision in *Rayson v. Parton*, which has been cited on behalf of the heir-at-law, is not applicable to the present case. A considerable change was made in the position of the heir-at-law by the Land Transfer Act 1897. His position is practically that of the next of kin; and practically the heir-at-law and all the other persons who benefit under an intestacy were fighting in the same interest as, and, so far as they took any steps at all, in support of the defendant. I do not see any reason why they should not have joined in supporting the defendant, and so fought the case as a whole. In my view of the matter I consider that it would be quite unreasonable to saddle the plaintiffs with any costs except those of the defendant, and therefore these applications must be refused.

Solicitors for the plaintiffs, *Kennedy, Hughes, and Ponsonby*, for *Colmore and Monckton*, Birmingham.

Solicitors for the defendant, *Tippetts*, for *E. Eaden*, Birmingham.

Solicitors for the heir-at-law, *Nicholson and Crouch*, for *Cresswell and Russon*, Bromsgrove.

Solicitors for parties cited, *Timbrell and Deighton*, for *C. U. Jagger*, Birmingham.

Friday, Dec. 20, 1901.

(Before BARNES, J.)

In the Goods of THOMAS GARY COWARDIN. (a)
Probate—Administration—Bond—Signature of one surety—Substitution of name of second surety—Cancellation.

One surety to an administration bond executed the same on being assured that the other person named in it as co-surety would execute it. The latter refused to do so. The name of another surety was inserted in the bond, and this person executed it. The first surety did not assent to the alteration.

Held, that the bond was void and must be cancelled.

THIS was a motion on behalf of Maximilian Aron, seeking to be released and discharged from co-suretyship to an administration bond granted to Mary Rose Cowardin, the widow of the deceased, on the 5th July 1901, and asking that the bond should be cancelled.

It appeared that when Mrs. Cowardin was about to take out letters of administration to the estate of her late husband she applied to Mr. Aron to become a surety to the administration bond, and she assured him that the other surety would be a gentleman of the name of Keys. Mr. Aron knew that Mr. Keys was a person of considerable means, and upon this representation of Mrs. Cowardin he executed the bond. Subsequently Mr. Keys declined to execute the bond, and the name of a gentleman called Harper was substituted. Mr. Harper then executed the bond. It was admitted that the alteration took place after Mr. Aron had signed, though there was

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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some conflict as to whether anything was known by him of the fact of the alteration.

Barnard in support of the motion.—It was immaterial whether Mr. Aron did or did not consent to the alteration. A deed cannot be altered except by another deed. There cannot be a parol variation. Mr. Aron was never bound by the bond, and it ought to be cancelled.

Bargrave Deane, K.C. and *Attenborough* for the administratrix.—Mr. Aron had acted under the bond as a surety, and he ought not now to be heard to say that it was invalid. The bond was not bad, and Mr. Aron was bound by it.

Barnard in reply.—In *Ward v. National Bank of New Zealand* (49 L. T. Rep. 315; 8 App. Cas. 755) the headnote is as follows: "Where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must show an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release." Also in the course of the judgment Sir Robert P. Collier says, after reviewing a number of cases: "On the same principle it has been held that when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each."

BAERNES, J.—This bond was executed by Mr. Aron on the 12th June 1901, and there is no doubt that it had been contemplated that Mr. Keys should be a co-bondsman with Mr. Aron. But as the bond now stands the name of Mr. Harper has been substituted for that of Mr. Keys, and the change was made after the 12th June. So far as I can understand, the bond was never brought back to Mr. Aron, and it was never re-executed by him. It is now suggested that the bond is void as far as Mr. Aron is concerned, although counsel for the administratrix assert that he gave his assent to the alteration. At first I was inclined to think that the point raised was merely a technical one, but after carefully reading through the affidavits, it does not appear that the application is so unreasonable as it seemed at first sight. It is true that an effort was made by the parties to arrive at some arrangement, and negotiations were carried on for some days. But I have come to the conclusion, from the correspondence which has passed, that no definite arrangement ever was made. The question, therefore, resolves itself into this: Is Mr. Aron still liable on the bond after what has taken place? In *Underhill v. Horwood* (10 Ves. 209) the Lord Chancellor says, at p. 225: "Where a man executes a bond, meaning that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. But the cases go further. In such a case, however, unless there is something special, the man who had become so severally bound has a right to have that bond delivered up; for his intention was, not to become a mere several obligee, but to be a joint and several obligee; and the rights are different both in law and equity, for if he is only a several obligee, he has no remedies over against anyone, but if he is a joint and several obligee, or only a joint obligee, there is right of contribu-

tion against the other sureties in equity from the earliest times, and of exoneration from the principal." Therefore it is clear how important it is to a surety to have as his co-bondsman a man of whom he has approved in the first instance, in case there should arise the necessity of either party taking proceedings against the other. I am of opinion that Mr. Aron did not consent to the alteration in this bond, and I think, therefore, that the application must succeed. The grant of letters of administration will be recalled, and the bond will be cancelled so far as Mr. Aron is concerned. The administratrix must pay the costs of the application.

Solicitors for Mr. Aron, *Lumley and Lumley*.

Solicitor for the administratrix, *Attenborough*.

DIVORCE BUSINESS.

Friday, Dec. 20, 1901.

(Before *BAERNES, J.*)

HARRIES v. HARRIES AND GREGORY. (a)

Divorce—Decree nisi—Intervention of co-respondent—Decree absolute—Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144) s. 7.

A co-respondent entered an appearance in a divorce suit, but did not defend the action. A decree nisi was obtained by the petitioner. It was held by the Court that the co-respondent could not afterwards intervene to show cause why the decree should not be made absolute.

THIS was a motion to make absolute a decree nisi which had been pronounced on the 20th Dec. 1900.

The co-respondent appealed on the ground of fraud and conspiracy. On the 17th Dec. 1901 the Court of Appeal dismissed the appeal with costs, without calling upon counsel for the petitioner, and on the 18th Dec. leave was given by the Divorce Court for the decree absolute to be expedited, as nearly twelve months had elapsed since the making of the decree nisi, subject to proper notice being given to the King's Proctor.

Newson for the petitioner.—It was too late for the co-respondent to intervene. He had entered an appearance, but had not defended the suit. He had since appealed and lost.

Willey-Wright for the co-respondent.—He asked for leave to intervene to show cause why the decree should not be made absolute, on the grounds (1) that the decree nisi was obtained contrary to the justice of the case by withholding material facts from the Court, (2) that the petitioner had been guilty of unreasonable delay in presenting his petition, and (3) that the Court had been misled and deceived at the hearing of the case by the false evidence of the petitioner. The co-respondent had entered an appearance at the Registry, and the Court could not, therefore, make the decree absolute. By rule 70, anyone could intervene for that purpose.

BAERNES, J.—A respondent cannot intervene to prevent a decree nisi being made absolute. The authorities are clear upon the point. In the case of *Stoate v. Stoate* (5 L. T. Rep. 138; 2 Sw. & Tr. 384) it was held that "a respondent against whom a decree nisi for dissolution of marriage has been pronounced cannot show cause against

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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the decree being made absolute under sect. 7 of 23 & 24 Vict., c. 144." And a co-respondent is in no better position than a respondent. It seems to me a novel idea that a co-respondent should seek to intervene as a member of the public. Although an appearance has been entered by the co-respondent, I can disregard it or order it to be struck out. The decree *nisi* must be made absolute, with costs.

Solicitors for the petitioner, *Seattle and Morrison*.

Solicitor for the co-respondent, *Appleyard*.

ADMIRALTY BUSINESS.

Aug. 7 and 8, 1901.

(Before BARNES, J. and TRINITY MASTERS.)

THE MINNEAPOLIS. (a)

Salvage—Apportionment—Special awards—Non-navigating portion of crew—Horsemen.

*A large steamer carrying passengers, cargo, horses, and cattle, fell in during bad weather with a dismasted barque in the Atlantic, and, after taking off her crew and cutting away the wreckage of her masts, towed her to the Azores. The owners of the barque in settlement of the salvage claim paid 8250*l.* to the owners of the steamer.*

In an action for apportionment:

*Held, that the owners were entitled to 6175*l.* and the master to 500*l.*; that as special awards and according to their rating those of the crew who had taken off the crew of the barque should receive 150*l.*, those who had cut away the wreckage 300*l.*, the boat's crew employed during that service 25*l.*, and the boat's crew engaged in passing ropes 75*l.*; and that of the remaining sum of 1025*l.* to be divided rateably amongst the whole crew; the non-navigating portion, consisting of the surgeon, purser, cooks, stewards, and stewardesses, should share as if rated at one-third of their actual rating, and the horsemen and foreman, who were in the employment of the owners and liable to be called upon to perform duties, at one-third of the rating of an A.B.*

The Coriolanus (62 L. T. Rep. 844; 15 P. Div. 103) distinguished.

THIS was an action for apportionment of salvage brought by certain members of the crew of the steamship *Minneapolis*. The defendants were the owners of the vessel.

The facts are stated in the judgment.

Laing, K.C. and *Nelson* for the plaintiffs.

Aspinall, K.C. and *A. Pritchard* for the defendants.

The arguments of counsel were directed to the special claims of the boats' crews which took off the crew of the *Comet*, cut away the wreckage, passed the ropes and made connection, and to the share, if any, of the salvage reward to which the non-navigating portion of the crew and the horsemen and horse foreman were entitled. The following cases were referred to:

The Coriolanus, 62 L. T. Rep. 844; 15 P. Div. 103;
The Sprae, 69 L. T. Rep. 628; (1893) P. 147.

Aug. 8.—BARNES, J.—This is a suit by some of the crew of the steamship *Minneapolis* against the owners of that vessel, and practically, by reason of

the statement of counsel for the plaintiffs that they appeared for the master and all the crew besides those who are on the record as plaintiffs, it is a suit between all those who are interested in the salvage action, which has been settled, to obtain an apportionment of the reward. It appears that on the 21st March 1901 the *Minneapolis* was homeward bound from New York to London with a general cargo and passengers, and in latitude 44 degrees 49 minutes N. and longitude 35 degrees 47 minutes W., she fell in with the *Comet*, a four-masted barque, bound in ballast from Greenock to Philadelphia to load a cargo of oil for Japan. The *Minneapolis* is a vessel of 13,401 tons gross register, belonging to the Atlantic Transport Line, and she had a crew of 148 persons. There were some sixty-two passengers and a number of horses and cattle. It is not necessary to go in great detail into the services that were rendered. Substantially they appear to be these: First of all a lifeboat, with an officer and crew, was sent to take off the crew of the *Comet*—I presume that at that time it was not certain whether the vessel could be saved or not—and they, in the course of three trips, succeeded in bringing the whole of the crew of the *Comet*, and the master and his wife, on board the *Minneapolis*. Then, later on, the *Minneapolis* sent a boat, with the second officer in charge and others of the crew, for the purpose of cutting away the wreckage of the masts, or some of the masts—I think the foremast and mizzenmast—of the *Comet*, with a view, if possible, of taking the barque in tow, if the risk of her being lost by the puncturing of the hull by the masts was done away with. Some of those men seem to have gone on board, and at very considerable risk succeeded in cutting away the wreckage. That all, I think, took place on the 22nd March. On the 23rd March, the weather having somewhat moderated, the *Minneapolis* was able to take the *Comet* in tow, and on the following day the *Comet* was safely brought to Ponta Delgada in the Azores. Now, the result of the litigation and settlement between the salvors and the owners of the *Comet* is that a sum of 40,000*l.* was agreed to be paid by the owners of the *Comet* to the salvors as a whole, and that, I am told, represents 8250*l.* in English money. The question before the court is, How is that sum to be apportioned between the owners, master, and crew of the *Minneapolis*? It is quite obvious at the outset that a very large portion must go to the owners of the *Minneapolis*. In the first place, this is a very large vessel, belonging to the line I have referred to, and her value, with cargo, is stated to be 300,000*l.* at least, and there is some freight amounting to 8000*l.* odd. The owners were put to expense which, in round figures, is stated to be somewhere about 2000*l.*, partly from the consumption of coal, stores, and for extra victualling, and partly the various expenses which were consequent upon the disorganisation of their service through their vessel being late in her arrival and otherwise, details of which were furnished. The real instrument of salvage was this large, powerful steamer, because it was by means of her being treated as a tug on the occasion that this vessel was rapidly taken into the Azores. The apportionment which I propose to make is as follows: To the owners, I think, the sum of 6175*l.*, having regard to their interests and so forth, should be awarded. Next comes the consideration of the master's claim

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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The master had a very serious responsibility in determining to deal with such a salvage as this. He was in charge of a very large steamer, with a numerous crew and a number of passengers, and also live stock on board, and it is easy to see that his responsibility is great in determining what to do on such an occasion. I think, having regard to those considerations, that he should receive the sum of 500*l*. Now I come to deal with some matters which are of importance. They are matters which arise in this way. It is obvious from what I have said that a number of those who are the deck and engine-room and stoke-hole part of the crew did a great deal of extra work in connection with the actual salvage services, because they did not remain simply on board their own steamer, but did outside work, some of it of a substantial and important character. In the first place, there was the transfer of the crew and master and the master's wife from the *Comet* to the *Minneapolis*, which was a most desirable thing to do in order to save their lives if it had not been possible to take the *Comet* in tow. To do that the boat made three trips. Particulars have been furnished me of those who were on board the boat. The names are: Paul, chief officer; Pollard, second officer; Pearce, quartermaster; Morton, Griffiths, Ferguson, Mowat, and Elt, A.B.'s. Apart altogether from the part which they take in the general award to the crew, I think their services ought to be recognised by an award of 150*l*., to be divided amongst them in proportion to their ratings. Then there comes a still more important matter. It appears that the boat, as I have said, was sent in charge of the second officer, Mr. Lazalle, with certain of the crew, to cut away the masts, and we are told that that was a risky and difficult matter to do. They had to go on board the ship which had no one on board and was rolling about, and somehow to hold on whilst two masts were cut away. Those who did this work appear to have been Mr. Lazalle; Mr. Berkeley, the second engineer; P. Kircaldy, the senior third engineer; J. McQueggin, leading fireman; H. Porter, fireman; W. Trim, carpenter. I think those men did a very useful service, because by that means the *Comet* was enabled to be towed, and, as I have said, there was risk in going on board to do this work. Amongst those men I consider that the sum of 300*l*. should be distributed according to their ratings. Now, I have looked through the details of the evidence, but I cannot find who were the persons who were left in the boat whilst those whom I have mentioned went on board and cut away the masts. I assume that some sailors must have assisted in rowing the boat whilst those men went on board, and, lest I should leave anybody out who assisted in that matter, I think that they should get 25*l*. in recognition of their assistance. In addition to that, there was a suggestion made of the merits of those who remained on board the *Comet* whilst she was in tow to St. Michaels; but I find, on looking through the list, that I have really rewarded all those persons in dealing with the crew of the boat which transferred the crew of the *Comet* and those who went to cut away the masts, and I do not think it necessary, therefore, to deal in any way specifically with those who remained on board the *Comet*. I do not suppose their danger was a very material matter to con-

sider outside the general award to the officers and crew. But there remains Mr. Brown, the third officer who was in charge of the boat which went later on, on the 23rd, to pass ropes and make connection. That appears to have been a duty of some danger and difficulty, and I have had no particulars given me exactly as to who were the persons doing that. The names, however, can easily be ascertained. I think there should be divided amongst Mr. Brown and the seamen who did that work, according to their ratings, a sum of 75*l*. The result of these deductions is to leave the sum of 1025*l*. to be divided amongst the rest of the crew, and that crew, as I have said, numbered, without the master, 147 persons. That sum should be divided amongst the crew according to their ratings subject to these qualifications. I have considered the way in which what I may call the navigating and non-navigating members of the crew may be treated in the case of *The Spree*, (1893) P. 147, and it is not necessary that I should go over the judgment which I gave in that case, because it would be only repeating a number of reasons which have been there pointed out for differentiating between those who are the real workers of the ship both on the deck and down in the engine room department, and those who are merely members of the crew attending, not to working the ship at all, but to working such parts of her as are concerned with the passengers and otherwise, like the horsemen. Dealing first with the navigating members of the crew, it will be seen from what I have already said that a good number of the deck hands and officers are specially remunerated for what they did outside the ship, and as regards what was done on board the ship I see no particular reason for drawing any particular distinction between the various navigating members of the crew—that is to say, the officers, seamen, engineers, firemen, donkeymen, greasers, and trimmers, and so forth—and they, I think, should therefore take their share of the 1025*l*. according to their ratings. Then there remain a number of persons who were not in the navigating and working part of the ship as a navigating machine, such as the surgeon, cook, steward, stewardess, purser, and so forth. It was not contended before me that any of these persons whom I am now considering were to be excluded from the salvage award, and I think that is the right view to take, for the reasons which I gave in the course of my judgment in *The Spree*. It is quite true that some of these, if not all of them, do not in one sense perform any active service in the rendering of the salvage service, but it must not be forgotten that they are all on the articles, that they are all liable to take their stations, that they are all persons who run some risk in so far as the ship salving is at any extra risk, and that if any of those persons who went away and assisted had been lost, extra duties would necessarily be required to be performed by those who are left. So I think it would not be wise that these persons should be excluded from the salvage award altogether. I think it would be bad policy and lead to difficulties if they were not recognised. Therefore, I think the parties are right in not suggesting they should be excluded; but, at the same time, whatever their merits are, they do not bear a high proportion of the work of those who are actually engaged in performing services on

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the deck or in the engine room and so forth, and, having regard to the large size of this steamer, practically they were not in any serious risk. As I said before in the case of *The Spree*, without laying down a rule, as each case must be governed by its merits, because in some cases you might find the steward of the vessel hauling on the ropes, as happened in the case of *The Noordland*, referred to in the case of *The Spree*, I think the proper thing to do is to treat all those with whom I am dealing as if they were rated at one-third of their ratings; that is to say, they will take a share as if their rating was a third of what it really is. It is less, I agree, than what I mentioned in the case of *The Spree*, but there are reasons for differentiating. Then there are the horsemen and the horse foreman. Again, it is not now suggested that they should be excluded. Their case is not the same as that of the cattlemen in *The Coriolanus* (62 L. T. Rep. 844; 15 P. Div. 103), who were not really servants of the ship-owners. These men are really the servants of the shipowners. They are paid so much for the trip, and I was informed that these men have their stations at the boats, and are liable, therefore, to be called upon to perform duties, so far as they can, very much in the same way as stewards. I think that persons in that position ought to be just as much included in a salvage award as those who are in the cabin department. In order to recognise their position, and yet not reward them as if they had done a great deal, I think the proper thing to do, and the Elder Brethren, with whom I have had a long consultation, agree, is to treat them as rated at one-third of the rating of an A.B., and let them take a proportion on that basis. The costs will be borne by the parties in proportion to their awards.

Solicitors for plaintiffs, *Lowless and Co.*
Solicitors for defendants, *Pritchard and Sons.*

Friday, Feb. 21.

(Before BARNES, J. and TRINITY MASTERS.)

THE RHEIN. (a)

Collision—Gravesend Reach, River Thames—Vessel at anchor in fairway—Bye-laws 8 and 38 of Thames Bye-laws—Proper application of Bye-law 38.

Semble, that the obligation on steamers and sailing vessels under the 38th Thames Bye-law, when in the fairway and not under way, to ring a bell, does not apply in clear weather.

THIS was a collision action brought by the owners of the steamship *Sitona* against the owners of the steamship *Rhein*.

The case is reported on the question of the proper application of bye-law 38 of the Thames Bye-laws, and the facts so far as material are as follows:—

The *Sitona* was a screw steamship of 1010 tons gross register, and was on a voyage from Skien, Norway, to Surrey Commercial Docks. The collision occurred about 8.30 p.m. on the 1st Jan. 1902, in Gravesend Reach, river Thames, and the *Sitona* was at anchor at the time, in the anchorage-ground, it was alleged, heading up river, and exhibiting the regulation anchor lights.

The *Rhein* was a screw steamship of 1024 tons gross register, and was proceeding down the river on a voyage from London to the Tyne, and the defendant's case was that her helm was ported for an upcoming steamer, and almost at the same time two white lights were seen nearly right ahead, which were taken to be the stern-lights of two vessels going down river. Owing to the strong wind blowing, she was slow in coming round, and, whilst still under a port helm, it was seen that the lights ahead were the lights of a vessel at anchor, and although every effort was made to avoid a collision, the *Rhein* collided with the *Sitona*.

The defendants charged the plaintiffs (*inter alia*) with improperly anchoring in the fairway and with neglecting to ring their bell. It was admitted by the plaintiffs that the bell of the *Sitona* was not being rung.

Bye-laws 8 and 38 of the Thames Bye-laws are as follows:

All vessels navigating Gravesend Reach are to keep to the northward of a line defined by a skeleton beacon erected upon the India Arms Wharf or with the high chimney at the Cement Works at Northfleet, and all vessels intending to anchor in the Reach are to bring up to the southward of that line.

Bye-law 38. All steam and sailing vessels, when in the fairway of the river and not under way, shall at intervals of about one minute ring the bell rapidly for about five seconds.

Aspinall, K.C., Christopher Head, and Dunlop for the plaintiffs.

Laing, K.C. and Nelson for the defendants.

In the course of the arguments the following cases were referred to

The Carlotta (80 L. T. Rep. 664; (1899) P. 223;

The Blue Bell (72 L. T. Rep. 540; (1895) P. 242;

The Warwick (63 L. T. Rep. 561; 15 P. Div. 189.

BARNES, J., after dealing with the facts and finding that the *Sitona* was anchored a little outside of the anchorage ground, proceeded as follows: The defendants contend that their vessel cannot be held to blame because the persons navigating her would, having regard to the rule requiring vessels at anchor to keep in the anchorage ground, be entitled to assume that the lights they saw were not the lights of a ship at anchor, or, at all events, that they would not be negligent in not thinking them the lights of a ship at anchor, and that they might be the lights of a vessel or vessels moving on the tide. That appears to me to be very much a matter for the opinion of the Elder Brethren. The question is, whether a competent person in charge of the downcoming steamer, when two anchor lights are properly exhibited and showing properly in weather in which they can be seen for an adequate and proper distance, is entitled to assume or is negligent in thinking that they are not the lights of a vessel at anchor, but the lights of something moving. The Elder Brethren are strongly of opinion that a person navigating with care and keeping a proper look-out ought, without any difficulty, to have been able to know that they were the lights of a vessel at anchor. It ought not to make any material difference that the person navigating has the rule about the anchorage ground in his mind, and would naturally suppose that vessels would be at anchor there and not in the fairway. The Elder Brethren say

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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that for many reasons nobody navigating down Gravesend Reach can assume that no vessels will be at anchor in the fairway. They point out, for instance, that it may not always be possible to enter the anchorage ground owing to the crowd of vessels there already, and there are many other circumstances in which a vessel may be forced to bring up in the fairway. The view of the Elder Brethren is that it is improper to assume that because there are white lights ahead they are not the lights of a vessel at anchor because they happen to be in the fairway. That being so, and finding that the lights exhibited would adequately warn approaching vessels that they were the lights of a ship at anchor and therefore a ship to be avoided, then they ought to avoid it, and the mere fact that the vessel is at anchor in the fairway does not affect the question. This depends on the well-known principle that if there is an object which, even though it is not in a proper place, you can avoid by the exercise of reasonable care and skill, then you must avoid it. The conclusion of fact, therefore, to which I come is that the collision was really due to bad lookout on board the *Rhein*, and to not appreciating that the lights they saw were the lights of a vessel at anchor. With regard to the point raised that the *Sitona* was not ringing her bell, Mr. Laing referred to rule 38. I do not suppose that if she had been ringing her bell it would have made any difference, but, as at present advised, I cannot hold that this rule applies except in special circumstances where there is proper necessity for the application of it. If I were to hold otherwise I should be holding that every ship at anchor in the Thames, because it is practically all fairway, would have to ring her bell on the finest summer day, and there would be the clang of bells all the way down the river. I should not hold this view until I were forced to do so. It seems to me unreasonable to so hold, especially when I find that rule 38 is in the class headed "fog and steam-whistle signals," which would go to show that rule 38 only applies in cases of fog, mist, falling snow, and the like. The conclusion I have come to is that the defendants must be held alone to blame for this collision.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, T. Cooper and Co.

Solicitors for the defendants, Rehders and Higgs.

Wednesday, March 5.

(Before Sir F. JEUNE, President, and BARNES, J.)

WASTWATER STEAMSHIP COMPANY LIMITED
v. T. B. NEALE AND CO. (a)

Charter-party—Sub-charter-party—Right of ship-owner to sue indorsee of bill of lading for freight on cargo shipped under sub-charter-party.

The owners of the W. chartered her to G. under a charter-party, which provided that the master should sign bills of lading as presented, and that the charterers' liability should cease on shipment of the cargo, and gave the shipowners a lien for freight, dead freight, and demurrage. G. rechartered the vessel to M. L. under a charter-party which contained provisions similar to the original charter-party.

M. L., who had no notice of the original charter-party, shipped a cargo in pursuance of the second charter-party, and bills of lading were signed by the master as presented by which the cargo was to be delivered to the order or assigns of the shippers on payment of freight without recourse to shippers as per the second charter-party.

Held, that the bills of lading were signed by the master as agent of the shipowners, and that the shipowners were entitled to sue the indorsees of the bills of lading for the freight due thereon.

APPEAL of the plaintiffs from a decision of the judge of the County Court of Lancashire.

Action to recover a sum of 86l. 11s. 6d., being a balance of freight, and 61l. 8s. 9d., being a balance of demurrage alleged to be due from the defendants under the following circumstances:—

By a charter-party dated the 13th July 1899 the plaintiffs as owners chartered their steamship *Wastwater* to Goddard and Gilliland, of Sabine Pass, for three consecutive voyages from Sabine Pass, Galveston, or New Orleans to certain named ports in the United Kingdom and Continent at a freight of 16s. per ton on her dead-weight cargo capacity.

The charter-party contained the following amongst other clauses:

The freight to be paid in cash on unloading and right delivery of the cargo.

Owners shall pay at port of loading 2½ per cent. commission and also cost of insurance on the amount to be advanced by charterers or their agents for disbursements and charges at port of loading, and master shall give his draft on owners or consignees as required to cover said advances (which, together with drafts for difference of freight, shall be payable within three days after arrival or out of the first freight collected), or, if required, a bank credit to be furnished by the owners for amount of said disbursements.

Charterers have the option of loading lawful merchandise, paying freight on steamers d.w. capacity as above. All spaces to be placed at charterers' disposal which would be used for cargo if loading for owners' account.

The captain shall sign bill of lading as presented without prejudice to this charter-party, any difference between the amount of freight by the bills of lading and this charter-party to be settled at port of loading before sailing.

Eighteen running days (Sundays and holidays excepted) shall be allowed charterers for loading and discharging, and her days on demurrage over and above the said lay-days at the rate of 4d. per net register ton per day.

Charterers' liability to cease when the cargo is shipped, the owner or master having an absolute lien upon cargo for the recovery and payment of all freight, dead freight, and demurrage."

Subsequently Mr. Gilliland, of the firm of Goddard and Gilliland, by a charter-party dated the 18th Jan. 1900, purporting to act as agent of the steamer but without informing the plaintiffs, chartered her to the Morgan Lumber Company, who were ignorant of the original charter-party, for the carriage of a cargo of timber from Sabine Pass to Liverpool at a freight of 10·75 dollars per 1000 feet, payable on delivery of the cargo. This charter-party contained clauses similar to those set out above, except that it provided for a higher rate of demurrage than the charter-party of the 13th July, and it was doubtful whether it gave a lien for damages for detention at the port of loading.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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A cargo of timber was shipped in April on board the *Wastwater* at Sabine Pass by the Morgan Lumber Company for which bills of lading were signed by the master as presented, by the terms of which the cargo was to be delivered at Liverpool to their order or assigns on payment of freight, without recourse to shippers, at the rate of 10-75 dollars per 1000 feet as per charter-party dated the 18th Jan. 1900.

Gilliland appointed Thin, a shipbroker, to act for the steamer in Liverpool as his agent, and Thin was also appointed by the plaintiffs to act as their agent.

The defendants were the indorsees of the bills of lading.

The whole of the time allowed for loading and discharging was used at the port of loading, and the vessel came on demurrage on her arrival at Liverpool.

The defendants took delivery of the cargo and paid part of the freight, withholding payment of part of the freight against a claim for short delivery.

They disputed the claim for demurrage altogether.

The master threatened to exercise a lien on the cargo for freight and the demurrage at the higher rate under the second charter-party, and after some negotiations the defendants agreed to pay Thin whatever freight was due under the bills of lading, and by a letter dated the 22nd May and addressed to Thin, agreed to pay "whatever demurrage may be due this steamer on final discharge under our charter-party."

The plaintiffs claimed the balance of freight under the bills of lading and the demurrage under the letter of the 22nd May and the charter-party of the 18th Jan. therein referred to.

The defendants resisted the claim on the grounds that they were only liable to Gilliland under the charter-party of the 18th Jan.; that the bills of lading were signed by the master as agent of Gilliland, and not of the plaintiffs; that the agreement in the letter of the 22nd May was made with Thin as agent of Gilliland, and that, therefore, the plaintiffs had no title to sue on the bills of lading or on the agreement with Thin for the freight or demurrage.

The County Court judge held that Thin could not equitably act as the agent of both the plaintiffs and Gilliland at the same time, and on the grounds relied on by the defendants nonsuited the plaintiffs.

The plaintiffs appealed.

Horridge, K.C. and Leslie Scott for the appellants (plaintiffs).—The plaintiffs were entitled to sue the defendants for the freight as indorsees of the bills of lading. The July charter-party did not operate as a demise of the ship to Goddard and Gilliland. The ship remained in the possession of the owners, and the master signed the bills of lading as their agent, and not as the agent of Gilliland. Owing to the operation of the cesser clause in the July charter-party the consignees were the only persons to whom the owners could look for payment of the freight. The charter-party gave an absolute lien for freight and demurrage. Even if the January charter-party gave no lien for damages for detention at the port of loading it was contemplated by all the parties that the master would exercise a lien if the claims were not settled. The defen-

dants agreed with Thin to pay the demurrage to prevent delay in getting delivery. The master was acting as the owners' agent throughout. Thin was authorised by the owners and by the master to collect the freight and demurrage for them, and the fact that he was also Gilliland's agent did not prevent his acting as the owners' agent at the same time. The interests of both principals were identical, as both wanted to get the freight and demurrage paid by the consignees. The defendants knew that Thin was the owners' agent when they wrote the letter of the 22nd May.

Hamilton, K.C. and Keogh for the respondents (defendants).—The January charter-party was entered into by Gilliland without the owners' authority. The freight due under that charter was due to Gilliland and not to the plaintiffs. It was under this charter that the cargo was shipped and the bills of lading were signed by the master as agent of Gilliland. The Morgan Lumber Company had no notice of the July charter-party, and were not bound by its terms. The bills of lading in the hands of the Morgan Lumber Company and of the defendants, who were their agents to receive the cargo at Liverpool, were merely receipts for the goods, and the only contract to which the Morgan Lumber Company and the defendants were parties was the charter-party of January to which the plaintiffs were no parties. There was no privity of contract between the plaintiffs and the defendants. [BARNES, J.—If the Morgan Lumber Company's goods were on board the ship without the plaintiffs knowing anything of the second charter-party they were taken on board by the plaintiffs on the terms of the first charter-party.] Neither the Morgan Lumber Company nor the defendants were bound by the terms of the July charter of which they had no notice:

Marquand v. Banner, 25 L. J. 313, Q. B.

This decision was approved by Lord Campbell in *Schuster v. McKeller* (26 L. J. 281, Q. B. at p. 288), and, though doubted in *Gilkison v. Middleton* (26 L. J. 209, C. P.), that case is not the present case:

Carver's Carriage by Sea, 3rd edit., s. 155.

The owners in the peculiar circumstances of this case, could only look for the freight and demurrage to Goddard and Gilliland, who are only relieved by the cesser clause to the extent to which it gives an effective lien. The owners could not exercise their lien, as it was not preserved by the second charter-party. A lien for freight can only be exercised in favour of the person to whom the freight is due, and here the freight claimed was due to Gilliland. As regards the arrangement made by the defendants with Thin, that was merely an undertaking by the defendants, as representing the Morgan Lumber Company, to pay to Goddard and Co. whatever freight and demurrage was due to them under the bills of lading, and the January charter-party. The only lien the master could exercise was the lien under the January charter-party as agent of Gilliland and not of the owners. [BARNES, J.—The owners had a lien under the first charter-party against Gilliland; Gilliland had a lien under the second charter against the Morgan Lumber Company. The master had a right against Gilliland which he could exercise

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against the Morgan Lumber Company, and the consignees as representing them.] The plaintiffs' claim for demurrage is based as to time on the first charter, and as to rate on the second. It was for the plaintiffs to show that there was an agreement by the defendants to pay the freight and demurrage to Thin as agent of the plaintiffs, and the learned judge in the court below came to a conclusion of fact which was warranted by the evidence, and his judgment ought not to be disturbed.

Horridge, K.C., in reply, referred to

Baumwall v. Furness, 63 L. T. Rep. 1; (1893) A. C. 8.

The PRESIDENT.—In this case the learned judge of the court below nonsuited the plaintiffs, but I think this nonsuit must be set aside both with regard to the claim for freight and with regard to the claim for demurrage. Those claims stand on rather different grounds. The learned judge appears to me to have decided the whole of the matter upon the ground that Thin was the agent only for Gilliland, and was not, and could not be, the agent for the plaintiffs as well. His view appears to have been that there was a conflict between the interests of the plaintiffs and those of Gilliland, and under these circumstances he could not act as agent for both without the consent of both. I am clearly of opinion that on the evidence Thin was appointed to act and did act as agent for the plaintiffs as well as agent for Gilliland. That point is not of first importance, because the plaintiffs' claim to freight rests on the broad ground of the defendants' liability under the bills of lading. No doubt there are cases where the master ceases to be agent for the shipowner and becomes the agent of the charterer, but I see no reason for saying that that was so in the present case. The master all through appears to have acted in the ordinary way as agent for the shipowners, and there is no reason why the shippers should not be liable to pay the freight to the shipowners under and according to the bills of lading, and apart from that the defendants are liable for freight, upon the ordinary law, on the bills of lading, the master having a lien which he was entitled to enforce. With regard to the demurrage, the matter stands upon different grounds. The liability rests upon the agreement expressed in the letter of the 22nd May, and that agreement is quite clear in its terms. That agreement shows that Thin was then acting as the agent for the plaintiffs, and it shows that he was agent for the ship. It may be said with a good deal of force that Thin may have been agent for both the plaintiffs and Gilliland, and that the arrangement made by the defendants in their letter was that the demurrage should be paid to him as agent of Gilliland, and not as agent for the plaintiffs. But that does not appear to be the reasonable or businesslike way of looking at it. The result of the arrangement expressed in that letter appears to be that Thin was represented as the plaintiffs' agent to collect the whole of the demurrage, leaving him to arrange, as between Gilliland and the plaintiffs, how the demurrage was to be divided, and the fact that the master was pressing for the demurrage at that time, and considered himself entitled to enforce his claim for it, is sufficient

explanation of such arrangement having been made. Under those circumstances I think the nonsuit of the learned judge of the court below cannot be maintained, and the case must go back to him in order, if so advised, the plaintiffs may have an opportunity of calling any evidence they may desire.

BARNES, J.—There are two claims in this case, one being for freight and the other for demurrage. As to both these claims the defendants say that the plaintiffs have no right of action against them, because there was no obligation on their part to pay either freight or demurrage to the plaintiffs. Dealing with the question of freight first, it appears to me that the position taken up by the defendants is erroneous, both in law and in fact. First of all because, having regard to the form of the charter-parties, and the course of business which it is necessary to follow in order to put those charter-parties into proper operation, I feel no doubt that the bills of lading were signed by the master as agent for the shipowners, and that they gave the shipowners a right to sue those who are responsible on the bills of lading. If the defendants are liable as holders of the bills of lading at all, they are liable to the plaintiffs in accordance with the view which I think is correctly stated in *Carver on Carriage by Sea*, 3rd edit., at s. 157, where it says that, when the bill of lading is in the hands of a shipper or indorsee, who is a stranger to the charter-party, the contract shown by it is one between him and the shipowner, and may be enforced by and against the shipowner accordingly, whether the shipper or indorsee had notice of the charter-party or not. But the case as regards the freight does not rest there, because there was, according to the evidence, an express contract, which was made afterwards, with the defendants, to pay the freight to Thin according to the bills of lading. The only question on that is whether Thin was acting as agent for the plaintiffs. There is not the slightest doubt that that was so, because Gilliland was no longer interested in the case at all. By the way in which this class of business works out, Gilliland having to pay so much freight to the shipowners, and having to get part of it out of his recharter, a draft is given at the port of loading for the difference of freight, and the shipowner remains the only person practically concerned in enforcing the claim for freight against the consignees. That being so, I have no doubt whatever that the contract, so far as it went, was made with Thin as an agent for the shipowner. With regard to the demurrage, it seems to me that the only point that can be taken in favour of the defendants is that the contract contained in the letter of the 22nd May was in fact made with Thin as the agent for Gilliland only, or as joint agent for Gilliland and the plaintiffs. From the negotiations that took place beforehand, in which the position of the plaintiffs, who were interested in the demurrage, whatever rate or amount was to be paid, was known to the defendants, it is quite obvious that the contract with Thin was not made in the interest of Gilliland alone. [The learned judge referred to the evidence, and continued:] I do not think there is the least doubt on the evidence that the contract was in fact made by the defendants with Thin on behalf of the shipowners, and that

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they are entitled to the benefit of any contracts made by Thin on their behalf. The result is that, in my opinion, the judgment in the court below was wrong, and the nonsuit must be set aside, and the case go back to the learned judge.

Judgment accordingly.

Solicitors for the appellants, *Rowcliffe and Co.*, agents for *Hill, Dickinson, and Co.*, Liverpool.

Solicitors for the respondents, *Trinder, Capron, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 24, 30, and March 1.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

DEVERGES v. SANDEMAN, CLARK, AND CO. (a)
APPEAL FROM THE CHANCERY DIVISION.

Mortgage—Power of sale—No express power—Shares in a company—Damages.

A mortgage of shares, which was not by deed, contained no express power of sale, and no time was fixed for payment of the mortgage debt.

Held, that the mortgagee had an implied power of sale after a reasonable time had elapsed from the date of a notice by the mortgagee to the mortgagor requiring payment on a certain day.

Held, by Stirling and Cozens-Hardy, L.JJ. that a reasonable and proper notice had been given.

Held by Williams, L.J. that a good notice had not been given, as there had been such misstatements in the letters as brought the case within Pigot v. Cubley (15 C. B. N. S. 701), and, further, no day certain had been fixed for payment; but the plaintiff was only entitled as damages to the price realised by the shares, less the amount due to the defendants for principal, interest, and proper charges, as the plaintiff was never in a position to redeem the shares before the sale.

Decision of Farwell, J. (83 L. T. Rep. 706) affirmed.

THIS was an action against a firm of stock-brokers claiming redemption of certain shares in a company, or, in the alternative, damages for the wrongful sale of the shares.

In July 1897 the defendants, acting on the instructions of the plaintiff, who was a Spaniard, bought for him on the Stock Exchange 700 shares in the Central Boulder Gold Mines Limited.

The plaintiff was only able to provide part of the purchase money, and the balance, amounting to 538l. odd, was paid by the defendants on the verbal agreement that the shares should be transferred into the names of two members of the defendants' firm, to be held by them by way of mortgage to secure the sum due from the plaintiff to them thereon.

On the 31st Aug. 1897 the defendants wrote to the plaintiff as follows:

We have been expecting to receive from you the further remittance as promised by you to complete the amount due to us on the purchase of the 400 shares, which have been, as desired by you, registered in our names, and are, subject to the amount you owe us plus interest to the next account day, the 15th Sept., at your

disposal. Should you not place us in funds by that date, we shall deem ourselves at liberty to sell at our discretion as to date and at the then market price the shares we hold. We must recall to your mind our conversation by reiterating that it is not our practice to open speculative accounts, and hence our desire to have this transaction completed in the usual manner.

The plaintiff did not comply with the terms of this letter, nor did he make any further payment in respect of these shares, although repeatedly requested by the defendants to do so. A year having elapsed, and the defendants still retaining the shares, the company went into liquidation with a view to reconstruction, and its assets and undertaking were transferred to a new company. In the course of the reconstruction the defendants received a circular to the effect that the holders of those shares would be entitled to 1050 shares in the new company on the payment of a balance of 3s. a share. This circular was sent by the defendants to the plaintiff.

The plaintiff did not remit any money, and the defendants having paid the balance of 3s. a share, the shares in the new company were allotted to them, and, these shares having subsequently risen on the market, they in Feb. and March 1899 sold them without further reference to the plaintiff, believing that they were entitled to them as absolute owners. In July 1899 the plaintiff applied to the defendants for an account, which they rendered, showing a large balance due to them, and they informed the plaintiff that, inasmuch as he had failed to provide the necessary funds for taking up the shares in the new company, he had forfeited all right to any interest in that company. The plaintiff afterwards brought this action and alleged that the sale was without notice to him, and, as since the sale the price of the shares had risen in value, he had sustained loss by reason thereof.

The defendants admitted the sale, and, although at the time they claimed to retain the whole of the proceeds for their own benefit, by their defence they expressed a willingness to account, and delivered an account showing a balance in favour of the plaintiff of 55l. 4s. 11d., which they brought into court, and submitted that the sum was in satisfaction of the plaintiff's claim.

Farwell, J. held (83 L. T. Rep. 706; (1901) 1 Ch. 70) that a mortgagee of shares registered in his own name has an implied power to sell them if the mortgagor fails to pay after a reasonable time; and the plaintiff appealed.

The following letters are referred to in the judgments:—

12th Oct. 1897.—Plaintiff to defendants:—

Your letters 31st Aug. and 6th Sept. to hand, and the cause of not sending you the money is on account of the exchange, but I hope very shortly to send you the balance. Inclosed I hand you cheque for 50l. on London, and please acknowledge receipt and telegraph how those shares are. If you can make the lot to 500, do so; never mind one-eighth more or less. I shall have funds in London next month.

6th April 1898.—Defendants to plaintiff:—

If there is still any likelihood of your being unable to visit London in the immediate future, we shall feel obliged by your remitting us the amount due.

31st May 1898.—Defendants to plaintiff:—

Having received no reply to our letter we addressed to you on the 6th April (a copy of which we beg to annex),

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we send this under registered cover in order that there can be no doubt of its being placed in your hands, and that you will be consequently cognisant of our desire that you will not further delay in fulfilling your promise to liquidate your indebtedness to us, which amounted at the end of March to 577*l.* 10*s.* 8*d.*, and carries an accruing 6 per cent. interest. Twice you intimated that you were coming to London and would then settle the amount with us, and we feared that possibly illness might perchance have caused you to delay your visit, but are at a loss to understand the reason of our receiving no word whatever from you. The Central Boulder shares in which you are interested to the extent of 700 shares are now only worth a doubtful 10*s.* per share, and hence we are waiting to receive either funds from you to pay for them or your instructions to sell them at a given price, and moneys to meet the deficiencies which have gradually accumulated since your purchases by an unhappy but continuous depreciation in market value.

7th June 1898.—Plaintiff to defendants:—

Your letter of the 6th April came to hand in due course, and also your registered letter of the 31st May. The funds I shall have in London have not been given me, and this is the cause of the delay. I expect to receive them in the course of this month, and then I will settle with you. Our country is going through a tremendous panic, but this will not last long I hope.

13th June 1898.—Defendants to plaintiff:

We beg to inclose herewith two papers which will indicate to you the rough terms of a proposed amalgamation between the Central Boulder Gold Mines, in which you are interested, with the neighbouring West Boulder Gold Mine. . . . We are this day favoured with your letter of the 7th inst., in which you state that, not having received from others, you are unable to send us the moneys you had promised, and we trust you will hasten to make such arrangements as will enable you to remit to us the moneys now for some time since overdue. If the above scheme is passed, you would have further to remit us the 3*s.* per share due on the new shares, failing which the company could and would legally forfeit the shares belonging to you (but which are registered in our names); therefore, to avoid total loss, you would have either to sell your holding to someone willing to adopt the liability on reconstruction at whatever the market price may be or to make the payment on your behalf. We will thank you to give us by return of post your positive instructions as to selling your holding of Central Boulder shares or your intimation of your desire to participate in the new company and your adoption of the liability thereon. In either case we count on receiving your remittance for the amount overdue on your purchases of the original shares, and regret that your delay in so doing most unfortunately compels us to press you to do so at a time when your country and its resources are unhappily embarrassed by a war which we trust will be as short as it is sad, or that our action in so doing might erroneously appear unsympathetic.

22nd Aug. 1898.—Defendants to plaintiff (registered):—

We have twice written to you on the subject of your holding of Central Boulder Company shares (which are in our names), and have asked you to consider the papers we sent you . . . and to give us your decision whether you intend participating in the reconstruction of the company, thereby incurring a liability of 3*s.* on 1050 shares, or whether you will adopt the only other alternative of allowing your shares to be forfeited, and thereby accept the entire loss and sacrifice of the shares you have purchased (but which you have not entirely paid us for). It seems wise to join in the scheme on the off chance of success, or with a view of seizing some possible opportunity

of selling at a price in advance of the amount payable on joining this scheme. Having regard to the position you have placed us in, we are compelled to give you clear notice that we shall not apply for the 1050 shares, adopting the liability of 3*s.* per share (which must be done previous to the 9th Sept.), on your behalf or for your benefit, excepting always that you have previously remitted to us, and also accompany your instructions with a further remittance to cover the amount payable on these new shares. We further regret having to inform you that, as you have not fulfilled your promise by remitting us the money to complete the purchase of the shares and that we are unprotected by any security, we shall deem ourselves at liberty to adopt at our pleasure such steps as may unfortunately be necessary to recover the debts due by you to us here.

3rd Sept. 1898.—Plaintiff's clerk wrote to the defendants, saying in effect that he was unable to remit any money, and asking them to regard his interests with respect to the shares, and expressing a hope that they would obtain at least the sum they had paid.

9th Sept. 1898.—Defendants to plaintiff:—

We are in receipt of a letter, dated the 3rd inst., written on your behalf, and now confirm our telegram of this date "must have cash remittance." We fully explained in our letter of the 22nd ult. the position, and that we would do nothing on your behalf unless we received a remittance of the moneys due to us, with a further sum to cover the amount payable on claiming and taking up the new shares. Unless we receive a remittance in response to our telegram above referred to, we must reluctantly take steps to recover the debt due by you to us, as stated in our last letter already referred to.

15th Sept. 1898.—Defendants to plaintiff:—

Confirming our cablegram and letter of the 9th inst., we now inclose copy of a notice issued by the Central Boulder Company extending the time to applying for the new shares to the 23rd inst. As this is final, we must receive a remittance from you before that day in order to take the new shares on your behalf. We would impress on you that if you fail to remit you will lose all interest in the shares, and we must proceed against you to recover the sums we have paid on your account.

19th Sept. 1898.—Plaintiff to defendants:—

Your telegram and letter received when I was very busy with the vintage in the country, and now on my arrival I beg to tell you that it is quite impossible for me at this moment to remit cash as you desire. You ought to know the very inactive state of the business in Spain after a war as disastrous as that we have not yet seen ended, and the wines, the most valuable goods that we have, are unsold in the cellars. I very much regret that at the present moment it is quite impossible for me to grant your request, but I will as soon as possible send you the amount, and, in the meantime, I sincerely trust you will protect my interests so that you will not lose anything through me.

3rd Oct. 1898.—Defendants to plaintiff:—

We beg to inclose statement of account showing balance of payments made by us on your account with interest to 30th ult. due to us of 595*l.* 2*s.* 9*d.*, which amount we must request you to remit to us forthwith.

15th Nov. 1898.—Defendants to plaintiff:—

On the 3rd Oct. we addressed you a statement of account up to the 30th Sept., amounting to 595*l.* 2*s.* 9*d.*, which amount we desire you to kindly remit us forthwith. Owing to the lapse of time since we received communication from you, we deem it courteous, in the first instance, to renew our application to you to liquidate this sum—or even a material portion of it—which the extension of time you have should have rendered easy. If you find it unhappily necessary to delay the settlement of this unsecured debt (which you have so often

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promised to pay off with the assurance that we would not make or sustain a loss), we think you ought to hypothecate to us bonds or properties of a minimum value of 600l., to which sum your indebtedness has increased, as it is unreasonable as well as unfair to us to remain in our debt without giving us any protection whatever.

12th July 1899.—Defendants to plaintiff:—

As requested in your favour of yesterday's date, we have the pleasure of inclosing a copy of statement of account up to September of last year, and which you several times led us to believe you would liquidate. Since the 29th Sept. to last quarter-day, the 24th June, the amount has increased 26l. 15s. 6d. by interest, and now stands at 621l. 18s. 3d. The loss that you now profess you cannot understand is attributable to your having purchased a larger number of shares than you paid for, and which balance payment we consented to make on your behalf, and then to the collapse of the company through want of funds, necessitating its liquidation by means of a reconstruction in which shareholders could join by a given date on making due application and undertaking to make payment to the company of 3s. per share. We wrote you three explanatory letters and wired you, but you did not join the reconstruction; hence we told you that we awaited the settlement of your debt to us, and that your interest in the company would, according to the terms of the reconstruction, cease failing the payment of the 3s. per share, and that we would not make, under the circumstances of your heavy indebtedness to us, such payment for your benefit. We wrote you the expression of our opinion that you should incur the risk of this further payment in the hope of recovering the cost of the shares you bought.

Robert Wallace, K.C. and G. H. Stutfield for the appellant.—On the assumption that these shares were mortgaged, the sale was improper. If there was any power to sell the shares, it was only on proper notice being given of intention to do so on a fixed day, with a reasonable interval between the notice and the day of sale in order that the plaintiff might have an opportunity of redeeming. The plaintiff never had proper notice of the intended sale, and, moreover, had reason to believe from the defendants' letters that the shares had been disposed of long before they actually were. He was misled by being informed that the security was gone. When they sold they treated the shares as their own property, and did not purport to sell as mortgagees. In order to be good, a notice of intention to sell must give a correct statement of the account between the parties, and give the mortgagor an opportunity of redeeming. The letter of the 22nd Aug. 1898 and some of the others contain such misstatements as to the position of the plaintiff and the shares as to render them invalid as notices, and therefore they give no right to sell. The defendants say the shares are liable to forfeiture if the plaintiff does not assent to the scheme, and that they are unprotected by any security. Each of these statements was inaccurate. *Tucker v. Wilson* (1 P. Wms. 261; 5 Bro. P. C. 193) was based on the implied consent of the mortgagor. In *Re Morritt; Ex parte Official Receiver* (56 L. T. Rep. 42, 45; 18 Q. B. Div. 222, 235) Fry, L.J. said that in the case of a mortgage of chattels no power of sale is implied by law. They also referred to

Lockwood v. Ewer, 2 Atk. 303;

Robbins on Mortgages, p. 275;

Conveyancing Act 1881 (44 & 45 Vict. c. 41), ss. 19, 20, 25 (2);

15 & 16 Vict. c. 86, s. 48;

Wayn v. Lewis, 1 Drew. 487.

Upjohn, K.C. and Stewart-Smith for the defendants.—The defendants were mortgagees of these shares, and had an implied power of sale. The sale took place after they had given notice to the plaintiff of their intention to sell and also had given him ample time to redeem. The plaintiff was not misled by the defendants' letters; he never had the money to redeem the shares. He had ample opportunity to take up the new shares. The shares in the reconstructed company were substituted for the old shares, and were subject to the same power of sale as the old shares which they represented. On the receipt of the letter of the 22nd Aug. 1898 by the plaintiff, the defendants became entitled to sell the whole of the shares. The fact that the defendants made an honest mistake and considered that the new shares belonged to them does not prevent them setting up that they were sold under the implied power of sale:

Henderson v. Astwood, (1894) A. C. 150;

Re Morritt; Ex parte Official Receiver (ubi sup.).

But there was a power of sale by agreement between the parties contained in the letter from the defendants of the 31st Aug. 1897 and the reply of the plaintiff of the 12th Oct. There is an assertion of a right to sell which is acquiesced in. Even if the shares were improperly sold, the damages sustained by the plaintiff amount to nothing. He never had any money with which to pay the defendants, nor to pay the sums due on the new shares. He says so in his letters. He was never ready to tender the money due. They referred to

Mayne on Damages, 6th edit., p. 402;

Greening v. Wilkinson, 1 C. & P. 625;

Johnson v. Stear, 15 C. B. N. S. 330;

Halliday v. Holgate, 18 L. T. Rep. 656; L. Rep. 3 Ex. 299;

Wilkinson v. Verity, 24 L. T. Rep. 32; L. Rep. 6 C. P. 206;

Miller v. Dell, 63 L. T. Rep. 693; (1891) 1 Q. B. 468;

Spackman v. Foster, 48 L. T. Rep. 670; 11 Q. B. Div. 99;

Jennings v. Broughton, 5 D. M. & G. 126;

Martin v. Porter, 5 M. & W. 351;

Re Bahia and San Francisco Railway Company, 18 L. T. Rep. 467; L. Rep. 3 Q. B. 584;

Ottos Kopje Diamond Mines Limited, 68 L. T. Rep. 138; (1893) 1 Ch. 618;

Owen v. Routh, 14 C. B. 327;

M'Arthur v. Lord Seaforth, 2 Taunt. 257;

Michael v. Hart and Co., 85 L. T. Rep. 548; 112 L. T. 288; (1901) 2 K. B. 867; (1902) 1 K. B. 482.

Stutfield in reply.

Cur. adv. vult.

WILLIAMS, L.J.—The main question in this case is whether the sale by the defendants of certain shares in March 1899 is a sale within their powers. There may be some doubt as to whether the defendants were, strictly speaking, mortgagees; but as both sides argued the case before us on the assumption that the defendants were mortgagees, I shall deal with the case on that assumption. The plaintiff in his statement of claim so asserted, and although the defendants by the form of their pleading denied this allegation, yet, in the argument before us and in the court below, the counsel for the defendants, with the assent of the counsel for the plaintiff, withdrew this denial. Now, the

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defendants, being mortgagees, have in equity, notwithstanding their legal title to the shares, no estate sufficient to enable them to sell, and thus exclude the mortgagor from his equitable right to redeem, unless there is either an express or implied power of sale in the mortgagee. Now, in the present case there is no express power of sale, and we have, therefore, to ascertain whether or not there is, in the circumstances of this case, an implied power of sale. I wish at once to say that I do not think that the circumstances which will give rise to an implication of a power of sale in favour of a mortgagee of a chattel, or even of stock or shares, can differ in favour of the mortgagee from those which are necessary to give a right of sale to a pledgee. In both cases the creditor holding security is allowed, as against the debtor in default, to enlarge his interest or estate. In the case of a pledge, whether of chattels or of stock or shares, a power of sale is implied at law if a day is fixed by the contract for the payment of the debt; for in such case it is inferred that the contract between the parties is that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the thing pledged. In the case of a mortgage in which there is a fixed day for payment and default in payment, a similar power of sale would seem to arise, if not in the case of a mortgage of a chattel, at all events in the case of a mortgage of stock or shares. This seems established by *Tucker v. Wilson* (*ubi sup.*). In the present case no day is fixed for payment by the original contract. Now, in the case of a pledge at law, it would seem now to be fairly well established that, when a loan is for an indefinite time, the lender may terminate the credit by giving notice to the debtor to pay on a certain day, and that upon default to pay on that day the pledgee may sell the pledge; but I know of no case in which the power of sale of a pledge has been held to arise in a case where no day has been fixed by the creditor for payment; and I know of no reason or authority for the proposition that a power to sell should arise in a case of a mortgage of stock unless a day certain has been fixed for the payment. So far I have dealt only with the law apart from the Conveyancing Act 1881. Sects. 19 and 20 of that Act do not apply to the present case, because the mortgage was not by deed; and, even assuming that the so-called notice in the present case would have been, in the case of a deed, a notice requiring payment of the mortgage money served on the mortgagor, and assuming that there would have been default in payment for three months after such service—all of which assumptions I doubt—I yet think that the presence of these provisions in the Conveyancing Act would not justify us in departing from the law as it appeared to be established before the passing of that Act. Let me now consider the reason of requiring a notice as a condition of the implied power of sale. It may be said that the object of the notice is to put the mortgagor in default, and that it is this which is, in essence, the condition of the power of sale. Perhaps so. But in what respect is the mortgagor to be in default before the pledge can be sold against him? The debt is due, and an action could, *ex hypothesi*, be brought against him. Moreover, why is it that the notice must be "reasonable," as by all the authorities it

must be? To my mind the answer is plain—to give the mortgagor a reasonable opportunity to redeem. In my judgment none of the letters did give the mortgagor in this case this opportunity. Of course he had the right to redeem whether or not a notice was given. This is not the opportunity intended to be given by a notice; there is nothing in the letters to put a certain end to the indefinite credit. There is nothing in the letters to lead the mortgagor to suppose that he must redeem by a definite day or suffer a sale of the pledge. On the contrary, the letters plainly tell him that the subject-matter of pledge has ceased to exist. It is unnecessary to look at any of the letters prior to the purchase of the last 300 shares—that is to say, prior to Nov. 1897. Now, the first letter of any importance is that of the 31st May 1898. [His Lordship then read the letter.] The defendants are here waiting for instructions to sell, and certainly make no demand for immediate payment or for payment by a fixed date. Then comes the notice from the secretary of the company of the proposed amalgamation meeting which was sent to the plaintiff accompanied by the defendants' letter of the 13th June. This is followed by an amalgamation notice from the liquidators of the 16th Aug., and a registered letter of the defendants of the 22nd Aug. It seems to me that up to this date there is nothing in the letters of the defendants making such a demand as to raise an implied power of sale in case the mortgagor, the plaintiff, should not comply with it. On the contrary, the letters ask for instructions to sell, or for money to take up the substituted shares in the new company; and when one looks at the letter of the 22nd Aug. it seems to me impossible that anything in this letter containing the misstatement as to the mortgagor's position can operate to raise an implied power of sale. The mortgagor might have been willing and able to redeem if he had known that he could, as a dissentient shareholder, have insisted on being paid out at the then value of the shares. This, in my judgment, brings the case within the principle of the decision in *Pigot v. Cubley* (15 C. B. N. S. 701), in which a misstatement by the pledgee in his claim of the amount due prevented the implied power of sale arising, and made the sale wrongful. This misrepresentation as to the security being forfeited if the shares in the new company were not taken up, and the view of the defendants that they were entitled to treat themselves as unsecured creditors, although they in fact exchanged the shares for shares in the new company, continued until the sale of the new shares in March 1899. Moreover, in the account sent with the demand for payment in the letter of the 3rd Oct. 1898, at a time when 1050 shares were still unsold, but when the 700 shares had been surrendered, there is a misrepresentation in effect by omission, bringing the case within the principle of *Pigot v. Cubley* (*ubi sup.*). The mortgagor was entitled, when he knew of the surrender of the old against the new shares, to elect to take the new shares, but he was not bound so to do; and until he did so the position was that the mortgagee had realised the old shares by surrender and was bound to give credit for the value. I am inclined to think that, even if there had been such notice and default as to raise an implied power of sale prior to the taking up of

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the new shares by the mortgagees in September, the power of sale would not have continued and extended to the new shares which the mortgagor had no opportunity of redeeming; but this is unimportant, as I am clearly of opinion that there never was such notice and default as to raise an implied power of sale; and that no notice is material prior to the date of the purchase of the last 300 of the 700 shares. It follows that, in my opinion, the sale of the 1050 shares substituted as security for the 700 was wrongful, and that the plaintiff is entitled to damages; but I think that those damages are limited to the price realised by the shares less the amount due to the defendants for principal, interest, and proper charges; but as the 55l. brought into court was not sufficient to offset the plaintiff's claim, I think that the plaintiff is entitled to judgment, with costs. The order of Farwell, J. as to costs is based on the assumption that the defendants were entitled to sell. Perhaps I ought to add that the reason why I think, notwithstanding the decision of Wills, J. in *Michael v. Hart and Co.* (*ubi sup.*), that the damages in this case must be limited to the value of the shares at the date of the wrongful sale, and do not extend to the highest value between the wrongful sale and the trial, is that the circumstances of this case do not bring it within *Michael v. Hart and Co.*, assuming that decision to be right. In the present case the evidence shows that the plaintiff never was in a position to redeem the shares until the sale; and it is the merest speculation to assume that the plaintiff would have kept the shares till May (the time of the highest price) and then sold out, especially as the mortgagees could by notice have compelled him to redeem or have the shares sold. As both my learned brethren have arrived at a different conclusion from myself, the appeal must be dismissed with costs.

STIRLING, L.J.—This case was decided in the court of first instance, and has been argued in this court on the basis that the relation between the plaintiff and the defendants was that of mortgagor and mortgagee; and I think that it must now be dealt with on that footing. I agree with Farwell, J. in thinking that the statement of the law at p. 276 of *Robbins on Mortgages* is correct. The passage is as follows: "If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock and repay himself principal and interest, without any authority from the mortgagor and without commencing an action of foreclosure." This, however, leaves open the question, What are the rights of the mortgagee where no day has been appointed for payment? And I have nowhere found any authoritative statement of the law on this head. Some light may be derived from what has been said by learned judges as to the rights of a pawnee or pledgee of chattels in like circumstances. Thus Bowen, L.J. says in *Ex parte Hubbard* (17 Q. B. Div. 698): "There is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money either at the time originally appointed or after notice by the pledgee." In *Re Morritt Cotton*, L.J. says (56 L. T. Rep. 44; 18 Q. B. Div. 232): "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in

possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale." He afterwards says, with reference to the position of a mortgagor of personal chattels: "Where there is no express power of sale given by the mortgage, he has, after default in payment, and after he has given the mortgagor a reasonable time to pay the money due, a power to sell and give a good title to the purchaser, though, of course, the mortgagor has, at any time before sale, a right, on payment of the money due, including expenses, to prevent the sale and redeem the chattels." According to those authorities it would seem to me that where no time for payment has been originally fixed, then, before the power of sale can be exercised, notice is to be given to the mortgagor, and default must be made by him in payment after such notice. What this notice is to contain is nowhere defined; but it must, of course, be a notice which is in all respects reasonable, regard being had to the circumstances of the case. A notice demanding payment of an excessive sum has been held to be bad: (*Pigot v. Cubley, ubi sup.*). The notice must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage; and I think it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that if he fail to avail himself of that opportunity the mortgagee will be in a position to put in force his rights. The transaction between the plaintiff and the defendants commenced with a purchase of 400 shares on the 29th July 1897. The plaintiff remitted to the defendants a part only of the purchase money, and the shares were transferred to and registered in the names of two of the defendants. On the 31st Aug. 1897 the defendants wrote to the plaintiff a letter containing the following passage: [His Lordship then read it, and continued:] By a letter dated the 12th Oct. 1897 the plaintiff acknowledged the receipt of this letter of the 31st Aug. and excused himself for not having sent money to the defendants; but he raised no objection to the exercise of the right claimed by them. I think that he thereby gave his consent to the defendants' continuing to hold the shares on the terms stated in that letter, and that, on nonpayment by him on the 15th Sept. 1897 of the amount then due to the defendants, the defendants became entitled to sell those 400 shares. Subsequently to the last-mentioned date, further purchases of shares, amounting to 300 in all, were made by the defendants on behalf of the plaintiff, who again remitted to them part only of the purchase money; and the shares were transferred and registered in the same way as the original 400. The last of these purchases was made on the 11th Nov. 1897. All the unpaid purchase money remained due on the 31st May 1898, on which day the defendants wrote to the plaintiff a letter in which they expressed their desire that he would not further delay in fulfilling his promise to liquidate his indebtedness to the defendants, which they stated amounted at the end of March to 577l. 10s. 8d., and carried an accruing 6 per cent. interest. They informed him that the shares were then only worth a doubtful 10s. per share.

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On the 7th June the plaintiff replied to the effect that he had not received some money due to him in London, and this was the cause of the delay, but he expected to receive it in the course of the month and then he would settle with them. Shortly after this time a scheme of reconstruction of the company under sect. 161 of the Companies Act 1862 was resolved on. Under this each assenting shareholder was to receive in exchange for every two 1l. shares held by him three shares in a new company of 1l., but with only 17s. paid up; and the 9th Sept. was fixed as the last day for assents by shareholders. Correspondence took place between the defendants and the plaintiff with reference to this scheme in June and July; but I pass by this and come to an important letter by the defendants to the plaintiff, dated the 22nd Aug. 1898. [His Lordship then read that letter, and proceeded:] I think that, when fairly construed, this letter amounts to notice to the plaintiff that unless he should by the 9th Sept. remit to the defendants both the amount of his indebtedness to them in respect of the shares and also the amount which would become payable on the new shares, the defendants would deem themselves at liberty to enforce payment of the debt. On the 3rd Sept. the plaintiff's clerk wrote to the effect that the plaintiff was unable to remit any money, asked the defendants to regard his interests respecting the shares, and expressed the hope that they would obtain at least the sum they had paid. On the 9th Sept. the defendants replied to this letter, and said that unless they received a remittance in response to a telegram sent to the plaintiff ("must have cash remittance") they must reluctantly take steps to recover their debt. This remittance was stated to be of the moneys due to the defendants, with a further sum to cover the amount payable on claiming and taking up the shares. On the same day notice was given that the time for assenting to the reconstruction scheme was extended to the 23rd Sept. On the 15th Sept. the defendants wrote to the plaintiff informing him of this extension, and said: "We would impress on you that if you fail to remit you will lose all interest in the shares, and we must proceed against you to recover the sums we have paid on your account." On the 19th Sept. the plaintiff wrote to the effect that it was quite impossible for him to remit as desired by the defendants, and there, so far as the plaintiff is concerned, the correspondence ceased until July 1899, though letters demanding payment were sent by the defendants on the 3rd Oct. and the 15th Nov. 1898. We were invited by the learned counsel for the defendants to hold that the letter of the 22nd Aug. 1898 (if no other) was such a notice as entitled them to sell the shares, and I have come to the conclusion that it was. It fixes a day for payment—viz., the 9th Sept. 1898. The period between the date of the letter and the day fixed for payment is two days longer than the period fixed by the letter of the 31st Aug. 1897, which was assented to by the plaintiff, and was, I think, perfectly reasonable, both in itself and also when regard is had to the preceding correspondence. It also clearly intimates to the plaintiff that if he fails to comply with the terms of it the defendants will proceed to enforce their rights. It is said that this letter contains such misrepresentations as to invalidate it as a notice.

These are, first, that the defendants speak of the shares as liable to forfeiture in the event of the plaintiff not assenting to the scheme, and, secondly, that they describe themselves as unprotected by any security. Literally, no doubt, these statements are incorrect. If the plaintiff did not assent to the scheme, he would have been entitled to receive the value of his shares, which was ascertained to be a little over 1s. per share. The defendants had a security, and if they had sold the old shares in the market they would have obtained in the market about the same sum per share. Although in these respects the letter is not strictly accurate, I think that the statements contained in it are correct, and that it was not invalidated as a notice by any inaccuracies in it, and it was not misleading. The letters of the plaintiff show that he was impecunious, and the sum of 30l. would not have enabled him to pay a debt of over 500l. The subsequent correspondence extended the time for payment to the 24th Sept., and it does not seem to me that the subsequent letters of the 3rd Oct. and the 15th Nov., written by the defendants, deprived them of any right which they had thus acquired. I say this because, as I understand, the learned judge who heard the case and saw the witnesses has found as a fact that the defendants, although they made a serious and regrettable mistake as to their legal position, nevertheless acted in good faith, believing themselves to be owners of the shares substituted for those originally bought. In my judgment the defendants had, under the letter of the 22nd Aug. 1898, power to sell all the 700 shares at any time after the 24th Sept. 1898, and also, as regards the first 400 shares, the power derived from the letter of the 31st Aug. 1897. Both these powers were available over the new shares substituted for them respectively. I do not think that the fact found by Farwell, J. that the defendants sold *bonâ fide*, believing themselves to be absolute owners, precludes them from defending themselves on the ground of a power of sale which they were entitled to exercise; and I think that *Henderson v. Astwood (ubi sup.)* is an authority in support of that view. In my opinion, the judgment of Farwell, J. was right, and the appeal ought to be dismissed.

COZENS-HARDY, L.J.—The difference of opinion between my two colleagues has made me approach this case with anxiety; but after mature consideration, I think the judgment of Farwell, J. was correct and ought to be affirmed. The plaintiff alleges in his statement of claim that 700 shares, which were purchased for the plaintiff by the defendants acting as his brokers, were, in accordance with a verbal arrangement between the plaintiff and the defendants, transferred into the names of two members of the defendants' firm "by way of mortgage to secure the sum so due from the plaintiff." This allegation was not admitted by the statement of defence, but it was admitted before Farwell, J., and the argument before us has proceeded on that footing. Assuming the true relation between the parties to be that of mortgagor and mortgagees of shares, I think it is settled law (*Tucker v. Wilson, ubi sup.*) that the mortgagees have a power of sale, provided that a reasonable time has elapsed after notice requiring payment. The notice need not state that the mortgagees will sell; it is

sufficient that the notice requires payment of the mortgage money. On this point sect. 20 of the Conveyancing Act 1881 may be referred to. It clearly expresses that which is implied when judges speak of the necessity of reasonable notice, without saying what the notice should comprise. Now, in the present case I think the letters written by the defendants of the 6th April, the 31st May, the 13th June, the 22nd Aug., and the 9th and the 15th Sept. 1898 were, both separately and collectively, good notices requiring payment of the mortgage debt. I do not rely upon the letter of the 31st Aug. 1897, because at that date only 400 shares had been purchased; and the letter could only have relation to those 400 shares. No time being originally fixed for payment of the mortgage debt, it was payable on demand, and each and all of the letters I have referred to must be regarded as a demand for payment. It is true that in *Tucker v. Wilson* (*ubi sup.*) there was a definite time fixed originally for payment; but, in my opinion, that was not essential to the decision. The position of a mortgagee is at least as good as, and I think in some respects better than, the position of a pawnee. In *Re Richardson; Shillito v. Hobson* (53 L. T. Rep. 746; 30 Ch. Div. 396), Fry, L.J. states the law as follows: "The pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed, if there be a time fixed, or in default of payment after reasonable notice, if no time be fixed." And in *Ex parte Hubbard; Re Hardwick* (17 Q. B. Div. 698) Bowen, L.J. uses similar language: "In all such cases there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed or after notice by the pledgee." I may observe that the letters to which I have referred, with one exception, do not contain any statement, accurate or inaccurate, as to the amount due; but, although a mistake as to the amount due may destroy the effect of the notice as between pledgor and pledgee (*Pigot v. Cubley, ubi sup.*), I think that is not the law as between mortgagor and mortgagee. In order to restrain a mortgagee from selling in the absence of fraud, it is not sufficient to contest the amount due on the mortgage. The mortgagor must pay into court, or tender to the mortgagee, the amount claimed to be due. Having regard to the nature of the property, a fortnight, or at the outside a month, would in the present case be a reasonable time. If, therefore, the defendants had sold the 700 shares in Feb. and March 1899 I should have felt no difficulty in this case. But some difficulty is occasioned by the fact that the 700 shares have ceased to exist, and that under a so-called reconstruction scheme the defendants applied for and obtained an allotment of 1050 shares in a new company in respect of these 700 shares, and that they were foolish enough to fancy that they could claim the benefit of those shares as their own property not subject to any rights of the plaintiff, and that they sold those new shares in Feb. and March 1899, not as mortgagees, but as absolute owners. Now, it is clear that those 1050 new shares were as much subject to the mortgage as the original 700 shares. It is precisely similar to the case of a renewed lease granted to the mortgagee. This is the plaintiff's allegation. It follows that the substi-

tuted property is subject to the same power of sale as the old property was subject to. Nor can I see that it makes any difference that the defendants sold under the belief that they were no longer mortgagees. Farwell, J. has found that they were not fraudulent; and this being so, if authority is wanted, I think the decision in the Privy Council in *Henderson v. Ashwood* (*ubi sup.*) suffices to show that the sales in Feb. and March 1899 may be supported as sales under their power as mortgagees. I cannot help expressing my regret at the conclusion at which I have arrived, because I am convinced that in fact the relation between the parties was not that of mortgagor and mortgagee. The plaintiff was in Spain, and the defendants were in London. The verbal arrangement pleaded is a mere fiction. The relation between the parties was simply that of client and brokers; and if the plaintiff had sued the defendants on that footing, as at present advised, I think he might have recovered damages for wrongful conversion. The rights of a broker, in respect of a broker's lien, or under the rules of the Stock Exchange, are not the same as the rights of a mortgagee under an express contract of mortgage. In the view which I take it is unnecessary to consider what would have been the proper measure of damages if the conversion of the shares had been wrongful.

Solicitors: *E. F. Weldon; Morley, Shirreff, and Co.*

Jan. 21, 23, and March 3.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

JACOBS v. MORRIS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Principal and agent—Power of attorney—Construction—General words—Ejusdem generis—Power to borrow—Onus of proof—Excess of authority—Money had and received.

The plaintiff carried on business in Australia under a firm name. The firm had a London branch, and the plaintiff's brother, the defendant L. J., was appointed agent in 1893.

In Jan. 1899 the plaintiff executed a power of attorney whereby he appointed the defendant, L. J., to be his attorney to purchase goods in connection with the business, either for cash or on credit, or partly for cash and partly for credit, with power to modify or vary the terms and conditions of the contracts for purchase or wholly to cancel the same, and "where necessary, in connection with any purchases made on" the plaintiff's "behalf as aforesaid or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper in the premises, and to sign the plaintiff's name or his trading name to any cheques on his banking account in London.

In June 1899, the defendant L. J., purporting to be acting on behalf of the plaintiff's firm, applied to and obtained from the defendants M. and M. a loan of 4000l., ostensibly for the general purposes of the business.

The defendants M. and M. received from the defendant L. J. four bills of exchange to that amount

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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accepted in his own name *per pro.* the plaintiff's firm.

The cheques for the 4000l. were paid into the banking account in London of the plaintiff's firm, and drawn out by the defendant L. J., and applied to his own purposes without the knowledge of the plaintiff.

An action was thereupon brought by the plaintiff against the defendants M. and M. and the defendant L. J. for an injunction to restrain the defendants from negotiating the bills for the 4000l. upon the ground that they were accepted without the plaintiff's authority.

The defendants M. and M. counter-claimed against the plaintiff and the defendant L. J. for payment of the sums due on the bills with interest at 4 per cent., or alternatively for the 4000l. as money had and received by the plaintiff to the use of the defendants M. and M. with like interest.

Held, that the power of attorney did not confer a general power of borrowing; that the plaintiff could not be held liable for the 4000l. as money had and received for the use of the defendants M. and M.; that those defendants must be taken to have had full notice of the terms of the power of attorney, and of the fact that the defendant L. J. had no power to borrow; and that the lending of money to a person who had no power to borrow was the proximate cause of the loss.

Marsh v. Keating (1 Bing. N. C. 198; 2 Cl. & F. 250; 37 E. R. 75) considered and distinguished. *Decision of Farwell, J.* (84 L. T. Rep. 112) affirmed.

THE plaintiff, Louis Philip Jacobs, had carried on the business of a tobacco merchant in Melbourne under the style of Jacobs, Hart, and Co. since 1888, he having in that year become a partner in the business. In 1898 he became the sole proprietor of the business.

The plaintiff's firm had had a London branch since 1882, and for the period of two months in 1888 the plaintiff was the London agent.

In 1893 the plaintiff's brother, the defendant Leslie Rapinsky Jacobs, was appointed as such agent.

The defendants William Morris, Arthur Morris, and Walter Morris were also tobacco merchants and cigar importers, carrying on business in co-partnership in the city of London under the style of Morris and Morris.

On the 24th Jan. 1899 the plaintiff executed a power of attorney whereby he appointed the defendant Leslie Jacobs to be his attorney in and throughout the United States and the continents of America and Europe, and all other parts of the world, other than Australasia and New Zealand, for the plaintiff and in his name, or in his trading name, to purchase and to make and enter into, sign, and execute any contract or agreement with any persons, firm, company, or companies for the purchase of any goods or merchandise in connection with the business carried on by him as aforesaid, or for the purchase or acquisition by him of any patent rights, or of the right to the exclusive or partial use of any patent or invention, or for the purchase or acquisition of the right to act as the sole or partial agent of any person, firm, or company, and to make such purchase or acquisition either for cash or on credit, or partly for cash and partly for credit, as the said attorney should in his discretion think advisable.

Then followed a power to modify or vary the terms and conditions of such contracts or wholly to cancel the same, on such terms as the attorney might deem advisable. After which the power continued as follows:

And for me and on my behalf, and where necessary in connection with any purchases made on my behalf as aforesaid, or in connection with my said business, to make, draw, sign, accept, or indorse any bill or bills of exchange, promissory note or promissory notes, notes of hand or bills of lading, which shall be requisite or proper in the premises, and to sign my name or my said trading name to any cheques or orders for the payment of money on my banking account in London, England.

A banking account had been kept in the name of the plaintiff's firm continuously since 1882 with the London and Westminster Bank. But the defendant Leslie Jacobs had been the only person dealing with that account since he had become London agent of the firm, and had dealt with it partly for his own and partly as for firm transactions.

Ever since 1889 the defendants Morris and Morris had had dealings with the plaintiff's firm, and they were well acquainted with the defendant Leslie Jacobs.

On the 12th June 1899 the defendant Leslie Jacobs, purporting to be acting on behalf of the plaintiff's firm, applied to the defendants Morris and Morris for a loan of 4000l. He represented that he was authorised to borrow on behalf of the plaintiff's firm by the power of attorney, which he produced; that that firm contemplated manufacturing cigarettes; and that he required cash for machinery for this purpose and for buying leaf tobacco.

Upon the faith of these representations, and without looking at the power of attorney, the defendants Morris and Morris agreed to grant the loan, which was to bear interest at 4 per cent., upon the security of bills of exchange accepted by the plaintiff's firm, and upon the condition that the plaintiff's firm should push the sale of a certain brand of cigars, of which the defendants Morris and Morris were the owners, in the colonies.

The defendants Morris and Morris accordingly handed to the defendant Leslie Jacobs two cheques for 2000l., each of which was drawn to the order of Jacobs, Hart, and Co. and received from him four bills of exchange for that amount accepted by him as follows: "Per pro Jacobs, Hart, and Co., Leslie R. Jacobs."

These cheques were paid by the defendant Leslie Jacobs to the credit of the banking account of the plaintiff's firm in London, and the amount was subsequently drawn out by the defendant Leslie Jacobs, and was applied by him to his own purposes.

On the same date the defendant Leslie Jacobs, in further pursuance of the above agreement, purchased from the defendants Morris and Morris cigars to the value of 1070l., in payment of which he gave two bills for 1000l. and 70l., accepted in the same way as the former bills.

On the 13th July 1899 the defendants Morris and Morris repurchased these cigars from the defendant Leslie Jacobs, purporting to act as agent for the plaintiff's firm, for 874l. 16s., and gave bills for that amount, which were immediately discounted. This money also was applied

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by the defendant Leslie Jacobs to his own purposes.

For the purpose of putting the defendant Leslie Jacobs as the London agent in funds to pay for goods purchased in London on account of the plaintiff's firm, an arrangement was come to between the plaintiff's firm and their Australian bankers, who had a branch in London, to make advances in the following manner: When the defendant Leslie Jacobs bought goods for the plaintiff's firm he took the invoice and the shipping documents to the London branch of the Australian bank, together with a bill of exchange drawn by him in the name of the plaintiff's firm upon that firm itself.

Upon these documents the London branch handed him a cheque for the net amount of the invoice under a letter of credit given by the Australian bank to the plaintiff's firm, and sent by the plaintiff's firm to the defendant Leslie Jacobs. He then paid the money into the firm's account at the London and Westminster Bank, and paid for the goods by a cheque drawn in favour of the sellers on the same account.

The plaintiff had no knowledge of any borrowing under the power of attorney for the general purposes of the business, and he had no knowledge of the particular transactions in question in this case until after the money had been misappropriated.

In Nov. 1899 the plaintiff commenced this action against the defendants Morris and Morris and the defendant Leslie Jacobs; and by his statement of claim dated the 12th Feb. 1900 he claimed that the defendants Morris and Morris might be restrained by injunction from negotiating, dealing, or parting with the bills of exchange signed in the name of the plaintiff by the defendant Leslie Jacobs; and that the bills should be delivered up on the ground that they were accepted without the plaintiff's authority, and that there was a fraudulent conspiracy between the defendants Morris and Morris and the defendant Leslie Jacobs.

The defendants Morris and Morris counter-claimed (1) against the plaintiff on the bills of exchange for the amounts due thereon with interest at 4 per cent.; and alternatively for the 4000*l.* as money had and received by the plaintiff to the use of the defendants Morris and Morris with interest at 4 per cent. and for the 1070*l.* and the like interest as the price of goods sold and delivered; (2) against the defendant Leslie Jacobs for the 4000*l.* and 1070*l.* and interest and damages.

Evidence having been given in support of the plaintiff's allegation of conspiracy, Farwell, J. held that it was unfounded.

The case raised by the counter-claim was argued before Farwell, J. in Dec. 1900, when his Lordship decided (84 L. T. Rep. 112) that the counter-claim failed on both points. Upon the construction of the power of attorney his Lordship was of opinion that the general when construed with the prior context did not confer on the attorney a general power of borrowing. His Lordship also decided that, inasmuch as the plaintiff did not know, and had no means of knowing, that the 4000*l.* had been paid to the credit of his banking account until after it had been drawn out, the 4000*l.* could not be claimed as money had and received by the plaintiff to the use of Messrs. Morris.

From that decision the defendants Morris and Morris now appealed.

Neville, K.C. (with him *Butcher*, K.C. and *A. L. Morris*) for the appellants.—First, with regard to the construction of the power of attorney, Farwell, J., in deciding against the defendants Morris and Morris, referred to cases in which it was held that general words were not to be construed as enlarging the powers conferred by the instrument; and accordingly his Lordship decided that the power of attorney here did not confer a general power to borrow. But those cases are on a very different footing from the present, and are therefore distinguishable. The cases referred to by the learned judge were

Harper v. Godsell, L. Rep. 5 Q. B. 422;

Attwood v. Munnings, 7 B. & C. 278; 31 R. E. 194.

The power here, it is true, contains no express power to borrow, but it confers an authority upon the attorney, the defendant Leslie Jacobs, to make, draw, sign, accept, or indorse bills of exchange in connection with any purchases made on the plaintiff's behalf or in connection with his business. Those words cover both the bills drawn for 1070*l.* and accepted in payment for the cigars; and also by the words "in connection with my said business"—which give an implied power of borrowing—the transaction by which the 4000*l.* was lent by the defendants Morris and Morris. The words empowering the drawing and accepting of bills of exchange, unless they have no effect, must authorise something more than drawing and accepting bills of exchange in connection with the plaintiff's business, because express power to do this is conferred by the words in the earlier part of the instrument. There the instrument gives the attorney power "to purchase, and to make and enter into, sign, and execute any contract or agreement with any persons, firm, company, or companies for the purchase of any goods or merchandise in connection with the business . . . either for cash or on credit." That part of the instrument implies a power to borrow. A power to manage a business includes a power to raise money by borrowing:

Montaignac v. Shitta, 15 App. Cas. 357, at p. 359.

That authority shows that when once a power to borrow is established, a *bona fide* lender is not concerned to inquire whether the borrower is or is not exceeding his authority. Secondly, even if the plaintiff is not liable under the power of attorney, he is still liable for money had and received. Although the defendant Leslie Jacobs applied the money obtained by him to his own purposes, the money was paid into the banking account of the plaintiff's firm; and money paid into a bank is money had and received to the use of the person to whose account it is so paid:

Moss v. Macferlan, 2 Burr. 1005;

Marsh v. Keating, 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. E. 75.

Upjohn, K.C. and *Johnston Edwards* for the respondent.—First, we say that the plaintiff did not get the money which the defendant Leslie Jacobs obtained from the other defendants; and, secondly, if there was any laches or misconduct which enabled the defendant Leslie Jacobs to commit the fraud in question, that was on the part of the defendants Morris and Morris and not on the part of the plaintiff. They saw the

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power of attorney and could have read it, and had therefore express notice that it did not authorise these transactions. The power of attorney did not authorise borrowing, and a power to borrow cannot be read into it. A power of attorney must be construed strictly, and not by an *ejusdem generis* construction:

Bryant, Powis, and Bryant Limited v. La Banque du Peuple, 68 L. T. Rep. 546; (1893) A. C. 170, at p. 177;

Lindley on the Law of Partnership, 6th edit., p. 166.

The question as to whom a banking account may belong to is to be determined by ascertaining whose signature the bankers will honour, and in the present case that was the signature of the defendant Leslie Jacobs. But, even if this was not so, the plaintiff did not know that the money was in the bank, nor could he have known, as the bankers did not render any statement of accounts to him. We submit, therefore, that an estoppel arises against the defendants Morris and Morris by reason that they had constructive notice when they lent the money to the defendant Leslie Jacobs that he had no authority to borrow on behalf of the plaintiff. It was their conduct in lending the money which enabled the defendant Leslie Jacobs to pass the money through the plaintiff's banking account without his knowledge:

Cleather v. Twisden, 52 L. T. Rep. 330; 28 Ch. Div. 340.

[COZENS-HARDY, L.J. referred to *Reid v. Rigby*, (1894) 2 Q. B. 40, in which his Lordship said the facts in some respects resembled those of the present case.]

Neville, K.C. in reply.—It comes to a question as to which of two innocent parties shall suffer loss through the fraud of another person. The proximate cause of that loss was the power given to the defendant Leslie Jacobs to draw upon the plaintiff's firm. There may have been other causes, but that was the proximate cause. As to the question of the authority under the power of attorney, the argument of the respondent advances the appellants' case rather than his own. The learned judge in the court below decided that there was no power to borrow money. But I submit that the instrument did confer some power to borrow, and that therefore the case comes within the decision in *Montaignac v. Shitta* (*ubi sup.*).

Cur. adv. vult.

March 3.—The following written judgments were delivered:—

WILLIAMS, L.J.—I am of opinion that the judgment of Farwell, J. ought to be affirmed. The first question is as to the construction of the power of attorney. Does it include a power to borrow money? It contains no express power to borrow. [His Lordship read the power as above set forth, and, with reference to the latter clause of it, said:] This latter clause contains no express power to borrow, but it is said that the power to borrow arises by necessary implication from the words "or in connection with my said business," to make, draw, sign, accept, or indorse any bill of exchange, promissory note, &c. It is said that these words, unless they have no effect, must authorise something more than accepting or making bills of exchange in connection with any

purchases, because express power to do this is given just above in the earlier words of this clause. This argument seems to me well founded, but it still remains to consider what is the authority to accept bills or give promissory notes which is given by these words beyond the power to do so in connection with purchases. It is a power to accept bills and make notes in connection with "my said business," that is, the business of a tobacco merchant and manufacturer carried on by the donor of the power under the style of "Jacobs, Hart, and Co.," at Melbourne. Now, in my judgment, this authority cannot extend beyond the powers, express or implied, given to Leslie Jacobs by his appointment contained in the power of attorney. The power of attorney does not contain any express power, except the power to purchase and do certain particularised things in connection with such purchases. In other words, the power of attorney appoints Leslie Jacobs the purchasing agent for the business carried on by Louis Jacobs, and gives him certain particularised powers in connection with purchases, and then goes on to give him this power of accepting bills and making notes in connection with the said business. In my judgment the later words are intended merely to cover such powers beyond the mere power to purchase, which is expressly given, as are necessarily implied by the appointment of Leslie Jacobs as purchasing agent. Let us test it in this way. Suppose the authority, whether given by word of mouth or in writing, had been limited or expressed in some such words as these: "I hereby appoint Leslie Jacobs as the purchasing agent in Europe and America for the business of tobacco merchant and manufacturer which I carry on at Melbourne, in Victoria." Would such an appointment create by necessary implication a power in Leslie Jacobs to borrow money? I think not. The implied powers of an agent appointed by a trader are very different from the implied powers of a partner in a similar business. *Prima facie*, an agent cannot borrow unless he has express authority, as is explained by the judgments in *Hawthorne v. Bourne* (7 M. & W. 595). And the distinction between the case of an agent and the case of a partner is well illustrated by the judgments in *Brown v. Kidger* (3 H. & N. 853). But it may be urged that if power to accept bills and give promissory notes in cases other than purchases does not apply to borrowing, there is nothing else to which it could apply. I cannot agree. I can quite conceive many debts which might arise in the business of the firm by reason of acts clearly falling within the authority of the agent other than purchases. For instance, the agent might incur a debt for costs to a solicitor, or a debt to an accountant in respect of the examination and adjustment of a trading account; or, to take the case which I understand Farwell, J. to put, of an agreed sum payable to the vendor of goods on a contract which the agent has thought it advisable to pay money to be allowed to rescind. In all these cases it seems to me there is money payable which is not in connection with a purchase; and the words "in connection with my said business" seem to give a necessary authority to accept a bill or give a promissory note in such cases; and I therefore cannot agree that there is nothing but "borrowing" which these

words can cover. I think that the power of attorney contains no authority to borrow. I must mention one other argument, which is, as I understand it, this—that the actual practice in the business of this firm shows that the power to borrow is essential to the performance of the duty in England of a purchasing agent acting for an Australian firm, because the business was in fact mainly conducted, if not entirely, by the method of the agent when he bought goods, taking the invoice and the shipping documents to the London branch of the Australian Bank, together with the bill of exchange drawn by him in the name of the firm upon the firm itself; and upon these documents the London branch handed him a cheque for the net amount of the invoice, under a letter of credit given by the Australian Bank to the firm and sent by the firm to Leslie Jacobs; and that Leslie Jacobs then paid the money into the firm's account in the London and Westminster Bank, and paid for the goods by a cheque drawn in favour of the sellers. I cannot see that this practice shows that a general power to borrow was in any way essential to the conduct of the business. All it shows is that the firm had opened a credit with an Australian bank who authorised their London branch to advance to Leslie Jacobs the invoice price of exported goods against the shipping documents. This was an advance made under the special direction of the principal in Australia, who opened the credit to be operated upon against shipping documents of goods exported to the firm. This practice seems to me to be negative rather than to affirm a general power to borrow for the purposes of the business. If Leslie Jacobs had no right to borrow money on behalf of Louis Jacobs, this disposes of the counter-claim so far as it relates to the bills of exchange given in consideration of the loan, but it still leaves the claim, as money had and received to the use of Messrs. Morris, for the 4000*l.* obtained by the cheques of Messrs. Morris which were paid into the account of Louis Jacobs at the London and Westminster Bank. Here again, I agree with the conclusion at which Farwell, J. has arrived. I agree that Messrs. Morris cannot recover the 4000*l.* as “money had and received” by Louis Jacobs; but I do not base my conclusion, as Farwell, J. seems to do, on the ignorance or want of means of knowledge of Louis Jacobs, while the 4000*l.* remained to his account at the London and Westminster Bank, of the fact that it had been paid in to his credit. I prefer to base my decision on the estoppel arising against Messrs. Morris by reason that they had constructive notice when they lent the money, that Leslie Jacobs had no authority to borrow on behalf of Louis Jacobs, and that it was their conduct in lending the money which enabled Leslie Jacobs to pass the 4000*l.* through Louis Jacobs's account without his knowledge. I am not sure that in *Marsh v. Keating* (1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75) either the House of Lords or the judges whose opinion was taken meant to decide either that ignorance and want of means of knowledge will exonerate a person through whose account a sum of money has passed from responsibility, or that knowledge of the fact is essential to liability. Nothing more seems to me to have been decided than that there the defendants could not rely upon ignorance if they had

the means of knowledge. Park, J. in delivering the opinion of the judges, says: “If they had not knowledge they have all the means of knowledge, and there is no principle of law upon which they can succeed in protecting themselves from liability in a case where, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires”: (see 2 Cl. & F. 289, 290). The opinion does not say that knowledge was necessary. The ignorance in such a case seems evidence of negligence, or of the wide limits of actual authority given to an agent appointed by the principal to deal with strangers. I have no doubt myself that the onus in such a case is on the person through whose account the money passed; but, whatever may have been the intention of the decision in *Marsh v. Keating* (*ubi sup.*), I am not prepared to say that a man who places his account at a bank under the absolute control of an agent, giving him the power to endorse cheques payable to his order, including cheques crossed with the names of his bankers, and to sign cheques drawn on his account, had not the means of knowledge, at all events after a lapse of time, of what was being paid into and paid out of his account by his agent. I see nothing to prevent, in this case, such an audit in London, to say nothing of accounts rendered to Melbourne, as would have rendered these, I must say, “frauds” by Leslie Jacobs impossible. This is sufficient to constitute liability whatever view is taken of the decision in *Marsh v. Keating* (*ubi sup.*), and this liability arises in the present case, if at all, from the fact that Leslie Jacobs was in fact acting under the general authority actually given by Louis Jacobs when he indorsed Morris's cheque and thus authorised its presentation on behalf of Louis Jacobs by the London and Westminster Bank with whose name it was crossed, and the payment of it to the London and Westminster Bank by the bank on whom Morris had drawn the cheque. It seems to me that Louis Jacobs, by so doing, himself lent the proceeds of the cheque to the London and Westminster Bank. It seems to me that that which was done was done under an actual authority; and I doubt whether one need resort to ostensible authority or estoppel to found a charge against Louis Jacobs. But in my judgment Louis Jacobs is not liable for this 4000*l.* in an action “for money had and received” to the use of Messrs. Morris, because they cannot be heard to say that they did not know that Leslie Jacobs was receiving from them their cheque in favour of Louis Jacobs for a purpose foreign to that for which Louis Jacobs had given authority to Leslie Jacobs to indorse and to pay into Louis Jacobs' account. If this is so, the loss of Messrs. Morris' money was not caused by an act of Louis Jacobs, but by their own act. It was their own act which enabled Leslie Jacobs to commit the fraud. The only doubt which I have had has arisen from the fact of the prior loans by Messrs. Morris to Leslie Jacobs on account of Louis Jacobs, which loans (amounting in all, I think, to 3000*l.*) had been discharged in due course by or on account of Louis Jacobs. Messrs. Morris might well say that their course of business, notwithstanding the limits of the power of attorney, held out Leslie Jacobs as an agent of Louis Jacobs with authority to borrow; but I think that the evi-

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dence shows that Messrs. Morris doubted the authority of Leslie Jacobs to borrow, and were not in fact misled by any ostensible authority in him arising out of previous transactions. Of course, if Louis Jacobs had received the benefit of the money by its being used to pay his debts, he would *pro tanto* have adopted the loan and be liable. Farwell, J., however, has found that Louis Jacobs received no benefit from the 4000*l.* and there is a general statement by both Louis and Leslie Jacobs to this effect, and they were not cross-examined. I suppose, therefore, that this must be taken to be the fact, although an examination of the pass-book seems to me to lead to a contrary conclusion.

STIRLING, L.J.—The facts as to the payment of 4000*l.* into the banking account of the plaintiff's firm with the London and Westminster Bank appear to be these: The defendant Leslie Jacobs applied to the defendants Messrs. Morris for a loan of 4000*l.* which he represented that he was authorised to borrow on behalf of the plaintiff to enable him to buy machinery and materials for the purpose of setting up a manufactory of cigarettes in connection with his business. The defendant Arthur Morris, in his evidence in chief, gives the following account of what took place between himself and Leslie Jacobs:—"He (i.e., Leslie Jacobs) said, 'I have full power to borrow.' I said, 'I know you have.' He produced the power of attorney. I said, 'I take your word.' I read a few lines and said, 'I don't understand this sort of thing; you say it is all right. I take your word for it.' He offered to cable to his firm at Melbourne to cable to me that they wanted the loan. I thought it would be offensive to doubt his word and declined." The defendants thereupon, without any further inquiry, agreed to grant the loan on the security of bills accepted by Leslie Jacobs in the name of the plaintiff's firm. Accordingly on the 12th June Leslie Jacobs delivered to the defendants four bills of exchange so accepted, each being for 1000*l.*, and received from them two cheques for 2000*l.* each, dated respectively the 12th June and the 20th June, and made payable to the order of the plaintiff's firm. These cheques Leslie Jacobs (purporting to act under the power of attorney) indorsed and paid into the banking account of the plaintiff's firm with the London and Westminster Bank, and afterwards (but previously to the 1st July following) drew out the whole of these sums by means of cheques purporting to be drawn under the power of attorney and applied the proceeds to his own use. Farwell, J. has found that the plaintiff never was aware of any borrowing by the defendant Leslie Jacobs, and that he never got the benefit of it. If Messrs. Morris had read the power of attorney they would have known that there was no power to borrow, and also that Leslie Jacobs had power to indorse cheques or draw on the banking account, though only in connection with matters of which the alleged purpose was not one. If, then, the question be is it *ex aequo et bono* that the loss occasioned by the fraudulent act of Leslie Jacobs should be borne by the plaintiff, it seems to me that it is not. The primary cause of that loss is not anything done or omitted to be done by the plaintiff, but the neglect of ordinary business precautions by the defendants the Messrs.

Morris. It is said, however, that the case falls within the decision in *Marsh v. Keating* (1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75). Farwell, J. has held that the principle involved in the opinion given by the judges who advised the House of Lords in that case requires that two things should be established—first, that Messrs. Morris' money went into the plaintiff's account; and, secondly, that the plaintiff knew or had the means of knowledge while it remained to the credit of that account that it was the money of the plaintiff. I agree with Farwell, J. in taking this view of *Marsh v. Keating* (*ubi sup.*), and I also agree with him in thinking that the defendants Messrs. Morris have failed in establishing the second point. I think, therefore, that his decision ought to be affirmed.

COZENS-HARDY, L.J.—I agree that Farwell, J.'s judgment ought to be affirmed, and it might be sufficient to say that I accept the reasons assigned by him for his conclusion. But, as I have had the opportunity of reading the judgment of Williams, L.J., I desire to say that I adopt his view as to the construction of the power of attorney, and I hold that it did not confer a general power of borrowing. With respect to the 4000*l.* which was paid into the plaintiff's account at a London bank by the attorney Leslie Jacobs, it seems that it was all drawn out by Leslie Jacobs and applied for his own purposes before the plaintiff, who was resident in Australia, knew or could in the ordinary course of business have known anything about the transaction. And under these circumstances I think the plaintiff cannot be held liable for the sum as money had and received for the use of Morris and Morris. The truth is that Morris and Morris must be taken to have had full notice of the terms of the power of attorney, and that it did not authorise the borrowing of this 4000*l.* They advanced the money on the attorney's statement that the power did authorise it. Their omission to read the power was the proximate cause of the loss. As between them and the plaintiff, I think they are more to blame, and it would not be just to hold the plaintiff liable for an act done by his attorney beyond the scope of his authority in favour of Morris and Morris, who knew the limits of the authority.

Appeal dismissed.

Solicitors for the appellants, *Hollams, Sons, Coward, and Hawksley.*

Solicitors for the respondent, *Robinson and Stannard.*

Wednesday, March 5.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re WRIGHT, CROSSLEY, AND CO. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Costs—Taxation—Order for payment of costs to successful party except so far as increased by certain issues—Affidavit relating both to general and to excepted issues.

The Registrar of Trade Marks having granted an application by W., C., and Co. for the registration of their trade mark, an appeal was brought by the R. Company, which was allowed by Byrne, J.: (83 L. T. Rep. 150; (1900) 2 Ch. 218). His

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Lordship gave the costs of the appeal to the *R. Company* except so far as they had been increased by certain issues, the costs of which were to be paid to *W., C., and Co.* Upon taxation of the costs, the taxing master disallowed the costs of a witness who had filed an affidavit upon which he had been cross-examined. The *R. Company* objected (*inter alia*) to the disallowance of these costs on the ground that the affidavit did not relate solely to the excepted issues. In his answer to objections, the taxing master overruled the objections.

The *R. Company* took out a summons to review taxation. *Byrne, J.* affirmed the decision of the taxing master upon the ground that the evidence in question was unnecessary in any view of the case. The *R. Company* appealed upon the ground that this evidence did not relate solely to the excepted issues; and that consequently the whole costs of the witness went to the appellants, the successful parties, on the principle of *Brown v. Houston* (85 L. T. Rep. 160; (1901) 2 K. B. 855.)

Held, that the decision of the taxing master was perfectly right; and that the case of *Brown v. Houston* (*ubi sup.*) did not apply, because that was a common law action and the order in no way separated the issues, whereas in the present case the learned judge had distinctly separated the issues.

Decision of *Byrne, J.* affirmed.

By an order of *Byrne, J.*, dated the 24th May 1900, an appeal by the Royal Baking Powder Company of New York from an order of the Registrar of Trade Marks allowing the registration of a trade mark by *Wright, Crossley, and Co.* was allowed and the registration of the trade mark was refused: (83 L. T. Rep. 150; (1900) 2 Ch. 218).

The order contained a direction as to the taxation of costs, and *Wright, Crossley, and Co.* were ordered to pay to the Royal Baking Powder Company all their costs except so far as such costs had been increased by the issues of fact found against the Royal Baking Powder Company—namely the issues of user or non-user of the trade mark before 1875 and the abandonment of the trade mark subsequently. The Royal Baking Powder Company were ordered to pay to *Wright, Crossley, and Co.* their costs so far only as they were increased by those particular issues. Then followed the usual direction as to the set-off of costs.

Upon the taxation of the costs, the taxing master disallowed the costs of a witness named *John Augustine Smith*, who had been brought over from America to be cross-examined at the suggestion of *Wright, Crossley, and Co.*

Smith had made in the first place a declaration, and afterwards, in accordance with the practice, he had made a short affidavit verifying that declaration.

The Royal Baking Powder Company objected (*inter alia*) to the disallowance of those costs on the ground that the affidavit did not relate solely to the excepted issues.

In his answers to objections, the taxing master said that the form of order in this case was perfectly clear, and that its meaning was quite understood by the taxing masters; that he had to give the applicants the general costs of the

application, excluding therefrom costs solely attributable to the issues on which the applicants had failed, and to give to the respondents only such part of their costs as was solely attributable to those issues (see *Jenkins v. Jackson*, 63 L. T. Rep. 487; (1891) 1 Ch. 89), and that he had taxed upon that principle.

After referring to the nature of the objections, which, he said, with one exception, related to the manner in which he had exercised his discretion, and after observing that he had reconsidered the taxation in the light of the objections, the taxing master proceeded as follows:

"The main controversy before me was as to how much of the evidence went to the applicants and the converse question of how much of it was attributable to the issues on which the respondents succeeded. I do not think that the disallowance to one of the parties of the evidence of any particular witness can be usefully considered without at the same time having regard to what evidence is allowed to that party and to the taxation as a whole. I found it necessary to keep constantly in mind the whole scope of the evidence and the real necessities of the applicants and on the respondents in their respective cases. I was, in fact, dealing concurrently with two taxations. For instance, say I disallow to the applicants the costs of a witness whose evidence looked at alone may have a sentence or two which might go to more than the issues upon which the applicants failed, but then I have already allowed other witnesses to the applicants whose evidence, in my judgment, was sufficient for the applicants' case—that is, the case on which they succeed—and, if the only issues had been those on which the applicants succeed, I should, under Order LXV., r. 27, reg. 29, have disallowed on any party and party taxation the evidence now disallowed to the applicants on the ground that it was not really necessary for their case, and so comes within the rule. The applicants in their objections rather lose sight of the fact that the taxing master is on this taxation, as on all others, to apply the general rules and practice of taxation."

The taxing master accordingly overruled the objections.

The Royal Baking Powder Company took out a summons to review the taxation.

The summons came on to be heard before *Byrne, J.*, and on the 2nd Dec. 1901 his Lordship delivered judgment as follows:—

BYRNE, J.—This was a summons for the review of taxation. I delayed giving judgment in order that I might have an opportunity of seeing the taxing master. I am satisfied—indeed, I was satisfied before—that he thoroughly understood the order and the effect of the order, and that he has proceeded to tax on the right principle. Practically, the points raised are these: First of all, with reference to the evidence of a Mr. *John Augustine Smith*, an American gentleman. The evidence of this witness was not necessary from any point of view. There was sufficient on the documents and admissions by the respondents, and the other evidence, to enable the points upon which he was put forward to be determined. The expense of a New York witness for the purpose was quite unnecessary. I am informed by the taxing master that he did not

allow the costs of certain witnesses to show the volume of trade. That being the case, the matter becomes a matter of discretion on his part. In the case of this particular witness I am satisfied that he was not necessary. Now, with reference to trade witnesses. So far as the evidence went to anything other than the issues decided against the applicants, sufficient evidence, in the discretion of the master, was allowed. And, in speaking of the discretion of the master in this special case, I may mention that as a matter of fact I am informed by him that he took the taxation for a recently appointed master. The recently appointed master sat with him, and, although he did not sit to hear the objections, he heard the taxation, or the greater part of the taxation, and both taxing masters were agreed about the matter. Now comes a different point, and that is with reference to the attendance of country solicitors. [His Lordship dealt with this point and also with the question as to the employment of three counsel, and continued:] I think that that disposes of all the points argued before me; and the summons must therefore be dismissed with costs.

From that decision the Royal Baking Powder Company by leave now appealed.

Samuel Dickinson for the appellants.—Wright, Crossley, and Co. desired to have Mr. John Augustine Smith cross-examined. They, for some reason or other, preferred to have him here—from motives of economy it may be—instead of going across to New York to cross-examine him. The whole of his costs—amounting to the sum of 248*l.*—consisting of the costs of his declaration and affidavit, the costs of his coming to this country, and the costs of his attendance in court, have been disallowed by the taxing master. The witness was brought here to prove some matters other than those that related to the excepted issues, and that is the ground on which I rest this appeal. I could not have denied that if his evidence had been confined to the two excepted issues those costs would have been properly disallowed by the taxing master. But the declaration and the affidavit do not relate to the excepted issues solely. As the Royal Baking Powder Company had only to pay the costs so far exclusively as they related to the excepted issues and had the costs of the rest of the action, they are entitled, as I submit, to be allowed the costs of the whole of the affidavit of Mr. Smith. If any part of that affidavit related to matters other than the excepted issues, the appellants are entitled to the costs of the whole affidavit because there can be no splitting; that is not the practice. There is no splitting or apportionment of costs in such a case. [COZENS-HARDY, L.J.—No splitting of costs, you say. Speaking for myself, I have made some wrong orders if that is the right view.] There is a decision in which two of your Lordships took part where that rule was laid down:

Brown v. Houston, 85 L. T. Rep. 160; (1901) 2 K. B. 855.

[STIRLING, L.J.—You say that if an affidavit contains thirty paragraphs, of which twenty-nine relate to the excepted issues, but one relates to one which is not excepted, you get the costs of the whole affidavit?] Yes, that is my contention.

[STIRLING, L.J.—Then I think it high time that that practice was altered, if it exists.] The judg-

ment in *Brown v. Houston* (*ubi sup.*) was given by the Master of the Rolls (Smith) and the Lords Justices concurred. Ever since 1856 it has been settled law that the evidence of a witness on two issues must be borne by the unsuccessful party, although one only of the issues was decided against him and he won on the other. In *Brown v. Houston* (*ubi sup.*) the Court of Appeal saw no reason to depart from that rule, for it was one based on utility. It would be impossible to assess the proportion of expenses of the witness each party was to bear, and the decision in *Brown v. Houston* (*ubi sup.*) went upon that ground.

Neville, K.C. (with him *Sebastian*) for the respondents.

WILLIAMS, L.J.—This appeal must fail. In the course of the argument we have really disposed of all the matters except one, and it is unnecessary for us to repeat what has already been said. Generally, one may say as to these matters that they were matters of discretion, and the master exercised his discretion, and the learned judge in the court below who tried the case approved of that exercise. But with regard to the witness Mr. John Augustine Smith and the declaration made by him, I will say something more specific. It has already been pointed out by Cozens-Hardy, L.J. that taking the two issues which Mr. Dickinson himself says—and in fact everybody says—were the two issues in the trial, they were issues upon which his clients failed. One of those issues was as to the user of this trade mark before 1875. When it was alleged that this trade mark was used before 1875 it was attempted to answer that allegation by saying: "It is impossible that Wright, Crossley, and Co. could have used the trade mark before 1875, for it was essential to that user that the trade mark should be affixed upon the goods; and in point of fact they had no sale of the goods in question whatsoever before 1875, and therefore they could not have used this trade mark before that date." That is what this declaration of Mr. Smith's goes to, and under those circumstances it seems to me perfectly clear that the decision of the taxing master was right. I wish to say, however, that I do not assent to that part of the answers of the taxing master in which he suggests a set-off of this nature. He says in his answers to objections: "If it is wrong, I have done it on both sides." I do not think a taxing master on taxation can say that. I want to add one word about the case that Mr. Dickinson called attention to of *Brown v. Houston* (85 L. T. Rep. 160; (1901) 2 K. B. 855). With regard to that case, it has no application at all to the present case. In that case there was merely a verdict and judgment, and the order in no way separated the issues; whereas in the present case the learned judge distinctly separates the issues. Speaking for myself, I still think, as I thought when the case of *Brown v. Houston* (*ubi sup.*) was decided, that the common-law rule works injustice. It relates to the evidence of witnesses and to not splitting the evidence in a case where the successful litigant has called a witness who gave next to no evidence upon the point that he has succeeded on, and the bulk of his evidence upon the points upon which he has failed. But it is an injustice that can always be corrected by the judge at the trial making a special order dealing with the costs of the issues and the evidence of

the witnesses. This appeal will therefore be dismissed with costs.

STIELING, L.J.—I entirely agree. I particularly agree with reference to the observations of the Lord Justice in reference to the case of *Brown v. Houston* (*ubi sup.*). Even if there was no such direction in the present order, I should be very sorry to say that the rule which is found applicable in common-law actions where a witness is called and examined *voir dire* is to be applied to an affidavit the costs of which are allowed at so much a folio.

COZENS-HARDY, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the appellants, *Janson, Cobb, Pearson, and Co.*

Solicitors for the respondents, *Field, Roscoe, and Co., agents for Batesons, Warr, and Wimsurst, Liverpool.*

Jan. 29 and Feb. 19.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

STEIN AND ANOTHER v. POPE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Lease—Assignment—Assignment for benefit of creditors—Bankruptcy of assignor—Avoidance of assignment—Liability of assignee for rent.

The lessee of the plaintiffs of a house made an assignment to the defendant of the lease, with her other property, in trust for the benefit of her creditors generally. Rent became due under the lease, and this action was brought to recover that rent. Before the action came to trial the lessee was adjudged bankrupt in respect of the act of bankruptcy committed by making the assignment for the benefit of creditors, and the trustee in bankruptcy disclaimed the lease.

Held (affirming the judgment of Darling, J.), that the defendant was liable for the rent which accrued due before the bankruptcy of the lessee.

THIS was an appeal by the defendant from the judgment of Darling, J., at the trial of the action without a jury.

The plaintiffs brought this action to recover from the defendant the sum of 32l. 10s. for one quarter's rent of two houses.

The two houses had been demised by deed by the plaintiffs to Mrs. Bates.

On the 31st May 1900 Mrs. Bates executed a deed of assignment of her property including her leasehold interest in the two houses, to the defendant as a trustee for the benefit of her creditors generally.

On the 3rd Aug. 1900 the plaintiffs obtained judgment against the defendant for the rent of the two houses due under the lease upon the previous 24th June.

On the 27th Aug. 1900 a petition in bankruptcy was presented against Mrs. Bates, the act of bankruptcy relied upon being the assignment of the 31st May, and a receiving order was made upon that petition on the 27th Sept.

The present action was commenced on the 1st

Oct. 1900 to recover the rent of the two houses for the quarter ending the 29th Sept.

On the 18th Oct. 1900 Mrs. Bates was adjudged a bankrupt; and on the 26th Oct. 1900 a trustee in bankruptcy was appointed, who shortly afterwards disclaimed the lease of the two houses.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides:

Sect. 4 (1). A debtor commits an act of bankruptcy in each of the following cases: (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

Sect. 20 (1). Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.

Sect. 43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Sect. 44. The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt . . . shall comprise the following particulars: (1) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.

Sect. 54 (1). Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and, immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee. (2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

Sect. 55 (1). Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any sort of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, disclaim the property. (2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

CT. OF APP.]

STEIN AND ANOTHER v. POPE.

[CT. OF APP.]

The action was tried before Darling, J., without a jury, and the learned judge held that the defendant, as assignee, was liable for the rent, and gave judgment in favour of the plaintiffs.

The defendant appealed.

F. Cooper Willis and *Roskill* for the appellants.—The judgment of the learned judge was wrong, for the defendant was not liable to pay the rent due under the lease. By sect. 4 (1) (a) of the Bankruptcy Act 1883, a debtor commits an act of bankruptcy if "he makes a conveyance or assignment of his property for the benefit of his creditors generally"; sect. 43 provides that "the bankruptcy of the debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him"; sect. 44 provides that "the property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy"; and sect. 54 (1) provides that "immediately upon the debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." The effect of those provisions is that the assignment of the lease to the plaintiff was void as an act of bankruptcy, and that the leasehold interest vested in the trustee in bankruptcy as from the commencement of the bankruptcy—that is, from the 31st May 1900. The assignment to the defendant was absolutely wiped out when the assignor was adjudged bankrupt, and the trustee in bankruptcy became the assignee of the lease as from the 31st May. The defendant therefore could not be sued as being the assignee of the lease, the assignee being the trustee in bankruptcy. There could not be two assignees for the same period. Though the trustee could disclaim under sect. 55, yet he was the assignee until disclaimer, and the assignment to the defendant was wiped out for all purposes. The authorities show that the effect of the avoidance of the assignment is to put an end to all liability of the assignee under the lease.

Re Forster; *Ex parte Rawlings*, 58 L. T. Rep. 114; *Carr v. Acraman*, 11 Exch. 566; *Doe d. Lloyd v. Powell*, 5 B. & C. 308; 29 E. R. 253.

The observations of Brett, L.J., in *Titterton v. Cooper* (46 L. T. Rep. 870; 9 Q. B. Div. 473), as to the liability of a trustee in bankruptcy for rent, have nothing to do with the question in this case.

Herbert Reed, K.C. and *C. C. Scott*, for the respondents.—The learned judge at the trial was clearly right in holding that the defendant was liable for the rent which was claimed in this action. At the time when the writ was issued there was an undoubted cause of action for the rent which had then accrued due, for the assignor of the lease had not then been adjudged bankrupt, and the assignment to the defendant was still valid for all purposes. The Bankruptcy Act 1883, by sect. 20 (1) provides that the property of the bankrupt shall vest in the trustee when the debtor is adjudged bankrupt. In this case the adjudication was on the 18th Oct., and this action had been commenced on the 1st Oct. Until the adjudication the leasehold interest was vested in

the defendant, because it did not vest in the trustee in bankruptcy until the 18th Oct.:

Titterton v. Cooper, 46 L. T. Rep. 870; 9 Q. B. Div. 473.

Until the adjudication the leasehold estate must have been vested in someone; it was not vested in the debtor because she had assigned it to the defendant; and by the assignment it was vested in the defendant until it vested in the trustee in bankruptcy. The effect of the adjudication was that the leasehold estate was transferred from the defendant to the trustee, but the defendant remained the assignee of the term until it vested in the trustee. The only effect of the relation back of the title of the trustee is that it makes certain property of the debtor divisible among the creditors which would not otherwise be so; but the trustee has no title until the time appointed by the Act for the vesting of the property in him. An assignment of this kind, which is an act of bankruptcy, is only avoided for the purposes of the bankruptcy and for no other purpose. There are no provisions in the Bankruptcy Act which expressly make the assignment void; the transaction is only voidable at the option of the trustee in bankruptcy; if the trustee disclaims the lease, then, by the operation of sect. 55 (2), the result is the same as if the property never had vested in the trustee at all; and the property therefore was not taken from the assignee at all. The trustee in bankruptcy must approve or reprobate a transaction of this kind and make his election to treat the assignee as being assignee or as being a trespasser:

Ex parte Vaughan; *Re Riddeough*, 14 Q. B. Div. 25.

The parties to the assignment cannot say that it was void—only the trustee in bankruptcy can do so; until the trustee does so it remains valid and effective between the parties:

Shears v. Goddard, 74 L. T. Rep. 128; (1896) 1 Q. B. 406;

Charman v. Charman, 14 Ves. 580.

By disclaiming the lease the trustee in bankruptcy elected not to avoid this assignment, and therefore the defendant remained the assignee just as if the assignor never had been adjudged bankrupt.

F. Cooper Willis in reply.—The case of *Doe d. Lloyd v. Powell* (5 B. & C. 308; 29 E. R. 253) absolutely decides this question in favour of the appellant. It was there held that an assignment by a lessee of all his property to a trustee for the benefit of the creditors was an act of bankruptcy and void, and therefore did not operate as a valid assignment of the lessee's interest in the lease so as to cause a forfeiture for breach of covenant not to assign. That decision shows that the assignment in the present case was void as an act of bankruptcy, and therefore did not operate as an assignment to the defendant at all.

Cur. adv. vult.

Feb. 19.—ROMER, L.J. read the following judgment:—I do not think it necessary in dealing with this case to consider the question as to the effect of the disclaimer, for it appears to me that the defendant is liable for the rent, whatever the effect of the disclaimer may be. It is not, and could not be, disputed that, although the assignment to the defendant was an act of bankruptcy, that fact did not at the

time the rent accrued due prevent the defendant from being liable for the rent at the time it accrued due. The assignment at that time stood unimpeached, and could not be impeached, as between the assignor and assignee, and the plaintiffs, as lessors, were entitled to enforce payment of the rent as against the defendant. If at the time the action was brought it had come on at once for trial, the defendant would have had no defence, and judgment must have been given for the plaintiffs. This is not disputed on behalf of the defendant, but it is said for him that, owing to the circumstance that the action came on for trial subsequently to the bankruptcy, that lucky fact freed him from his existing liability, because the assignment had by the bankruptcy become void as against the trustee in bankruptcy. In my judgment, the bankruptcy had not the effect of releasing the existing liability for the rent as between the defendant and the plaintiffs, and the delay in the action's coming on for trial had not the effect contended for on behalf of the defendant. The bankruptcy, following on the act of bankruptcy, had, no doubt, the effect of making the assignment invalid as against the trustee and the creditors and for all purposes connected with the administration of the lessee's estate in bankruptcy. And in any question as between the lessors and the trustee in bankruptcy the former could not have insisted on the validity of the assignment: (see *Doe d. Lloyd v. Powell*, 5 B. & C. 308; 29 R. R. 253, where in a somewhat similar case the lessors were seeking to establish as against the assignees in bankruptcy that the assignment had operated as a forfeiture of the lease). But in the present case it is not in any way necessary, in order to give the fullest effect to the rights of the trustee and creditors in the bankruptcy, to hold that by the bankruptcy the defendant has been released from his liability to the plaintiffs. The bankruptcy provisions, which made the assignment an act of bankruptcy and the assignment invalid in bankruptcy, are not provisions for the benefit of the defendant. As a general rule bankruptcy does not affect the rights and liabilities of persons not parties to the bankruptcy, except so far as may be necessary in the interests of the trustee and creditors and the administration of the bankrupt's estate in bankruptcy. Here it is in nowise necessary in such interests to hold that the bankruptcy has freed the defendant from his liability to the plaintiffs. It would indeed be a strange result if the defendant, who was party to the act of bankruptcy, could avail himself of that fact and of the subsequent bankruptcy in order to free himself from liability to the plaintiffs, who were no parties to the act of bankruptcy. In my opinion the court is not bound to arrive at any such result in this case. If, indeed, the effect of the bankruptcy had been to vest the lease in the trustee in such a way as (apart from the right to disclaim) to make him directly liable as assignee for the rent in question to the plaintiffs, there might be a difficulty in the plaintiffs' way. For it might then be said on behalf of the defendant that there could not at one and the same time be two persons claiming through the lessee directly liable by privity of estate for the rent. But the bankruptcy had no such effect. Even if there had been no disclaimer, the trustee would not have become

liable for any rent which accrued due before his appointment: (see *Titterton v. Cooper*, 48 L. T. Rep. 870; 9 Q. B. Div. 473). It appears to me, therefore, that the defendant has not been released or discharged from his liability by the subsequent bankruptcy. At the time the rent accrued due the defendant was assignee of the lease and bound to pay the rent, and he has not escaped from his liability by his delay in payment. If he had paid the rent when it accrued due, as he ought to have done, without any action brought by the plaintiffs, he could not upon the bankruptcy have demanded repayment on the ground that no rent was due and that he had paid owing to a mistake of fact—namely, the existence of an assignment to him of the leases. To hold the defendant not liable in this case would lead to strange results. By reason of the action of the defendant in taking the assignment of the leases, the plaintiffs would naturally be led to look to him for payment of the rent accruing during the assignment, and might thereby, and by the defendant's delay in payment, have delayed proceedings against the lessee which might have resulted in recovery of the rent from the lessee. And yet the defendant, if he escaped liability, must say that his being party to an act of bankruptcy and his delay in payment have enabled him to throw the loss thereby occasioned on the plaintiffs, who are perfectly innocent parties. And, further, this case could not be distinguished from the case where the bankrupt was not an original lessee, but was herself only an assignee, and in that case after the assignment the lessors could not have sued her, but could only have sued the assignee; or the lessee, who might not have been worth suing. In my judgment, the appeal fails, and should be dismissed.

COLLINS, M.B. read the following judgment:—I agree in the result; but I desire to reserve my opinion as to what the rights would have been between the parties had bankruptcy supervened before any action had been taken by the lessor against the assignee. In other words, whether, apart from the special circumstances in this case, including a judgment recovered upon the footing of an assignment, the lessor could after bankruptcy have asserted that privity of estate had been established between him and the assignee by an assignment which was in itself an act of bankruptcy, and as such void *ab initio*.

MATHEW, L.J.—I agree with the judgment which has been read by Romer, L.J.

Appeal dismissed.

Solicitors for the appellant: *West, King, and Adams.*

Solicitors for the respondents: *Debenham and Walker.*

CH. DIV.] FINCHLEY ELECTRIC LIGHT CO. v. FINCHLEY URBAN DISTRICT COUNCIL. [CH. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 17 and 18.

(Before FARWELL, J.)

FINCHLEY ELECTRIC LIGHT COMPANY v.
FINCHLEY URBAN DISTRICT COUNCIL. (a)

Local government—Streets—Vesting in urban authority—Disturnpiked road—Electric light company—Right to carry wires across such road—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 149—General Turnpike Act 1822 (3 Geo. 4, c. 126), s. 84.

A local authority in an urban district, who were the successors in title of a turnpike trust, had obtained a provisional order from the Board of Trade for lighting the district by electricity. In consequence of delay the plaintiff company was started, which, in order to supply the best part of the district, found it necessary to cross with their wires a street which had formerly been a turnpike road and was now vested in the defendants. The wires were cut by the defendants. In an action for an injunction to restrain the defendants from interfering with such wires:

Held, that what passed to the defendants was so much of the land in question as is required for the purposes of the road, considering the nature of the particular purposes, in a given case. That here, inasmuch as the street was constructed under the General Turnpike Act and passed by purchase to the trustees for the purposes of that Act, the purchase extended usque ad coelum usque ad infernum, and that the defendants, therefore, when they took it over acquired equal rights therein, and that it was now held by them in like manner for the purposes of the street. That the claim therefore failed. But as in an earlier stage of the action, when certain facts now known were not before the court, an interlocutory injunction had been granted, the action would be dismissed without costs.

In this case the plaintiffs were an electric light company which was formed for the purpose of lighting the district of the defendant council.

The defendant council was an urban district council who were the successors of a turnpike trust in the district which had formerly owned the turnpike roads.

By 3 Geo. 4, c. 126, s. 84, these turnpike trusts were authorised to acquire lands by purchase for the purpose of improving the roads, and such lands were conveyed to the trustees in fee simple.

By the Public Health Act 1875, s. 149, where such roads had in the meantime become disturnpiked and had become streets they became vested in the local authority, in this case now represented by the defendant council.

The council had obtained a provisional order for the lighting of the district by electricity, but, as nothing practically had been done under such order for over two years, the plaintiff company was started for the like purpose.

In the course of their undertaking they placed wires across a road in the district which was formerly a turnpike road and had now become a street within the meaning of the above section of the Public Health Act.

The defendants cut the wires mainly, as the evidence showed, because they did not desire an opposition lighting scheme in the district.

The plaintiffs then brought this action to restrain the defendants from interfering with such wires, and on a motion for an injunction therein an interlocutory injunction was granted.

When the pleadings came to be delivered, the defendants set up that as regarded the street in question they were in the circumstances the owners thereof in fee simple, and were therefore justified in removing such wires, whether placed under, on, or above the street, it being a trespass.

At the hearing of the action the defendants relied on this defence, the onus being on them to establish it.

Upjohn, K.C. and Chubb for the defendants.—Under the special circumstances of this case the fee simple of the street is vested in us, and that is a sufficient defence to the action. [FARWELL, J.—When the Legislature gives powers to councils as to highways, I do not think it intends to confer those powers with a view to advance their municipal trading.] There was a conveyance to the turnpike trustees, and the council are their successors in title. They claim the right to refuse consent to the plaintiffs to place their wires across this street because they are a rival trader.

Jenkins, K.C. and Buckmaster for the plaintiffs.—The fee simple is not vested in the defendants *usque ad coelum*. Whether that is in the surviving trustee of the turnpike trust, or in the county council under sect. 64 of the Local Government Act of 1888, or in the adjoining owners of land is not necessary to decide. The meaning of the word "street" in the Public Health Act is shown in

Tunbridge Wells (Mayor) v. Baird, 74 L. T. Rep. 385; (1896) A. C. 434;

Rolls v. Vestry of St. George the Martyr, Southwark, 43 L. T. Rep. 148; 14 Ch. Div. 785;

Wandsworth Board of Works v. United Telephone Company, 51 L. T. Rep. 148; 13 Q. B. Div. 904.

"Street" means there so much as enables the defendants to perform their statutory duty as to highways. The earliest case which dealt with the point was

Coverdale v. Charlton, 38 L. T. Rep. 687; 4 Q. B. Div. 104.

The meaning of "vesting" is discussed in the judgment. It is therefore relevant in considering in whom the whole freehold is. *Tunbridge Wells (Mayor) v. Baird* (*ubi sup.*) has really no bearing on the question. As to the council being interested, the words in sect. 64 of the Act of 1888 are "property held for public uses." See also

Sub-sects. 2 and 6 of sect. 11;

Wandsworth Board of Works v. United Telephone Company (*ubi sup.*).

The soil when the turnpike ceased must have gone back to the adjoining owners. Between 1872, when the highway board took over the road, and 1875 the legal estate must have been floating about:

Reg. v. Thomas, 7 E. & B. 399.

FARWELL, J.—This case raises the old vexed question of the meaning of the words "vest" and "street" in the Public Health Act. Now, it is settled law that something passed, and the ques-

(a) Reported by A. W. CHASTER, Esq., Barrister-at-Law.

CH. DIV.] FINCHLEY ELECTRIC LIGHT CO. v. FINCHLEY URBAN DISTRICT COUNCIL. [CH. DIV.]

tion is what the word "street" in the property here in question passed. As a result of the authorities, the true view, I think, is that it means "so much of the land in question as is required for the purposes of the road, considering the nature of the particular purposes, in a given case." That definition, I think, reconciles all the decisions and is consistent with the decisions on which it is founded. Take, for example, the case of *Tunbridge Wells (Mayor) v. Baird (ubi sup.)*, where Lord Halsbury says (L. Rep. at p. 437): "It is intelligible enough that Parliament should have vested the street *quâ* street, and indeed so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street." Later on, at p. 439, he says: "For that purpose it would be intelligible. For any other purpose it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued of not taking private rights without compensation." To the same effect is the judgment of James, L.J. in *Rolls v. Vestry of St. George the Martyr, Southwark (ubi sup.)*: "It seems to me very reasonable then to interpret this enactment in a way which gives everything that is wanted to be given to the public authority for the protection of the public rights without any unnecessary violation of the rights of the landowner, and to say that according to its true construction what is to vest is not those pieces of property which have now got the name and are distinguished by the name of streets, but those things which now or at any time hereafter shall for the time being be streets and highways within the district." Now, the circumstances of this case are unlike any of those which have come before the courts, and give rise no doubt to some little difficulty. In my opinion, the duty of the court is to construe an Act of Parliament reasonably so as to give effect to the provisions, and not to cause a deadlock if it can be avoided. The "street" in question was constructed under the provisions of the Act of 3 Geo. 4, and the portion in question which is crossed by the wires of the plaintiff company passed by a purchase effected on the 7th Nov. 1828 to the trustees under that Act for the purposes of the Act, and it is conveyed to the trustees, their heirs and successors. The fee, therefore, in the entire land was vested in the trustees. Now, that conveyance was taken under the provisions of the General Turnpike Act (3 Geo. 4, c. 126), s. 84, which enacts that "It shall be lawful for the trustees or commissioners of any turnpike road to treat, contract, and agree with the owners of and persons interested in any lands, tenements, hereditaments, and premises, with their appurtenances, which they shall deem necessary to purchase for the purpose of widening, diverting, altering, and improving such road for the purchase thereof, and for the loss or damage such owners or persons may otherwise sustain." The rights the trustees therefore were empowered to purchase were very wide—in fee simple, which is *usque ad celum usque ad infernum*, and these were conveyed to them. Now, it is said that, by virtue of various Acts of Parliament under which the road became disturnpiked in 1872 and became a main road then or shortly afterwards, the result has been according to the

contention of the plaintiffs, although the language there was in accordance with the terms of the Act of Parliament, "acquired for the purposes of a road," and the land was so used, I am to construe the Acts of Parliament so as to vest in the local authority, the present defendants, not the whole of the land acquired or required for that purpose, but only so much as according to the reasoning of the courts in other cases was not acquired at all, but was dedicated to the public by the adjacent owners of the legal estate; in other words, that the portion which above is above the limits required for passengers and below is not required for the purposes of the road is vested in somebody else. It appears to me that when the Act of Parliament says the rights shall vest in the local authority it has said that so much as is required for the purposes of the road shall vest in them, and that it is impossible for the court to say that it is not so acquired or required. Consequently, what must be had regard to is what the courts in the cases which have come before them have said as to what is required for the purposes of the road. But there is something more here, because here the Act of Parliament authorises the acquisition for the purposes of a road. Therefore I am bound to say that it is acquired and required for the purposes of a road. If it were not so, the difficulty arises as to in whom the legal estate is left. It is suggested that, somehow or other, it is in the adjacent owners and has been rededicated. But I am unable to follow that argument. The legal estate was conveyed out and out to the trustees, and the only person who could be so entitled would be the last surviving trustee or his real representative. But supposing it were so, for whose benefit would it be and against whom could he maintain ejectment? After all this lapse of years, the person in possession is the local authority, and the land was conveyed for the purposes of a road, and it was conveyed for such purposes as were necessary to the local authority. The fee, so far as it exists, is in the occupation of the local authority, and to hold that it was in a bare trustee would mean, so far as I can see, that the only conceivable *cestui que trust* was the local authority, and he could not, of course, recover from them. If it is suggested, again, that the fee is in the adjacent owners, I fail to see any resulting use. No attention was called to the language of the General Turnpike Act of George IV., to which I have referred, which reverts the legal estate in the owner from whom it was purchased in case it ceased to be a road. The only other suggestion is that it passed, somehow or other, to the county council under the Act of 1888. It seems to me that I should be wrong if I attempted to follow the reasoning of counsel so as to render an Act a failure or to be absurd. That Act by the 11th section gives the maintenance of roads—that is, main roads—to county councils. Sub-sect. 2 is: "Provided that any urban authority may within twelve months after the appointed day, or in case of a road in the district of such authority becoming a main road at any subsequent date then within twelve months after that date, claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority and thereupon they shall be entitled to retain the same, and for the purpose of the maintenance, repair, improvement, and

enlargement of and other dealing with such road shall have the same powers and be subject to the same duties as if such road were an ordinary road vested in them, and the council shall make to such authority an annual payment towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of such road. (6) A main road and the materials thereof and all drains belonging thereto shall, except where the urban authority retain the powers and duties of maintaining and repairing such road, vest in the county council, and where any sewer or other drain is used for any purpose in connection with the drainage of any main road the county council shall continue to have the right of using such sewer or drain for such purpose. . . . " So far as that is concerned there is no vesting. Sect. 64 provides: "On and after the appointed day all property of the quarter sessions of a county, or held by the clerk of the peace or any justice or justices of a county, or treasurer or commissioners or otherwise, for any public uses and purposes of a county or any division thereof, shall pass to and vest in and be held in trust for the council of the county, subject to all debts and liabilities affecting it, and shall be held by the county council for the same estate, interest, and purposes, and subject to the same covenants, conditions, and restrictions for and subject to which that property is or would have been held if this Act had not passed, so far as those purposes are not modified by this Act." Sect. 68 defines the general purposes. It is contended that under these sections there is no vesting of the road, or so much of the legal estate in the land incorporated in the road as is not used for purposes of passage or repairing or otherwise as ordinary road purposes, under sect. 11 in the urban authority and under sect. 64 in the council. I think that is an extravagant result to arrive at. They must be read together, so that the property was intended to be vested under these sections and the Public Health Act in the urban authority. So far from assisting the plaintiffs' case, I think it assists the defendants'. I think that really exhausts the suggestions made as to any other possible locality to which this legal estate is gone. But I desire to point out that the reasoning on which it has gone, that the Legislature is not presumed to take away without compensation anything more than is absolutely required, is inapplicable here, because it was acquired and paid for for the purposes of the road. I agree that there is not sufficient in the case itself to enable me to give a construction to the section of the Public Health Act as to "street." But I arrive at it in the way I have pointed out as to what the courts have held—viz., as to so much as is required for the purposes of the street. I hold in the present case that the land has been acquired and is required for the purpose of the street. The plaintiffs therefore have no right to take wires across the atmosphere above what belongs to the defendant council. The application for an injunction therefore fails. But in the circumstances, and having regard to the correspondence and to the plaintiffs' rejoinder, and the fact that an injunction was originally obtained against the defendants, I think that justice will be done by saying no costs.

Solicitors: *Benham and Meyer*; *A. M. M. Forbes*.

Thursday, Feb. 20.

(Before FARWELL, J.)

WALES v. CARR. (a)

Mortgage—Redemption—Costs of negotiating the loan, investigating the title, and preparing the mortgage deed.

Where the costs of negotiating the loan, investigating the title, and preparing the mortgage deed have not been deducted, as is usually the case, from the loan, they cannot be charged on redemption against a puisne mortgagee as costs, charges, and expenses properly incurred by virtue of the mortgage.

IN this case certain freeholds had in Jan. 1901 been mortgaged, and on the completion of the mortgage the solicitor's costs of negotiating the loan, investigating the title, and preparing the mortgage deed, amounting to 28l. 8s., had not been, as is usually the case, deducted from the loan. These costs were subsequently paid by the mortgagees.

There was a second mortgage on the property, which was transferred to the plaintiffs in May 1901, and in Sept. 1901 they received notice from the defendants, the first mortgagees, of their intention to exercise their power of sale. Thereupon the plaintiffs claimed to redeem.

The first mortgagees insisted that on redemption these costs were part of their costs, charges, and expenses properly incurred under and by virtue of their mortgage, and that the plaintiffs were bound to pay them as a term of redemption.

The second mortgagees did subsequently redeem, and by arrangement with the first mortgagees paid them these costs under protest.

They then brought this action claiming a declaration that on redemption the defendants were not entitled to charge these costs as part of the costs, charges, and expenses of their mortgage.

S. R. Earle for the plaintiffs.—The question is whether on redemption the costs of negotiating the loan and the mortgage, if not then paid by the mortgagor, can be added by the mortgagee to his costs, charges, and expenses.

Gregg v. Slater, 22 Beav. 314;

Wyatt v. Cook, (1868) W. N. 237;

Cordery on Solicitors, 3rd edit., p. 71.

The mortgagee, as a member of a firm of solicitors, acted for both parties. See

Fisher on Mortgages, 5th edit., p. 918.

On principle, the mortgagee, if he bring an action, is only entitled to the costs thereof (*Bolingbroke v. Hinde*, 53 L. T. Rep. 704; 25 Ch. Div. 795) unless there are special circumstances, as in *National Provincial Bank of England v. Games* (54 L. T. Rep. 690; 31 Ch. Div. 582), where these costs were allowed. The practice in such cases is stated in

Ex parte Firth; *Re Cowburn*, 46 L. T. Rep. 120; 19 Ch. Div. 427.

These costs are payable by the mortgagor, and not by us, under rule 3 of the Solicitors' Remuneration Act 1881.

Cozens-Hardy for the defendant.—*Gregg v. Slater* (*ubi sup*) is distinguishable, the decision there being that a mortgagee was a solicitor and could not claim costs. That case as reported in

(a) Reported by A. W. CHASTER, Esq., Barrister-at-Law.

2 Jur. N. S. 246 and *Wyatt v. Cook* (*ubi sup.*) as reported in 3 L. J. Notes of Cases, pp. 75 and 217, show that they are not applicable here. These costs became due by virtue of the mortgage deed coming into existence, and we are therefore entitled to add them to our security:

Field v. Hopkins, 62 L. T. Rep. 774; 44 Ch. Div. 524;

Ashburner on Mortgages, p. 308;

Robbins on Mortgages, p. 1191.

In *Nicholson v. Jeyes* (22 L. J. 833, Ch.) the general principles are stated applicable to the case:

Ex parte Fewings, 50 L. T. Rep. 109; 25 Ch. Div. 338.

FARWELL, J.—This is an application by the transferees of a second mortgage, and it is in effect to be treated as an application in a redemption action. All outstanding matters between the parties have been settled except a sum of 28*l.* which has been incurred for costs. These costs have been incurred in and about the preparation of the mortgage deed. They are costs which the mortgagee is entitled to recover from the mortgagor at common law if and when he has paid them under an implied contract of indemnity arising out of the relationship between them. I take the law to be as stated by Jessel, M.R. in *Ex parte Firth*; *Re Cowburn* (*ubi sup.*). It is a statement of the common law made in the presence of two common law Lords Justices, who would certainly not have passed it if it had been inaccurate. So far from doing that, they treated it as quite correct. He says: "There is a great distinction between a sum of money being advanced on the terms of the lender paying out of it a debt due by the borrower to a third person, a portion of that sum being handed back again to the lender or handed over by him to another person who is a creditor of the borrower, and a sum of money being retained for that which is not truly a debt until after the transaction itself is completed—that is, a sum of money which consists of the expenses of the transaction itself. When a mortgage is completed, the mortgagor is liable to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagee is primarily liable to his own solicitor for those expenses. The mortgagor is liable to pay over to the mortgagee what he pays to his own solicitor, but there is no debt until the transaction is completed." It is quite plain that there he is using the technical terms of common law—"debt" and "liability"—and it is clear why these matters are arranged, for otherwise the liability to indemnify the mortgagee against the costs he has paid to his own solicitor would exist in the case of every mortgagor after the mortgage had been completed. That is the common-law liability. Now, it is obvious that these costs are in no way included in terms in the mortgage deed itself. That extends to the payment of the principal sum and interest; and costs in the action are given by the court if he sues on the covenant at common law or sues in Chancery for foreclosure. Further than that, there are certain costs, charges and expenses never recovered at common law, but which, in a proper case, the Court of Chancery always gives as a term of redemption. That is to say, the mortgagor's estate having become absolute at law, he is allowed to redeem only on terms.

Now, Mr. Cozens-Hardy has called my attention to the case of *Ex parte Fewings* (*ubi sup.*) There are there two interlocutory observations of Cotton, L.J. which I will read. He says: "Can she maintain an action for them against the mortgagor? That is quite a different thing from recovering them as part of the price of redemption. . . . I do not see how costs incurred by a mortgagee for the protection of the mortgaged property could be the subject of an action of debt against the mortgagor," and in his judgment he says: "Fry, L.J. reminds me that, independently of the 10*l.* for work which is said to have been done at the request of the debtor, there are some items, amounting to 5*l.* 12*s.*, for work done by the directions of Mrs. Nutting, the mortgagee, herself, and it is said that she can claim those items as a debt due from the debtor. In my opinion that is erroneous. No doubt if the debtor in his character of mortgagor claimed to redeem the mortgage, the court would not grant him that which originally was an indulgence, a departure from the strict tenor of his legal right, without imposing upon him the condition of paying the mortgagee not only the debt which he had contracted to pay by his covenant, but any expenses which had been properly incurred by the mortgagee in her position as such. But that is an entirely different thing from saying that an action of debt could be maintained by the mortgagee against the mortgagor for those expenses. It is said that the mortgagee's right in a redemption action is founded on an implied contract by the mortgagor to pay these costs. But I am of opinion there is no such contract; it is as a condition of redemption that a court of equity imposes on the mortgagor the terms of paying all costs properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee." The Lord Justice distinguishes there between costs, charges, and expenses, which are not common-law debts at all, and those costs which are common-law debts. Again, these are costs which are necessarily incident to the creation of the position of mortgagee as such. Now, the proposition is stated by Lord Cottenham in *Dryden v. Frost* (3 My. & Cr. 670), cited in *National Provincial Bank of England v. Games* (*ubi sup.*) thus: "The court in settling the account between a mortgagor and mortgagee will give to the latter all that his contract or the legal or equitable consequences of it entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights whether at law or in equity. . . . In *Detillin v. Gale* (7 Ves. 583) Lord Eldon says that he ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean reasonably with respect to such rights as his mortgage title gives him." These are costs which come out under a uniform inquiry in a foreclosure action as costs, charges, and expenses, and what is due to the mortgagee under and by virtue of his mortgage security. "Under and by virtue" includes costs, charges, and expenses properly incurred. Certainly it does not include a simple contract debt, which is not due "under and by virtue," but by reason of the preparation and execution of the deed of security. They are costs which are due under an implied covenant of indemnity at common law. If it were not so, in effect to tack to the security a simple contract debt would be

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contrary to all principle. The fact is that this question does not arise in practice because in the enormous majority of cases the solicitor always takes care to pay these costs out of the moneys before they are handed over; and it certainly seems remarkable that this case should arise for the first time in 1902. *Gregg v. Slater* (*ubi sup.*) was relied on by Mr. Earle. But that case is not very clear. I have come to the conclusion, looking at the report in the *Jurist*, that really it is no decision on the subject at all. What the judge said there was that these were not mortgagee's costs, and were not recoverable under the security. Perhaps his Lordship meant something by that, but I do not think he did. But the statement in the *Jurist* is: "The claim is now brought on to a hearing by the plaintiff to obtain payment of these costs as part of his proper costs as mortgagee. If the plaintiff be right, there must be the usual decree, notwithstanding payment of principal and interest. But in my opinion these are not mortgagee's costs; they are nothing more than costs incurred by a mortgagor to a firm of solicitors, one of whom happens to be the mortgagee. The combination of characters in the plaintiff does not affect the question. The bill is made out to the mortgagor, and the costs are properly payable by him. The solicitors do not assert any claim against the mortgagee. They were employed by the mortgagor, and he is the party liable, and they have their remedy against him." So that really it is not a decision which affects the question. The case of *Wyatt v. Cook* (*ubi sup.*), as it appears in the *Weekly Notes*, is unintelligible, but as reported in the *Law Journal Notes of Cases* it is quite plain. There a mortgage of the reversion of an expectant heir was set aside on the usual ground. As a consequence there was no question in saying that the mortgagee should pay the costs of making the deed void, and the court gave such costs to the mortgagor. But in the Court of Appeal the mortgagor offered to pay them, and the Lords Justices said, after looking into the matter, that there was no decision one way or the other. It was not relied on by Mr. Cozens-Hardy, and really the most of the cases cited had nothing to do with the point. In *Nicholson v. Jeyes* (*ubi sup.*) there was an administration suit, and an order made directing certain costs to be raised by mortgage of certain property. The order related to costs, charges, and expenses, and no mortgage was executed. A gentleman came in who was willing to lend the money. The solicitors said that in that case they could not get their costs of preparing the deed, and the gentleman was not prepared to advance the money on those terms. The matter was brought before the Lords Justices, who declined to give any direction. Mr. Cozens-Hardy relied on the statement of Knight-Bruce, L.J., which was not addressed to the argument on the greater part of the case at all. He says: "I consider the mortgagee must have all his reasonable costs to which according to the usual course of practice out of court he as mortgagee would be entitled." That is a very curt way of stating it, but it really contains in it the whole truth. Here there was no mortgagor. The court had directed a mortgage of the property they were administering. Therefore the case was not one of implied contract to pay the mortgagee's costs. Accordingly the Lord Justice had in his mind that "if out of court the

mortgagee is able to get his costs, charges, and expenses by way of implied contract, he is entitled to stop them out of the mortgage money." As to the other matter, it might never arise again. Turner, L.J. says: "As the order has directed that the mortgagee shall have his costs, charges, and expenses, the words 'including his reasonable and proper charges of settling the security' may be added." Now, he was a most careful man, and I do not think that if "costs, charges, and expenses" were necessarily sufficient, he would add words which would be unnecessary if the argument were right. But, in fact, when you come to consider the costs recoverable immediately on the execution of the deed, the payments by the mortgagees to their own solicitor, and no others can be recovered than those only which are chargeable against the property in a foreclosure or redemption action, the distinction between the two seems to come out very clearly. Notwithstanding, therefore, the authorities, on principle a mortgagee cannot charge against the property by way of tacking the cost of preparing the mortgage deed, but he is entitled to recover that sum against the mortgagor. The result is that I find for the plaintiff.

Solicitors: *Rooks, Spiers, Wales, and Ward; Attenborough and Sons.*

Feb. 17 and 18.

(Before BUCKLEY, J.)

Re S. ABRAHAMS AND SONS LIMITED. (a)

Company—Debentures—Registration—Extension of time after winding-up—Companies Act 1900 (63 & 64 Vict. c. 48), ss. 14, 15.

The directors of the company which was incorporated in 1898, in November of that year passed a resolution that the sum of 5500l. should be raised by the issue of fifty-five debentures of 100l. each, to rank pari passu and charged upon the whole of the company's property and assets, including its uncalled capital.

Before the 1st Jan. 1901 (when the Companies Act 1900 came into operation) fifty of the debentures were issued, and in July 1901 the company issued the remaining five debentures to the applicant. These debentures were not registered. A solicitor consulted by the applicant advised him that, as the resolution was passed before the commencement of the Act, nothing required to be registered under the Act.

In Oct. 1901 the company resolved on a voluntary winding-up.

In Nov. 1901 the applicant applied under sect. 15 of the Act for an order extending the time for registering the debentures under sect. 14.

The value of the company's assets was stated to be about 5030l., but certain costs had to be provided for, and there were many unsecured creditors.

Held, that the omission to register was due to a "sufficient cause" within sect. 15 of the Act of 1900; that if an order for extension of time was made, it would contain the words saving the rights of parties acquired prior to actual registration as in Re Joplin Brewery Company Limited (85 L. T. Rep. 411; (1902) 1 Ch. 79); that an order in such a form after winding-up

(a) Reported by H. PROCTER, Esq., Barrister-at-Law.

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would be useless, and that the application must be refused.

THE facts are sufficiently set out in the headnote.

A. F. Peterson for the applicant.—I ask for an order extending the time for registration, omitting the words saving the rights of parties acquired prior to actual registration, inserted in the order made in *Re Joplin Brewery Company Limited* (85 L. T. Rep. 411; (1902) 1 Ch. 79). There are no assets for unsecured creditors. The other debenture-holders will not be prejudiced by the order. Their debentures rank *pari passu* with those of the applicant. In *Re Spiral Globe Limited* (85 L. T. Rep. 778; (1902) 1 Ch. 396) the order was made after the winding-up had commenced.

Stewart-Smith for the liquidator was not called upon.

BUCKLEY, J. (after stating the facts, continued:) The resolution of Nov. 1898 did not create any mortgage or charge, but only put the company in a position to do so when they did issue the debentures. The applicant's mortgage or charge was created in July 1901, after the commencement of the Companies Act 1900, and sect. 14, sub-sect. 1, of that Act provides that every such mortgage or charge "shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company," unless registered within twenty-one days. These debentures were not registered, and the mortgage or charge is therefore void. The applicant asks that the time for registration may be extended without the order containing the condition imposed in *Re Joplin Brewery Company Limited* (*ubi sup.*). In short, the applicant asks for an order acting retrospectively from a date prior to the commencement of the winding-up, in order to obtain a security which he had not at that time. I cannot make any such order. At the date of the winding-up the company owed 5000*l.*, which is secured by debentures, and 500*l.* to the applicant, which is unsecured. There are also debts owing to other unsecured creditors. Assuming the assets of the company are of the value stated, the 5000*l.* owing on debentures will have to be paid in full, and the balance, if any, will be applied by the liquidator in the payment of dividends to the unsecured creditors. If the order asked for by the applicant is made, the holders of the debentures for 5000*l.* will be prejudiced, and, if there is any surplus, the unsecured creditors other than the applicant will be affected, for his 500*l.* will be paid in priority to their debts. I have asked on what ground the order ought to be made. The language of sect. 15 of the Companies Act 1900 as to extending the time for registering debentures is different from that of the Bills of Sale Act 1878, as to extending the time for registering bills of sale. But here the omission to register was not "accidental," it was deliberate. It was not "due to inadvertence," for the act was considered by the solicitor. It was, however, in consequence of the solicitor's misapprehension of the Act, due to "some other sufficient cause." I see no principle on which I should make an order which will prejudice the other creditors, whether secured or unsecured. The case is entirely governed by two cases decided on the Bills of Sale Act 1878—*Crew v. Cummings* (59 L. T. Rep.

886; 21 Q. B. Div. 420) and *Re Parsons; Ex parte Furber* (68 L. T. Rep. 777; (1893) 2 Q. B. 122). The principle of those cases is that when sect. 8 of the Bills of Sale Act 1882 has rendered the security void, and someone other than the holder of the bill of sale has seized the goods, the court ought not to make an order extending the time for registration, which will have the effect of taking away from that person that which he has obtained. In *Re Parsons; Ex parte Furber* (*ubi sup.*) the Court of Appeal held that the time for registration could not be extended under sect. 14 of the Bills of Act 1878, so as to defeat the vested right of the trustee in bankruptcy. On the 16th Oct. 1901, when the company went into liquidation, the rights of all the creditors attached, and the unsecured creditors had the right to say that the securities should be administered on the footing that 5000*l.* only was secured by debentures. I cannot take that right away. As to the other debenture-holders, it is true that all the holders of the series were to rank *pari passu*, but that means all who hold debentures validly issued. I cannot, because the applicant has been badly advised, take away part of their security. Except in very exceptional cases, the order extending the time for registration under the Companies Act 1900 will contain the words as settled in *Re Joplin Brewery Company* (*ubi sup.*). If the words are inserted in an order made after winding-up, I cannot see how the order can do anybody any good. The application is dismissed with costs.

Solicitors: *Close and Co.; R. Barnes.*

Feb. 18 and 19.

(Before BUCKLEY, J.)

Re METALS CONSTITUENTS LIMITED. (a)

Company—Shares—Signatory—Misrepresentation by promoter—Agreement to take shares—Rescission—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 6, 18, 23.

A subscriber to the memorandum of association of a company cannot obtain rescission of the contract by him to take shares on the ground of misrepresentations made to him by a promoter of the company.

Karberg's case (66 L. T. Rep. 700; (1892) 3 Ch. 1) distinguished.

THE company was registered under the Companies Acts 1862 to 1900, on the 10th May 1901, with a capital of 10,000*l.* in 9980 ordinary and twenty management shares of 1*l.* each.

The memorandum of association was signed by Lord Lurgan for 250 ordinary shares.

In Aug. 1901 the company's secretary applied to Lord Lurgan for payment of the amount of the shares, but Lord Lurgan denied that he was a shareholder and refused to make the payment asked for, stating that he was induced to apply for shares as a signatory upon misrepresentations made to him.

On the 17th Aug. Lord Lurgan took out an originating summons for rectification of the register of members of the company by removing his name therefrom in respect of the 250 shares, but nothing was done on the summons before the

(a) Reported by H. PROCTER, Esq., Barrister-at-Law.

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company, on the 23rd Oct., passed an extraordinary resolution for voluntary winding-up and the appointment of a liquidator.

In November the liquidator settled Lord Lurgan's name on the list of contributories, and Lord Lurgan took out a summons to vary the list by excluding his name therefrom.

In support of the summons he filed an affidavit stating that he had been induced to sign the memorandum and articles of association by misrepresentations made to him by one Sims, who was a promoter of the company.

A. Houston for Lord Lurgan.

H. T. Eve, K.C. and J. W. Manning for the liquidator.

The following authorities were referred to:

Re Metropolitan Coal Consumers' Association; Karberg's case, 66 L. T. Rep. 700; (1892) 3 Ch. 1;

Re Canadian (Direct) Meat Company Limited; Tamplin's case, 93 L. T. 104, 547; (1892) W. N. 94, 146;

Re Florence Land and Public Works Company; Nicol's case, 52 L. T. Rep. 933, 941; 29 Ch. Div. 421, 444.

BUCKLEY, J.—I will assume that before the incorporation of the company a man named Sims made to Lord Lurgan a representation which was untrue, and on the faith of which he signed the memorandum of association of the company for 250 shares. Is Lord Lurgan entitled to rescission of any contract by him to take shares on the ground of the assumed misrepresentation? I think he is not. Before the incorporation of the company Sims was not the agent of the company because the company did not exist, and therefore Lord Lurgan could not have been induced to sign for the shares by the misrepresentation of the company or its agents. The contract with the subscribers of a memorandum of association is of a very peculiar kind. Down to the moment when the memorandum and articles are taken to Somerset House to be registered there is no contract at all, because the company does not exist, and any contract by the signatories must be with the company. At the moment of registration two things took place by force of the Companies Act 1862—the company sprang into existence, and the subscribers to the memorandum of association became, by virtue of sect. 23 of the Act, members of the company. In the present case there was no executory contract which was subsequently executed, and there was no contract at all until the moment when the company and the members—the signatories to the memorandum—came simultaneously into existence. I must therefore hold that the subscriber to the memorandum cannot have rescission on the ground that he was induced to become a subscriber by the misrepresentation of an agent of the company. The second point taken on behalf of the applicant is that he is entitled to rescission on the principle that if one party to a contract has obtained a benefit under the contract from the other party to it, and that other party was misled into entering into the contract, although the first party took no part in misleading him, the first party cannot insist on the performance of the contract. Can Lord Lurgan insist on this principle in his favour? I think not. The scheme of the Companies Act 1862 is that a company owes its existence under

sect. 6 to the signatures of seven persons to the memorandum of association, and sect. 23 says that the subscribers of the memorandum "shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member . . . and whose name is entered on the register of members, shall be deemed to be a member of the company." I think that means that a contract is created not merely as between the subscriber and the company, but as between the subscriber and the company on the one hand, and all other persons who shall become members on the other hand. Sect. 18 provides that upon the registration of the memorandum and articles the registrar is to give his certificate, and that "the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate." So that when this corporation came into existence the effect of the Act was that it existed with Lord Lurgan and others as members of it, and he is bound by the memorandum of association. If he seeks to rely on *Karberg's case* (*ubi sup.*) and can be relieved from his contract on the ground that the company cannot retain the benefit of a contract entered into on the basis that the representation made by Sims was true, then every person who subsequently became a member under the impression that Lord Lurgan was a member, would be deprived of the benefit which he supposed he had by Lord Lurgan being a member. In *Karberg's case* (*ubi sup.*) the acceptance of the application for shares by the allotment of the shares was the acceptance of the offer on the terms of the prospectus, although that prospectus was issued by the promoters. In the present case no allotment of the shares to Lord Lurgan was necessary. His signature to the memorandum of association made him on registration a member of the company, and bound him not only in favour of the company, but in favour of every other person who became a member of the company. Therefore, on the law the applicant must fail. But on the facts also I think he fails. [His Lordship, after reviewing the facts, found that the applicant had elected to keep the shares after he had become suspicious about the company, and after Sims had told him that he could sell the shares at a profit.] The application must be dismissed with costs.

Solicitor for the applicant, H. Percy Becher.

Solicitors for the liquidator, Blair and Girling.

Feb. 25 and 26.

(Before BUCKLEY, J.)

Re DAVIS; HANNEN v. HILLYER. (a)

Will—Construction—Charitable legacy—Gift to institution which never existed—General charitable intention.

A testatrix made bequests to charitable institutions for the blind, orphans, deaf and dumb, sick, &c., and, amongst them, to "the Home for the Homeless, 27, Red Lion-square, London." She declared

(a) Reported by H. PROCTER, Esq., Barrister-at-Law.

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that in the event of any question arising as to the designation of any of the charitable institutions thereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it was intended to benefit, the decision should rest absolutely with her executor; and she directed that the residue of her estate should be divided rateably amongst "the various charitable institutions which are beneficiaries under this instrument." At the date of the will there was not, and there never had previously been, in London any charitable institution known as "the Home for the Homeless."

Held, that there was sufficient on the face of the will to show a general charitable intention on the part of the testatrix, and that the legacy did not lapse.

Held, also, that the residue was to be divided rateably among the institutions named in the will, which did exist, including the institution or authority which would administer the legacy in question.

SARAH DAVIS, by her will, dated the 30th March 1894, bequeathed to the Consumption Hospital, Brompton, 500*l.*; to the School for the Indigent Blind, St. George's Fields, Southwark, 1000*l.*; to the Royal Albert Orphan Asylum, Bagshot, 500*l.*; to the Home for the Homeless, 27, Red Lion-square, London, 500*l.*; to St. Mary's Hospital, Cambridge-place, Paddington, 500*l.*; to the Female Orphan Asylum at Beddington, Surrey, 500*l.*; to the Deaf and Dumb Asylum, Old Kent-road, 500*l.*; to the London Fever Hospital, Islington, 200*l.*; to the Smallpox Hospital, Highgate Hill, Upper Holloway, 100*l.*; and to the Hospital for Epilepsy and Paralysis, Portland-terrace, Regent's Park, 500*l.*

The testatrix declared that the receipt of the respective treasurers of the aforesaid institutions should be a sufficient discharge to her executor for the legacies respectively; and further, that in the event of any question arising as to the designation of any of the charitable institutions thereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it was intended to benefit, the decision should rest absolutely with her executor. After making other pecuniary bequests to individuals, the testatrix declared that the residue of her estate, after payment of her funeral and testamentary expenses and debts, and after the payment in full, free of legacy duty, of all the legacies, should be "divided rateably among the various charitable institutions which are beneficiaries under this instrument."

The testatrix died on the 13th March 1899, leaving property worth about 50,000*l.*

On the 8th June 1899 the executor of the will took out an originating summons for the determination of questions which had arisen with regard to the legacy and share of residue given to the Home for the Homeless, 27, Red Lion-square, London, and on the 4th Dec. 1901 the master certified, in pursuance of an order for inquiry of the 26th Jan. 1900, that there was on the 30th March 1894 (the date of the will) or previously no charitable institution in London called or known as "the Home for the Homeless," or bearing a similar title; and that he was unable to certify what charitable institution was intended to be referred to by the testatrix under that designation.

H. M. Humphry for the executor.

H. Terrell, K.C. and W. M. Cann for the testatrix's nephew, attending the proceedings by order on behalf of the next of kin.—The legacy in question fails and goes to the next of kin. The testatrix intended to benefit a particular institution at a particular place, and it did not exist. She has not shown a good general charitable intention to enable the court to deal with the legacy *cy-près*. They referred to

Loscombe v. Wintringham, 13 Beav. 87;

Re Clergy Society, 2 K. & J. 615;

Re Maguire, L. Rep. 9 Eq. 632;

Hoare v. Hoare, 56 L. T. Rep. 147;

Re Rymer; *Rymer v. Stanfield*, 71 L. T. Rep. 174, 590; (1895) 1 Ch. 19;

Clarke v. Taylor, 21 L. T. Rep. O. S. 287; 1 Drew, 642;

Marsh v. Attorney-General, 3 L. T. Rep. 615; 2 J. & H. 61.

[BUCKLEY, J. referred to Tudor on Charitable Trusts, p. 41, and *Re Slevin*; *Slevin v. Hepburn* (64 L. T. Rep. 311; (1891) 2 Ch. 236).]

J. M. Stone, for the Secretary of the School for the Indigent Blind, submitted that the legacy was not applicable *cy-près*, but fell into residue, and referred to

Re White's Trusts, 55 L. T. Rep. 162; 33 Ch. Div. 449;

Moggridge v. Thackwell, 7 Ves. 36.

M. Romer for the Secretary of the British Asylum for Deaf and Dumb Females, whose claim to the legacy and share of residue in question had been disallowed.

R. J. Parker for the Attorney-General.—This case is distinguishable from cases where there were gifts to charitable institutions which ceased to exist either before the date of the will (*Re Ovey*; *Broadbent v. Barrow*, 52 L. T. Rep. 849; 29 Ch. Div. 560), or after the date of the will and before the testator's death. In those cases the legacies fail. The principle of them does not apply here where no such charitable institution as "the Home for the Homeless" ever existed in London. It cannot be said that the testatrix intended to benefit a particular institution. She has shown a general charitable intention, particularly in the clause of the will giving the executor power to determine questions. He also referred to Chitty, J.'s judgment in *Re Rymer* *Rymer v. Stanfield* (71 L. T. Rep. 174, 176; (1895) 1 Ch. 19, 25.

Terrell, K.C. replied.

BUCKLEY, J.—This testatrix bequeathed to "the Home for the Homeless, 27, Red Lion-square, London," the sum of 500*l.* At the date of her will there was not, and there never had previously been, in London any charitable institution known as "the Home for the Homeless." The question I have to determine, therefore, is whether upon the whole of this will there is a lapse by reason of that state of facts, or whether there is an indication of a general charitable intention, so that effect can be given to the gift, although the legatee named was and is non-existent. Now, there is one class of cases which deals with the state of facts in which a legacy is given to a charitable institution which has existed, but has ceased to exist. I think all of them have been cases where the charitable institution existed at the date of the will, but ceased to exist

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before the death of the testator. In that class of cases it has been held that there is a lapse. Now, the earliest authorities upon that point are *Clarke v. Taylor* (*ubi sup.*), a decision of Kindersley, V.C., and *Russell v. Kellett* (26 L. T. Rep. O. S. 193; 3 Sm. & G. 264), a decision of Stuart, V.C. In *Fisk v. Attorney-General* (17 L. T. Rep. 27; L. Rep. 4 Eq. 521) Wood, V.C. at pp. 527-8, said: "Then there is the other point which was argued by Mr. Wickens, as to the gift to the charity which no longer exists. I am far from saying that that argument may not some day or other require further consideration"—that is to say, Wood, V.C. at that date doubted whether in such a state of facts as that you might not still be able to find a general charitable intention. However, since *Fisk v. Attorney-General*, that matter came before the court in *Re Ovey*; *Broadbent v. Barrow* (*ubi sup.*), and before the Court of Appeal in *Re Rymer*; *Rymer v. Stanfield* (*ubi sup.*), and it must now be taken that that doubt of Wood, V.C. has gone, and that the rule in *Clarke v. Taylor* (*ubi sup.*) is the right one. Lord Herschell, in *Re Rymer*; *Rymer v. Stanfield* (*ubi sup.*), at p. 34, says: "The first is *Clarke v. Taylor*, decided forty years ago, but which has been often followed since, and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound." So that I start with this, that if there be a gift to a charitable institution which existed but has ceased to exist, there is a lapse. Now, that is not the case with which I have to deal here. This gift is to a charitable institution which never existed at all. Now, there are four decisions upon that class of case. I must examine them in detail, but the principle which seems to me to underlie all of them is this, that where you find a gift to a charitable institution which never existed, the court, which always leans, of course, in favour of a charity, is more ready to infer a general charitable intention than to infer the contrary. Of course, it is perfectly possible to contemplate that a testator may have intended to benefit a particular institution which he thought existed, but which did not exist. But when I come to look at the cases to which I am going to refer, I find that the court did not regard that as the more probable state of things, but regarded as the more probable that what he pointed out was not person but purpose. There was no person such as he described, and the court there gave effect to the purpose which he described. Now, of those four cases, I will take first the first and the last together, because they have less bearing than the other two upon the point. The first is *Loscombe v. Wintringham* (*ubi sup.*). The gift there was to the "governors, guardians, and trustees of a society instituted for the increase and encouragement of good servants, to the intent and purpose that the sum of 500*l.* of lawful money of Great Britain might be paid to the governors, guardians, and trustees of the said society for the increase and encouragement of good servants." The first obvious comment upon that is that no society is named at all by name. The particular sort of society is pointed to and that is all. It was easy, as it seems to me, in that case to arrive at the conclusion that the object of the testator was to give to a purpose and not to a person. What was held there was that there was

a good charitable gift. Then the last case is that of *Hoare v. Hoare* (56 L. T. Rep. 147). The facts there were that a settlor granted a certain rent-charge to provide for the payment of the salary of a priest in his private chapel; to apply a certain sum for the purpose of lighting and cleaning the chapel; another sum for the teaching and maintenance of ten boys as choristers in the chapel; another sum for the payment of a schoolmaster, teaching and educating the poor boys at the schoolhouse intended to be built; another sum for a schoolmistress; another sum for keeping the schools and almshouses in order; and another sum for the maintenance of poor labourers dwelling in such almshouses. The chapel was a private chapel and never had been consecrated or dedicated. The court held that there was not a general charitable purpose, but that his purpose was only to devote a sum of money to the maintenance of the chapel that was not a public chapel but his own private chapel on his own estate, and that, having regard to this definition of the purposes, that the purposes had failed. Chitty, J. held that the trusts were invalid. It seems to me that that case turned on its own particular facts and does not assist one very much on general principles. There remain the other two cases, and it is from those, as it seems to me, the principle is to be deduced. The first is *Re Clergy Society* (*ubi sup.*). There, there were legacies given in this order: to the Church Building Society, so much; the Clergy Society, so much; the Society for Promoting Christian Knowledge, so much; the Church Missionary Society, so much; and to the Clergy Orphan Society, so much. These were all to be institutions established in London. There was no such society which came forward to establish that it was the society mentioned as "The Clergy Society." There was a society in Gloucester to which the testator had been a contributor, but Wood, V.C. thought that was excluded because it was not in London. As regards those that were in London, there was no society that could satisfy the description. The court nevertheless came to the conclusion that a good general charitable purpose had been declared, and what the court there proceeded upon, if one looks at p. 622, is substantially this, and no more than this, that, having regard to the position in which the gift came with the other gifts which I have read, on either side of it, there was sufficient to show a general charitable purpose. Wood, V.C., at p. 622, says: "Then it was suggested that the bequest must be considered void for uncertainty, because no object can be found to answer the description. In the case before Knight-Bruce, L.J. there was a gift to a charity in Middlesex; and, there being none which exactly answered the description, it was held that the court had authority to direct a scheme, and in this case, this legacy being preceded by a legacy to the Church Building Society, and followed by legacies to the Church Missionary Society and to the Clergy Orphan Society, I think there is sufficient on the face of the will to show that the testatrix meant to confer a charitable benefit on the clergy of the Church of England." That seems to me to have been the *ratio decidendi* in *Re Clergy Society*. The other case is *Re Maguire* (*ubi sup.*), a decision of James, V.C. That is, in my opinion, a very strong case. The gift upon which the

question arose was one to the Church Pastoral Aid Society in Ireland. There was no such society. The immediate preceding gift was to the Church Pastoral Aid Society in England, and there was such a society. I should have thought from that evidently a person was meant, that in the former gift there was such a person, and that there would have been strong ground for saying that person and not purpose was meant in the second gift. James, V.C. thought not. There was there a preceding gift to a society, which did exist—namely, the Additional Curates' Aid Society in Ireland. Those, I think, are all the material facts which I need state. Now, the judgment of James, V.C. is this: "The intention of the testatrix to devote this sum to charity, and also the particular object of the charity, are sufficiently indicated by the name of the society itself, and by the place in which the legacy is found among other legacies to charity. There can be no doubt of the intention of the testatrix to provide for the objects embraced by the Spiritual Aid Society"—i.e., the Additional Curates' Aid Society, to which it had changed its name. "And it follows from *Loscombe v. Wintringham* and *Re Clergy Society* that this is a perfectly good charitable bequest." And further on, after referring to what Wood, V.C. said in *Fisk v. Attorney-General* (*ubi sup.*), he says: "I certainly do not intend myself to go further than Wood, V.C. did, but in this case there is a clear intention by the testatrix to effect a particular object of charity—pastoral aid in Ireland—which is carried out by the society now claiming it. I apprehend the Attorney-General will not object, and there will be an order for payment of the legacy to the Spiritual Aid Society for Ireland to be applied for the purposes of Church pastoral aid in Ireland." As I said, the Spiritual Aid Society was one to which there had been, beyond question, a gift made. It seems to me from those two decisions the principle to be extracted is this: that the court will lean in this class of case, where there is a gift to a charity which never existed at all, and will take even a small indication on the face of the will for the purpose of seeing whether a purpose and not a person is intended. Now, leaving that, I look at this will. I find, in the first place, that this gift is interpolated between other charitable gifts. To summarise those they are these: First, the blind; secondly, orphans; then comes the one in question, the home for the homeless; then hospitals; then orphans again; then the deaf and dumb; then fever, smallpox, and the hospital for epilepsy and paralysis. So that you find this gift to a non-existent charity called "The Home for the Homeless" interpolated between gifts to the blind and to orphans, to the deaf and dumb, and to the sick. I find one ground there that was relied upon in both *Re Clergy Society* and *Re Maguire*. Then there follows this: The testatrix says, "In the event of any question arising as to the designation of any of the charitable institutions hereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it is intended to benefit, the decision shall rest absolutely with my executor." It seems to me that this is the plainest indication that the testatrix intended that her charitable purposes should not fail because she had made some mistake as to the

person to whom she had directed the legacy to be paid. There is this further, that when she comes to give the residue, she gives it in this way—that it shall be "divided rateably among the various charitable institutions which are beneficiaries under this instrument." I think that there is more room here than there was in *Re Clergy Society* and *Re Maguire* for the court, acting on the principle which, it seems to me, is the true one, to infer here a general charitable bequest. I therefore hold that this legacy is effectual. For the purpose of putting all the authorities together, I desire to add that *Loscombe v. Wintringham* (*ubi sup.*), *Re Clergy Society* (*ubi sup.*), and *Re Maguire* (*ubi sup.*) were all considered by Lord Herschell in *Re Rymer*; *Rymer v. Stanfield* (*ubi sup.*), in which he says: "The appellant contends that under those circumstances, and on the *cy-près* doctrine, the gift ought still to be treated as charitable, and to be applied to some cognate purpose. In support of this, when once the construction has been arrived at which I have put upon the will, I have been unable to find that they have cited a single authority in point. They placed reliance upon the decision of Lord Eldon in *Moggridge v. Thackwell* (7 Ves. 36) and *Mills v. Farmer* (1 Mer. 55)," and from the latter case he read this language of Lord Eldon's, which I think is useful for this purpose: "But, to give effect to a bequest in favour of charity, the court will . . . supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. A third principle, which it is now too late to call in question, is that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode which alone was left deficient." That is the principle upon which *Re Clergy Society* (*ubi sup.*) and *Re Maguire* (*ubi sup.*), in Lord Herschell's opinion, go.

J. M. Stone.—I submit that the residue is to be divided rateably only among the charitable institutions which do exist. The legacy which has been held not to fail may either go to the Crown to be disposed of out of pure benevolence, or be applied *cy-près*, in which case the court might under a scheme apply it to something not an institution, or at any rate to an institution which could not be said to be a beneficiary under the will. He referred to

Moggridge v. Thackwell (*ubi sup.*).

R. J. Parker.—I submit this is a case in which the court will take administration of the trust, but I do not desire to argue the point in the absence of proper parties. The words of the residuary gift are wide enough to cover the institution or authority which will administer the legacy. He also referred to

Moggridge v. Thackwell (*ubi sup.*) at pp. 86, 87.

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BUCKLEY, J.—The residue is given “to be divided rateably among the various charitable institutions which are beneficiaries under this instrument.” It is argued that the authority which may have to effectuate the general charitable purpose as regards the legacy will not be within the words “charitable institutions which are beneficiaries under this instrument.” Now, if it be a question—I do not know that I need decide it now—whether, having regard to what was said in *Moggridge v. Thackwell* (*ubi sup.*), the purpose here described is a general indefinite purpose, in which case it would be for the King by sign manual to deal with the fund, or there is an object pointed out, in which case the fund would be administered by the court, as at present advised, it appears to me that here the object is not indefinite, but specific. It is the homeless that are to be benefited; but, whether it be the one or the other, I think it would be a most narrow construction to hold that the authority, whoever it is, that gives effect to the general charitable purpose, is not within the words “charitable institutions which are beneficiaries under this instrument.” However this fund is administered, it must be administered by somebody or other in favour of a class of persons—that is, the homeless. The word “institutions” is large enough to cover whoever administers that fund. The residue, I think, goes rateably among the various charitable institutions that are benefited under this instrument, including the institution or authority which has to administer the legacy of 500*l.* I give liberty to the Attorney-General to apply for a scheme or otherwise, as he may be advised, without serving any of the parties to the action.

Solicitors: *W. Jessop; Tippetts; Smith, Fawdon, and Low; Cheston and Sons; Treasury Solicitor.*

KING'S BENCH DIVISION.

Wednesday, Jan. 15.

(Before PHILLIMORE, J.)

ATTORNEY-GENERAL v. JOHNSON. (a)

Revenue—Succession duty—Estate duty—Gift subject to annuity for two lives—Bonâ fide sale—Succession Duty Act 1853 (16 & 17 Vict. c. 51)—Customs and Inland Revenue Acts 1881, 1888, and 1889—Finance Act 1894 (57 & 58 Vict. c. 30).

*C. B. in pursuance of an arrangement with the L. M. Society paid the sum of 500*l.* to the society subject to an arrangement to pay him an annuity of 25*l.* during his life, and after his death to his wife M. B. during her life.*

*The commercial value of such annuity was 210*l.**

C. B. died on the 12th May 1895 and M. B. on the 5th May 1900.

On claims by the Crown for estate duty on the death of C. B. and succession duty on the death of M. B.:

*Held, (1) that although estate duty was payable under sect. 2 (1) (c) of the Finance Act 1894, so much of the amount as was purchase money could be deducted under sect. 3, sub-sect. 2, and so estate duty was only payable on 290*l.*;*

(2) that there was a bonâ fide sale, and so no succession duty was payable.

INFORMATION.

The London Missionary Society is a body of persons not incorporated, but associated for certain charitable purposes of a religious character and possessed of considerable invested funds which are held by trustees appointed by the society, and are dealt with and disposed of by directors, in whom the management of the society is from time to time vested.

In the year 1889 the society accepted from Mr. C. T. M. Burton, a director of the society, an offer of a sum of 500*l.* in lieu of a legacy, subject to a contract or reservation for the payment of 25*l.* per annum to him during his life, and after his death to his wife Martha Burton during her life, in case she should survive him. This arrangement was confirmed and carried out by a resolution passed at a meeting of the directors of the society on the 11th Feb. 1889.

The sum of 500*l.* was given and paid by Mr. C. T. M. Burton to the society, and the funds of the society held by their trustees became and were, pursuant to the arrangement, charged with the payment of the annual sum of 25*l.* during the lives of him and his wife and the life of the survivor of them, and the annual sum was duly paid thereout by the trustees accordingly.

Mr. C. T. M. Burton died on the 12th May 1895.

His widow, Martha Burton, died on the 5th May 1900.

It was alleged by the information that upon the death of Mr. Burton estate duty became payable by the society and its trustees under the Finance Act 1894, s. 2 (1) (c) incorporating sect. 38 (1), (2) of the Customs and Inland Revenue Act 1881, and sect. 11 (1) of the Customs and Inland Revenue Act 1889, on the said sum of 500*l.*, being a gift to the society of which *bonâ fide* possession and enjoyment was not assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

Further, that upon the death of Martha Burton, succession duty at the rate of 11½ per cent. became payable by the society and its trustees upon the said sum of 500*l.* in respect of the determination of the payment of 25*l.* per annum to Mrs. Burton, under the Succession Duty Act 1853, s. 7, and the Customs and Inland Revenue Act 1888, s. 21.

In the answer of the defendant (who was the home secretary of the society and represented them) it was stated that none of the funds of the society, whether held by its trustees or otherwise, were charged with the payment of the annual sum of 25*l.*, or any annual sum during the lives of Mr. and Mrs. Burton or the life of the survivor.

The annual sum was in fact never paid out of the funds of the society, but was paid by the directors as one of the ordinary outgoings.

It was contended by the defendant that upon the death of Mr. Burton estate duty did not become payable by the society or its trustees, as contended for in the information or otherwise on the said sum of 500*l.* If, contrary to the contention of the society, such sum or any part of it

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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passed on the death of Mr. Burton within the meaning of the Finance Act 1894, it so passed by reason only of a *bonâ fide* purchase from him within the meaning of sect. 3 of that Act, and was therefore exempted from taxation. The only property (if any) which passed on the death of Mr. Burton, in reference to the arrangement between him and the society, was the annual sum of 25*l.* which is exempted from taxation by sect. 15 of the Finance Act 1894, and the duty on which, if not so exempted, would have been payable by Mrs. Burton under the Finance Act 1894, s. 2 (1) (d). Alternatively only such part of the sum of 500*l.* was to be deemed to have passed on the death of Mr. Burton as remained after deducting therefrom such a sum as, having regard to the rate of interest earned by the investments of the society, was taken or must be deemed to have been taken from the capital of the sum of 500*l.* in order to satisfy the instalments of the annual sum of 25*l.*, which were in fact paid to Mr. and Mrs. Burton by the society, or which, in accordance with the usual expectation of life, would have been so payable.

Further that upon the death of Mrs. Burton no succession duty became payable by the society or its trustees on the sum of 500*l.* in respect of the determination of the payment of 25*l.* per annum to Mrs. Burton. The annuity of 25*l.* was *bonâ fide* purchased by Mr. Burton from the society by payment of the sum of 500*l.*, and there was no succession by the society to any property on Mrs. Burton's death. If, contrary to the contention of the society, there was any succession it is taxable, if at all, under the Succession Duty Act 1853, s. 16, to which the Customs and Inland Revenue Act 1888, s. 21, has no application, and the rate of duty is 10 per cent. and not 11½ per cent. Further, if and so far as any estate duty is payable as claimed the additional rates of succession duty imposed by the last-mentioned section are not chargeable, having regard to the Finance Act 1894, s. 1.

By the Succession Duty Act 1853 (16 & 17 Vict. c. 51), s. 7:

Where any disposition of property not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor or any other person for any term of life, or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for on the person in whose favour such disposition shall be made.

And by sect. 16:

Where property shall become subject to a trust for any charitable or public purposes under any past or future disposition which, if made in favour of an individual would confer on him a succession, there shall be payable in respect of such property upon its becoming subject to such trust a duty at the rate of ten pounds per centum upon the amount or principal value of such property, and it shall be lawful for the trustee of any such property to raise the amount of any duty due in respect thereof with all reasonable expenses upon the security of a charity property at interest with power for him to give effectual discharges for the money so raised.

By the Customs and Inland Revenue Act 1888 (51 & 52 Vict. c. 8), s. 21:

(1) In addition to the duties chargeable in respect of the successions under section 10 of the Succession Duty Act 1853, there shall be levied and paid to Her Majesty in respect of every succession therein referred to upon the death of any person living on and after the first day of July 1888, according to the value thereof, the following duties—that is to say, where the successor shall be the lineal issue or lineal ancestor of the predecessor a duty at the rate of 10*s.* per centum upon the value of the interest of the successor. In all other cases mentioned in such section a duty at the rate of 1*l.* 10*s.* per centum upon the value of the interest of the successor: Provided that additional duty under this Act shall not be payable upon the interest of a successor in leaseholds passing to him by will or devolution by law or in property included in an account according to the value thereof duty is payable under the Customs and Inland Revenue Act 1881.

By the Customs and Inland Revenue Act 1881. (44 & 45 Vict. c. 12):

Sect. 38 (1). Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on account delivered of the personal or movable property to be included therein according to the value thereof. (2) The personal or movable property to be included in an account shall be property of the following description, viz.: (a) Any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased. (b) Any property which a person dying on or after such day having been absolutely entitled thereto has voluntarily caused, or may voluntarily cause to be transferred to or vested in himself and any person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person. (c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will whereby an interest in such property for life, or any period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property.

By the Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7):

Sect. 11 (1). Sub-section two of section thirty-eight of the Customs and Inland Revenue Act 1881 is hereby amended as follows: The description of property marked (a) shall be read as if the word "twelve" were substituted for the word "three" therein, and the said description of property shall include property taken under any gift whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The description of property marked (b) shall be construed as if the expression "to be transferred or to be vested in himself and any other person" included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone or in concert, or by arrangement with any other person. The description of the property marked (c) shall be construed as if the expression "voluntary settlement" included any

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trust whether expressed in writing or otherwise in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person and as if the expression "such property," whenever the same occurs, included the proceeds of the sale thereof. The charge under the said section shall extend to money received under a policy of insurance effected by any person dying on or after the first day of June one thousand eight hundred and eighty-nine on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit.

By the Finance Act 1894 (57 & 58 Vict. c. 30):

Sect. 2 (1). Property passing on the death of the deceased shall be deemed to include the property following—that is to say . . . (c) Property which would be required on the death of the deceased to be included in an amount under section thirty-eight of the Customs and Inland Revenue Act 1881 as amended by section eleven of the Customs and Inland Revenue Act 1899 if those sections herein enacted and extended to real property as well as personal property, and the words voluntary and voluntarily, and a reference to a volunteer were omitted therefrom.

The Attorney-General (Sir R. Finlay, K.C.), the Solicitor-General (Sir E. Carson, K.C.), and Vaughan Hawkins for the Crown.

Micklem, K.C. and J. E. Harman for the defendant.

PHILLIMORE, J.—In this case, on the 11th Feb. 1889, the directors of the London Missionary Society resolved "That in consideration of the payment to the London Missionary Society of 500*l.* in lieu of a legacy by a director (Charles Munday Burton, Esq.), who does not wish his name to appear in any published or announced list of subscriptions, the present trustees and their successors in the trusteeship of the society be and are hereby authorised to pay the sum of 25*l.* per annum in quarterly payments, the first payment to be made in . . . months after the receipt of such capital sum during the life of the said Charles Munday Burton, Esq., and a like payment to his present wife, Mrs. Martha Burton, during her life, should she survive him." Before that resolution was arrived at two letters had passed from Mr. Burton to the society which I think it well to read: "1st March.—Dear Mr. Jones,—I have not been able to get to the office since last I had the pleasure of seeing you at the mission house, and as I cannot tell when I may be well enough to venture so far again, will you kindly send on to me for approval the amended document which we arranged should be written out anew? Permit me to thank you for your very kind letter, which came to hand last night. I can assure you that payment to the society of the anticipated legacy has been made with a glad heart, in which my wife has cordially joined, and the completion of which brings us rest and peace." Then follow expressions showing his interest in the work, and his devotion to the cause of religion. I am told that this class of arrangement is not unusual with missionary societies, and apparently with this missionary society, and some colour is given to that by statements contained in the letter of the 6th June 1900 from the solicitors for the defendants to the Inland Revenue, which has

been relied upon and put in by the Crown for other purposes. My only object in making that observation is this: that I may take it, if this is a common form of arrangement, that the officers of the society, who make it on behalf of the society, will see in the course of their duty that they at least get money's worth, whatever the subscriber may get for any arrangement of this kind, or in other words, that the annuity they give will not be more than the commercial value of an annuity purchased in a similar manner of an ordinary office. It appears in this particular case that the commercial value of such an annuity as Mr. Burton stipulated for—25*l.* for himself for life, and then to his wife if she survived him—would be 210*l.*; and therefore the society benefited to the extent of 290*l.*, if this is to be treated as an ordinary commercial arrangement. Mr. Burton died in May 1895, after the passing of the Finance Act 1894, and his widow died in May 1900. The Crown now claims, as I understand, first of all an estate duty upon this sum, and secondly, a succession duty. The Crown claims succession duty at 11½ per cent., but the society set up that as a charity it comes only under sect. 16 of the Succession Duty Act, and therefore is only liable to 10 per cent. Without exactly admitting that or making it a precedent, the Crown is quite willing in this case that the succession duty should be assessed only on the footing of that contention. Now, I have to determine both these points. With regard to estate duty the matter is put in this way. Sect. 2 of the Finance Act 1894, sub-sect. 1 (c), renders liable to succession duty property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act 1881, as amended by sect. 11 of the Customs and Inland Revenue Act 1889, if those sections were therein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily," and a reference to a "volunteer" were omitted. At the present day one must accept the condition of Parliamentary legislation which makes this form of drafting imperative, great as is the difficulty which it imposes upon both advocates and judges in construing Acts of Parliament, and the result is that I must read sect. 2 (1) (c) as if the joint sections of the two Customs and Inland Revenue Acts were written out in full in that place. The effect of those two joint sections so written out is well given by Mr. Hanson (and I think accurately) in his book on Death Duties, at pp. 106 and 107: "Any property taken as a *donatio mortis causa* made by any person dying" (after a particular date) "or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bonâ fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforth retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." Now, I think it has been suggested by the Crown (though I am not quite certain) that this property is taxable as property taken under "any gift, whenever made,

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of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor." I am not quite certain whether the Crown was contending this or not. If the Crown does so contend, my opinion is adverse to them. I do not think that *Attorney-General v. Grey* (82 L. T. Rep. 62; (1900) A. C. 124) has any bearing upon this case at all. It is possible that it might have been decided in such a way as to affect this case, but I think that the whole matter decided by that case is, that property out of which the donor receives benefits for his life is not property which has been assumed and retained to the entire exclusion of the donor, which, of course, is almost obvious, and as in this case the property was a sum of 500*l.*, and as it was entirely taken by the society without reservation at all, and as the annuity which the society contracted to pay was not in any way charged upon this property, nor was property in any way appropriated to the payment of it, I am quite clearly of opinion that that paragraph does not apply. Then remains the last line of the sub-section, property taken under any gift whenever made retained to the entire exclusion of any benefit to the donor by contract or otherwise. The words are not very apt, but I think I must take it, particularly after the decision of the *Attorney-General v. Worrall* (71 L. T. Rep. 807; (1895) 1 Q. B. 99) that that means that where property is given, and in consideration of that gift, there is a contemporaneous arrangement by contract to pay to the giver something for his life, that gift is not such an out and out gift as to be exempt, and falls under this section as a taxable gift. I so assume in deciding this case. Therefore if that be the case, it would stand in this way: Under sect. 2 (1) (c) this 500*l.*—being property given, but given upon terms that there should be an annual payment to the donor for his life and onwards—is property taxable under sect. 2 (1) (c). This property would be so taxable if it ended there. Then comes sect. 3, which is a reservation or a taking out of the taxing disposition of certain property passing under certain forms of arrangement. I am clear that it is a distinct remission of duty which otherwise would but for that section have been incurred, and I so construe it. Now, there is a great difficulty about it, because sub-sect. 2 of sect. 3 is, I can only express it by saying, a different plane of thought, or a different denomination from the sections of the Customs and Inland Revenue Act which are to be read into this Act. Put in another way, if the sections of the Customs and Inland Revenue Act had been written out in full in this Act, I cannot conceive that any draftsman would have passed sect. 3, sub-sect. 2, with those words before him, exactly in the language in which they were passed. Perhaps more probably he would have left sect. 3 as it stands, and he would have amended the Customs and Inland Revenue Act sections as inserted in this Act, or so amended them as to make sect. 3, sub-sect. 2, unnecessary. But I have got to construe it as the Legislature has left it, and I am clear that I must give some effect to sect. 3, sub-sect. 2, which will diminish the burden which otherwise would be imposed by sect. 2 (1) (c), and the only way in which I can do that is to say this: Where only the Customs and

Inland Revenue Act applies, it may be that there is no such thing as a purchase for partial consideration. It is evident that there are certain cases in which there will be a purchase with some consideration, which, nevertheless, will be a taxable purchase. That is the effect of the decision in the case of *Attorney-General v. Worrall* (*sup.*). There may be cases where there are cross gifts, and where, though one gift is in consideration of the other, for the purposes of taxation each gift is to be treated as gratuitous, and whichever comes to be the taxable one, is to be taxable accordingly. But under sect. 3, sub-sect. 2, the case is otherwise, and under that section there may be an arrangement under which property is purchased (consciously purchased) for a considerable sum less than its value, there being a gift to the purchaser of the balance over the true commercial value of the property. Putting it in other words, there may be, as it were, in one case cross-claims and in the other case a set-off, and the only amount which is taxable is that which is left after the set-off has been discharged. That is my construction of this case. I think this money, as I have said already, is clearly taxable under sect. 2 (1) (c). But then I am directed (and it is important to draw attention to the language of the statute) to allow a deduction from the value of the property for the purpose of duty by sect. 3, sub-sect. 2. That I think is the form. The whole 500*l.* is in the first instance taxable, then as much of it as is purchase is to be deducted by sect. 3, sub-sect. 2, and, as I come to the conclusion that in this case the value of an annuity of 25*l.* a year for two lives was 210*l.*, it comes to this, that from the whole 500*l.* originally taxable, 210*l.* must be deducted, and therefore only 290*l.* remains to be taxed. I cannot pass this matter without dealing with the way in which it was put most powerfully before me for the Crown. It was said that you must first determine whether there is a gift or whether there is a purchase, and only if you determine that it is a purchase can you apply sect. 3, sub-sect. 2. My answer is, that that is a mistake arising from confining attention entirely to the Customs and Inland Revenue Acts and not reading the whole Finance Act, including those sections read into the Finance Act as one. You must read them as one Act, and not as two Acts historically one after the other. It is to my mind clear that you can have something which is both a purchase and a gift—*pro tanto* purchase and *pro tanto* gift—and that that must be the meaning of sub-sect. 2 of sect. 3. Therefore, in my opinion, there must be judgment for the Crown on the question of estate duty, but on 290*l.* only. The succession duty question on which I have to decide is, I think, more difficult than the estate duty question. The claim is put under sect. 7 of the Succession Duty Act 1853, and, as Mr. Vaughan Hawkins has pointed out, that section is an addition to the ordinary taxing section, sect. 2, and would apply in a case like this if there has been no *bona fide* sale. It is true there was no property to succeed to upon the death of Mr. Burton and his wife, but the section says that there shall be imposed a tax, or rather that the disposition shall be deemed to confer at the time appointed for the determination of such benefit a beneficial increase to such property as a succes-

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sion. Therefore I agree that if this is not a *bonâ fide* sale and comes within this section (on which I have got a word to say) the Crown is entitled to duty, and entitled to duty on the full 500l. There is no question here of partition between the 290l. and 210l. It is on the full 500l. or on nothing. But when one has once faced that, there arises the very formidable objection which Mr. Micklem has pointed out, that the nearer a full consideration you get the annuity, the greater the duty paid. Now that to my mind is absurd, and that leads me to consider whether the true meaning of this section (I do not decide it for a reason I will give) is not this, that where the annuity is purchased, or where the estate or interest is determinable by life, and the purchase is so much greater than the purchase money that it is not to be deemed to be a *bonâ fide* sale, that then the section applies. In other words, that this section does not apply to a case where a smaller life interest is given than the purchase money in fact would bring, but only in cases where a large life estate is created, really by way of settlement, and that settlement is endeavoured to be concealed by the fact that a small sum of money has been given for the purpose. I am inclined to think that that is the meaning of sect. 7, and that the sale is only to be assumed not *bonâ fide* when it is not *bonâ fide* by reason of the life interest created in the settlement being too large. However, I do not decide it upon that point, because, assuming for the moment in favour of the Crown that this is a case to which the section applies, I have then got to consider what is a *bonâ fide* sale within the meaning of the Succession Duty Act, and I do not think, within the meaning of that Act, a sale is not a *bonâ fide* sale because it is at an under-value, or even at a considerable under-value. I think where substantial consideration passes—substantial not only absolutely, but relatively substantial—that is an element of bargaining in the matter, and it is a *bonâ fide* sale, though in reality very much more is given for the life interest than in fact was required. I think here, having regard to the expressions in the letter of the 1st March, and having regard to the fact that this class of arrangement is not uncommon, and the duty which would be imposed upon the directors of this society (indeed, upon Mr. Burton himself as a director of the society) to see that at any rate the society was not injured by this arrangement, I must consider that this is a *bonâ fide* sale within the meaning of that section. No doubt it is remarkable that this society should enter into transactions such as this. I have not got the constitution of the society before me, and I only know that it is a charitable and missionary society. I should very much doubt if there were any power expressed in the rules of the society enabling the directors to do this, and I should very much fear if there is no such power that such a transaction as this would be *ultra vires*. But while I anticipate that would be the case, I feel certain that at any rate it would not be to the injury of the society that such an arrangement as this should be made. I feel certain that the directors would see that they were not granting too large an annuity, and to that extent at any rate the element of consideration and bargaining would enter into the transaction. Upon the whole, therefore, I am of opinion that

the Crown is not entitled to succession duty, and is only entitled to estate duty on the 290l.

Judgment accordingly.

Solicitors: *The Solicitor of Inland Revenue; Leonard and Pilditch.*

Wednesday, Jan. 15.

(Before PHILLIMORE, J.)

ATTORNEY-GENERAL v. MAYOR, &C., OF LIVERPOOL. (a)

Revenue—Loan capital—Duty—Issue—Finance Act 1899 (62 & 63 Vict. c. 9), s. 8.

The L. Corporation having issued tenders for stock, on the 15th April 1899 the whole of such stock was duly allotted, and upon the amounts payable upon allotment being paid, provisional receipts were given which were exchanged for scrip certificates to bearer, all of which were issued before the 20th June 1899.

The Finance Act 1899 came into operation on the 20th June 1899, and by sect. 8 enacts that every corporation "shall before the issue" of any loan capital deliver a statement of the amount proposed to be secured by the issue, and that statement is taxable.

Held, that the whole of the stock was issued before the 20th June 1899, and duty was not payable.

THIS was an information on behalf of the Crown to recover duty under sect. 8 of the Finance Act 1899 in respect of the issue of certain loan capital by the defendants.

By the Liverpool Corporation Loans Act 1894, as amended by the Liverpool Corporation Loans Act 1897, the mayor, aldermen, and citizens of the city of Liverpool, hereinafter referred to as the corporation, were empowered to issue stock upon the terms and subject to the conditions and provisions contained in those Acts.

By a resolution of the council of the city of Liverpool, duly passed in accordance with the Acts on the 5th April 1899, it was resolved that under the authority and subject to the provisions of the Acts the corporation, acting by the council, should thereby, in exercise of their power, create stock to be called the Liverpool Corporation Two and a Half per Cent. Redeemable Stock, and to be issued to an amount on the terms and in the manner therein specified, and as appeared in the prospectus.

On or about the 8th April 1899, in pursuance of the resolution, a prospectus was issued by the Governor and Company of the Bank of England on behalf of the Liverpool Corporation inviting tenders for the stock to be delivered at the Chief Cashier's office, Bank of England, before two o'clock on Thursday the 13th April 1899.

The material portion of the prospectus was as follows:

The Governor and Company of the Bank of England give notice that . . . they are authorised to receive on Thursday the 13th April 1899, tenders for 1,000,000l. of Liverpool Corporation Stock bearing interest at 2½ 10s. per cent. per annum, payable half-yearly at the Bank of England or at any of its country branches . . . The books of the stock will be kept at the Bank of England

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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in London, but arrangements have been entered into whereby assignments and transfers may be made at the Liverpool branch of the bank . . . Tenders must be delivered at the Chief Cashier's office, Bank of England, before two o'clock on Thursday, the 13th April 1899 . . . A deposit of 5l. per cent. on the amount of the stock tendered for must be paid at the same office at the time of delivery of the tender . . . The dates at which the further payments on account of the loan will be required are as follows: On Monday, the 24th April 1899, so much of the amount tendered for each hundred pounds of stock as when added to the deposit will leave sixty pounds (sterling) to be paid; on Wednesday, the 24th May 1899, 30l. per cent.; on Wednesday, the 21st June 1899, 30l. per cent.; but the instalments may be paid in full on or after the 24th April 1899, under discount at the rate of 1l. per cent. per annum. In cases of default in the payment of any instalment at its proper date, the deposits and instalments previously paid will be liable to forfeiture. Scrip certificates to bearer will be issued in exchange for the provisional receipts. The stock will be inscribed in the bank's books on or after the 21st June 1899, but scrip paid in full in anticipation may be inscribed forthwith.

On the 13th April 1899 tenders were received for amounts exceeding the whole of the stock offered, and the full amount of such stock—namely, 1,000,000l.—was duly allotted, and notice of such allotment was given to the respective allottees by letter of the 13th April 1899.

The respective further payments referred to in the prospectus were duly made by the allottees in respect of the greater part of the stock at or about the dates named in the prospectus, but portions of the instalments were paid up by the respective allottees before the latest date named for such payment, and in particular the final instalments of stock to the amount of 209,400l. were paid in full prior to the 20th June 1899, and the inscription of 200,300l., part of such last-named sum, was effected and completed in the books of the Bank of England before the 20th June 1899.

In respect of the stock so allotted as aforesaid as and when the amounts payable on allotment were paid, provisional receipts were issued to the respective allottees in the form attached to the letter of allotment. These receipts were exchanged for scrip certificates to bearer, and, in fact, every one of the allottees of the stock received a scrip certificate to bearer in respect of the amount of stock allotted to him prior to the 20th June 1899.

The books of the Bank of England for the inscription of the stock were prepared, and the inscription of the stock therein was effected between the 19th April 1899 and the 25th Jan. 1900. The inscription was effected by the clerks and officials of the Bank of England in the following manner: As and when each of the holders of the scrip certificates to bearer issued in exchange for the provisional receipts, delivered the same to the Bank of England the name of the person depositing each of the scrip certificates, together with his address and description and particulars of the amount of the stock held by him, were entered in the books, and a certificate was issued to the person whose name was so inscribed. The amount of stock inscribed before the 20th June 1899 was 200,300l. The amount inscribed on the 20th June 1899 was nil, and the amount inscribed after the 20th June 1899 was

799,600l., and there remains the sum of 100l. not yet inscribed.

After the first allotment of the stock and before the same was paid up in full, dealings in the partly paid stock, represented by scrip to bearer, took place on the London Stock Exchange, and delivery of the scrip was treated as constituting a transfer of the partly paid stock, the further payments being accepted from and the further receipts being given to the bearers for the time being of such scrip; the inscription of the stock when fully paid was made in favour of the person producing the scrip certificates to bearer, irrespective of the person to whom the original allotment was made. The letters of allotment or provisional receipts were in fact also treated as transferable by delivery, and were sold and dealt in as bearer securities. The scrip certificates to bearer were dated the 24th April 1899, but were not in fact issued until the 2nd May 1899, when they could be obtained on application in exchange for the provisional receipts, and were immediately marketable.

The Finance Act 1899 (62 & 63 Vict. c. 9) came into operation on the 20th June 1899.

No statement of the amount to be secured by the issue of the loan capital or any part thereof was delivered to the Commissioners of Inland Revenue before the issue thereof, or has since been delivered in the manner mentioned in sect. 8 of the Finance Act 1899.

The Attorney-General contended that the whole of the loan capital, save 209,400l. (being the amount on which the final instalments were paid before the coming into operation of the Finance Act) was issued after the coming into operation of the Act, and that the duty imposed by sect. 8 (2) of the Finance Act 1899 was payable in respect thereof.

The defendants contended that the whole of the loan capital was issued before the coming into operation of the Act, and that no duty is payable on any part thereof under sect. 8 of the Finance Act 1899.

The question for the opinion of the court was whether the loan capital, other than the 209,400l. or any part of it, was issued subsequently to the coming into operation of the Finance Act. If the decision was in the affirmative judgment was to be entered for the Crown for duty at the rate of 2s. 6d. for every 100l. of the stock issued subsequently to the coming into operation of the Finance Act.

By the Finance Act 1899 (62 & 63 Vict. c. 9), s. 8:

(1) Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom, propose to issue any loan capital they shall, before the issue thereof, deliver to the commissioners a statement of the amount proposed to be secured by the issue.

(2) Subject to the provisions of this section, every such statement shall be charged with an *ad valorem* stamp duty of two shillings and sixpence for every hundred pounds and any fraction of a hundred pounds over any multiple of a hundred pounds of the amount proposed to be secured by the issue, and the amount of the duty shall be a debt due to Her Majesty.

The Attorney-General (Sir R. Finlay, K.C.) and Rowlatt for the Crown.

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Lawson Walton, K.C. and Gore Browne for the defendants.

PHILLIMORE, J.—All I have to determine here is whether this loan capital was issued after the 20th June. It appears as regards that portion of the loan on which duty is now sought to be charged, namely, the million less 209,400*l.*, the final instalment was not paid until the 21st June, and therefore the inscribing of the stock was not complete as regards this portion until even later than the 21st June. It is contended on behalf of the Crown that, inasmuch as the final payment was not made until after the 20th June, this loan capital was issued after the passing of the Finance Act 1899, which received the royal assent on the 20th June. Now I do not say at this moment, for it is not now desirable to do so, when it is that it is the duty of a corporation, endeavouring to raise money by a permanent loan, and desiring to conform as they should to the provisions of sect. 8 of the Finance Act 1899, to deliver the statement duly stamped to the commissioners, which that section requires them to deliver. It may be—and there are analogies which would certainly point to that—that they must do it before they advertise for tenders which implies an obligation or promise to accept tenders within the terms of the advertisement. It may be that it is before they do that that they must deliver this statement. I am not sure, and I do not so decide, but what I do feel sure of is that they must do it before they issue that certificate which is called the scrip certificate, and I understand that all those scrip certificates were issued on the 24th April, or at any rate considerably before the 20th June. That being the case, I conceive that that is the latest date which can be said to be “the issue” within the meaning of the statute. And if, as I think, at least by that date, the corporation were bound to do it, they were equally entitled to say as against the Crown that, unless that date falls after the coming into force of the Finance Act 1899, they do not fall within this sect. 8 at all. In other words, my opinion is that the whole of this issue of the million—not merely the 209,400*l.*—was made before the 20th June 1899, and therefore the corporation could not comply with sect. 8, and therefore it had no duty to comply with that section. They are therefore not taxable. I do not think it is necessary to express any further opinion. As I have said, the analogy of the liability of companies, when they originally create their capital, or where their capital is being increased, to the tax imposed by the Stamp Act 1891, but enlarged and therefore referred to by this Act of 1899, in the very section which immediately precedes the section in question, would lead one to suppose that the statement must be delivered to the commissioners, and the duty paid before there is an attempt to get from the public the loan capital which the corporation is seeking to raise. But I understand and appreciate the fact that there may be hardships and difficulties in that construction, and I do not wish at all to say that that is a necessary construction here. All I do say is that by the time the corporation have issued the necessary certificates whereby they have bound themselves, upon the creditor complying with the remainder of the terms, to issue the stock to him, and enter him as a stockholder—by that time in my opinion they

have issued the loan. Therefore I must give judgment in favour of the defendants with costs against the Crown.

Judgment accordingly.

Solicitors: *The Solicitor of Inland Revenue; F. Venn and Co., for E. R. Pickmere, Liverpool.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Jan. 14.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

POISSON AND WOODS v. ROBERTSON AND TURVEY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Trial of action—“Liberty to apply”—Inspection of documents—Recipe relating to secret remedy—Joint owners—Recipe in possession of one owner—Right of the co-owner to inspection.

In 1895 E. and R. were joint owners of the original recipe for the manufacture of a secret specific or remedy. On the 11th March 1896 E. assigned his half-interest to W., the assignment containing a clause precluding W. from the right of knowing the secret of the remedy. On the 23rd March 1896 W. assigned to P. one-half of his interest. In July 1897 R. assigned one-quarter of his half interest to P., but without communicating the secret to him. In 1900 E. purported to assign to T. the absolute sole right and interest in the remedy, and handed to him the original recipe. P. and W. brought an action against R. and T. claiming a declaration that the alleged assignment to T. was a fraud on their rights and void, and that P. was entitled to have the recipe shown to him by T.

The action was tried by Kekewich, J. who, by an order dated the 10th July 1901, declared that the effect of the various assignments was to vest three-eighths of the remedy in T., three-eighths in P., and two-eighths in W. His Lordship, however, gave no decision upon the right of P. to inspect the recipe. Liberty was given to apply.

It appeared that the original recipe was written on a piece of paper, which was destroyed by T. shortly after the trial, but that he had kept a copy of it, which was now in his possession, and which he refused to produce. A motion was subsequently made by P., under the liberty to apply, that he might be at liberty to inspect and take copies of the recipe.

It was decided by Joyce, J. that the right to a share in the remedy did not involve a right to the knowledge of the secret for which P. ought to have bargained before paying his money; and that therefore the application must be refused. P. appealed.

Held, without deciding the point determined by Joyce, J., that the liberty to apply reserved by the order of Kekewich, J. did not cover such an application as the present; and that therefore, on that ground, the appeal must be dismissed, but without prejudice to any subsequent proceedings.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

POISSON, one of the plaintiffs in this action, claimed to be entitled to a joint interest in a secret specific or remedy; and a motion in the action was made by that plaintiff that he might be at liberty to inspect, and take copies of, the original recipe for the manufacture of the remedy which had been handed by George Rowland Edwards to the defendant Robertson, and was then in the possession, custody, or power of the defendant Turvey; and that the defendant Turvey might be ordered to produce the recipe for such inspection.

It appeared that in 1895 the recipe became the joint property of G. R. Edwards and the defendant Robertson.

By an agreement dated the 2nd March 1896, G. R. Edwards agreed with the defendant Robertson that he should have the sole right of dealing with the remedy for their joint benefit, and that G. R. Edwards should not disclose the secret. Under that agreement the defendant Robertson accordingly became entitled to one-half of the profits, he undertaking the whole business management, and G. R. Edwards being in the position of a sleeping partner.

By an indenture dated the 11th March 1896, G. R. Edwards assigned his half-interest in the remedy to the plaintiff Woods, the assignment containing a clause precluding the plaintiff Woods from the right of knowing the secret of the remedy.

By an indenture dated the 23rd March 1896, the plaintiff Woods assigned to the plaintiff Poisson one-half of his half-interest in the remedy.

On the 6th July 1897 the defendant Robertson, by a document in writing, assigned one-quarter of his half-interest to the plaintiff Poisson, but without communicating the secret to him, although there was no covenant that it should not be communicated to him.

On the 1st Aug. 1900 the defendant Robertson purported to assign to the defendant Turvey the absolute sole right and interest in the remedy, and he thereupon communicated the recipe to the defendant Turvey, handing to him the original paper upon which it was written.

The plaintiffs Poisson and Woods brought this action, claiming a declaration that the alleged assignment to the defendant Turvey was a fraud on their rights and void, and an order that the defendant Turvey should deliver up the recipe and other documents handed to him by the defendant Robertson. The plaintiff further claimed an injunction to restrain the defendant Turvey from manufacturing, selling, or dealing with the remedy or from disclosing the secret to any person other than the plaintiff Poisson, a declaration that the plaintiff Poisson was entitled to have the remedy communicated to him, an order directing the defendant Robertson to deliver to the plaintiff Poisson a true copy of the recipe, and an account of all dealings with the remedy by the defendant Turvey.

The action was tried by Kekewich, J., who, by an order dated the 10th July 1901, declared the effect of the various assignments was to vest three-eighths in the defendant Turvey, three-eighths in the plaintiff Poisson, and two-eighths in the plaintiff Woods. But his Lordship decided that this did not entitle the plaintiffs to an account,

and the learned judge gave no decision upon the question of the right of the plaintiff Poisson to inspect the recipe.

Liberty was given to apply; and the motion was brought on by the plaintiff Poisson under the liberty to apply given in the action.

It appeared from the evidence that the original paper upon which the recipe was written had become worn out, and was consequently, since the trial of the action, destroyed by the defendant Turvey, who, however, had taken and kept a copy of it. This was now in his possession, and he refused to produce it.

On the 26th Nov. 1901 the motion came on to be heard before Joyce, J., when the following judgment was delivered:—

JOYCE, J.—This is a most extraordinary case, and I regret that I do not see my way to make the order asked for on the defendant Turvey. My present impression is that the plaintiff Poisson can only succeed by showing that he has some right of property, legal or equitable, in the piece of paper upon which the recipe was written, or that he has some contract, express or implied, for the production of it. The right to an interest in the remedy does not necessarily involve a right to the paper upon which the recipe is written, or to a knowledge of the secret. It is not like the case of a title deed or copyright. Under the assignments prior to the one dated the 6th July 1897, the plaintiffs Poisson and Woods had shares in what is called the "secret remedy," but only under documents which provided that they should not know the secret. It was only under the document of that date that the plaintiff Poisson became entitled to know the secret. The truth is that the plaintiff Poisson ought not to have paid his money until he had seen the document, or he should have had inserted a covenant for its production. The defendant Robertson affected to assign the whole remedy to the defendant Turvey, who took without notice of the earlier assignment. Then at the trial of the action before Kekewich, J. the plaintiff Poisson asked by his pleadings for an order for the delivery of the recipe to him, and by amendment that the defendant Turvey should show it to him. Notwithstanding that the judgment gave no such relief, but merely a declaration as to the interests of the parties in the remedy. So the plaintiff Poisson is in a difficult position in coming to ask the court now for relief which he failed to obtain on that occasion. For these reasons I do not see my way to make a positive order on Turvey to show the paper. The application must therefore be refused. This is, however, without prejudice to any subsequent application.

From that decision the plaintiff Poisson now appealed.

Hughes, K.C. and Harman for the appellant.—According to the judgment of Kekewich, J. the appellant is interested in the recipe to the extent of three-eighths. Although under the assignment to him of two-eighths by the plaintiff Woods he is not entitled to know the secret of the recipe, yet, under the assignment to him of the other one-eighth by the defendant Robertson, he is so entitled. He is therefore entitled to see and to take a copy of the recipe. In this respect he has the same rights as that of a tenant in common of land, who has the

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right to see the title deeds of the property in which he is interested :

Baxter v. Hosier, 5 Bing. N. C. 283;
Ballen & Leake's Precedents of Pleading, 2nd edit.,
 p. 254.

By Order XXXI., r. 14, express power is given to the court or a judge to order production of documents "at any time during the pendency of any cause or matter." This is a cause or matter which is now "pending" before the court within the meaning of that rule. And under the "liberty to apply" reserved by the judgment of Kekewich, J. the court should order production of the recipe.

Wright Taylor (Warrington, K.C. with him), for the respondent Turvey, took the objection that this was an application which could not be made under the liberty to apply contained in the order of Kekewich, J.

WILLIAMS, L.J.—Everyone must be a guide to himself as to what is expedient in his own business; but as the matter stands, it seems to me that this action must be considered as having come to an end. There is a judgment, and under it it is plain that the plaintiff has got two-eighths of what has been called a "dormant right," and one-eighth of what has been called an "active right." That judgment reserved "liberty to apply." But that does not carry the matter any further. The action has, I repeat, come to an end. All that the court has been asked to adjudicate upon has been adjudicated upon, and the action is not of such a nature as that any consequential remedy has to be worked out. Under those circumstances, it seems to me that this objection must prevail. It is not desirable at any time that the court should decide questions which it is not necessary that the court should deal with for the determination of an action before it. Therefore I do not propose in the slightest degree to lay down the law with regard to what might be the rights of a co-owner of property in a case like the present. All I can say is that if the result of the contract here is that the plaintiff has become co-owner of a chattel, and that chattel has been converted by the other co-owner, the defendant, I am not aware of any rule of law which would debar the other co-owner from bringing an action for that conversion. If the co-owner, the defendant, in this case has dealt with the joint property by selling it, I wish to say—and in this respect I am speaking only for myself, and not for any other member of the court—that I am not, as at present advised, prepared to say that the other co-owner, who was not originally a party to the sale, could not come in by action and compel his co-owner to account for the moneys resulting from the sale of that common property or any part of it. But the court has not to decide that question on the present occasion, and I will not further discuss it. The appeal must, therefore, be dismissed with costs, but without prejudice to any subsequent proceedings.

STIRLING, L.J.—I am of the same opinion. I also think that such an application as the present cannot be made under the "liberty to apply" reserved in this action. The judgment contained a declaration as to the interests of the parties, and then followed an order to tax the costs of the action, with "liberty to apply." But the inser-

tion of those words does not add to the force of the order, and it does not enable the court to deal with other matters which do not arise in the course of working out the judgment. For that reason I think that the order made by the learned judge was right. As to the merits of the case, not having heard what has to be said by the other side, I am not prepared to hold that the plaintiff would not be entitled to some relief in a properly-constituted action. Upon that, however, not having, as I say, heard a full argument, I will add nothing.

COZENS-HARDY, L.J.—I agree. It has been argued by Mr. Hughes on behalf of the appellant that there is express power given to the court or a judge to order production of documents at any time under Order XXXI., r. 14. He proceeded to argue that this cause of action is pending. Under Order XXXI., r. 14, there is no doubt express power for the court to order the production of any document "during the pendency of any cause or matter"; and it is said that the present action is now "pending" before this court within that rule. But I do not think that is the meaning of the rule. This is not a "cause or matter" within the meaning of it, and it is not so because of the formal addition of the words "liberty to apply."

Appeal dismissed.

Solicitor for the appellant, *J. A. Maxwell*.

Solicitor for the respondents, *Maurice Moseley*.

March 14, 15, and 17.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

MAYOR, &C., OF BLACKBURN v. SANDERSON. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Local government—Paving works—Recovery of expenses—Summary remedy—Action in High Court—Limitation of action—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—*Blackburn Improvement Act 1882* (45 & 46 Vict. c. cccliii.), ss. 26, 232, 247.

An action was brought by a municipal corporation under their local Act of 1882 against the defendants to recover from them the apportioned shares of the expenses of making up and paving a certain street in Blackburn, which work had been done by the plaintiffs pursuant to sect. 26 of that Act. The street was described in the plaintiffs' notice as a "back road" only (a definition used in the Act of 1882) situate behind some houses of which the defendants were the owners.

The defendants raised two defences to the action: First, that the requisite notices calling on the defendants to do the work had not been served on them; secondly, that the proceedings were out of time, not having been commenced within six months from the date of the service of the notice of demand for payment. The latter question turned on the construction of sect. 232 of the Act of 1882, which provided that all expenses recoverable under that Act might be recovered in a summary manner, "or, if the corporation think fit, in the superior courts or any court of competent jurisdiction."

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Held, that, as to the first ground of defence, proper notices had been given.

Decision of Mathew, J. affirmed.

Held, that, as to the second ground of defence, the true effect of sect. 232 of the local Act of 1882, read in conjunction with sect. 247, was to entitle the plaintiffs to recover expenses payable by an owner either by summary proceedings before the magistrates, which must be taken within six months, or by action in the superior courts or in any court of competent jurisdiction, and that the limitation of six months did not apply to the alternative proceedings in the High Court.

Decision of Mathew, J. reversed.

Tottenham Local Board v. Rowell (35 L. T. Rep. 887; 1 Ex. Div. 514) and *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278) distinguished.

THIS action was brought by the plaintiffs, the Mayor, Aldermen, and Burgesses of the Borough of Blackburn, against the defendants, Charles Augustus Sanderson and others, the plaintiffs' claim being for the amount of expenses (54l. 15s.) settled and apportioned against the defendants pursuant to the Blackburn Improvement Act 1882 in respect of the excavating, ballasting, paving, grouting with pitch, &c., certain streets behind the defendants' property, and for interest thereon (4l. 3s. 10d.) at the rate of 5l. per cent. per annum from the 18th Aug. 1898, payment of the amount of expenses having, the plaintiffs stated, been duly demanded of the defendants on the 18th July 1898.

The defendants, who were mortgagees in possession of the property behind which the streets in question had been made up by the plaintiffs, contended that they were not indebted to the plaintiffs in the amounts claimed in this action.

The defendants stated that by way of objection to what purported to be notices of apportionment, made by the plaintiffs' surveyor and dated the 1st July 1898, of certain expenses, including the expenses claimed in this action, the defendants, in a letter, dated the 4th July 1898, written and sent by the defendants' solicitors to the plaintiffs' surveyor, informed the plaintiffs, as the fact was, that no notice had been served upon the defendants requiring them to make up the streets in question; and that what purported to be notices of reapportionment by the plaintiffs' surveyor of the expenses, including the expenses claimed in this action, were given by the plaintiffs to the defendants on the 18th July 1898, and the writ in this action was not issued until the 28th Feb. 1900. The defendants therefore contended that this action was not commenced within the time limited by law in that behalf—namely, by the Blackburn Improvement Act 1882, ss. 232, 245, and by the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11.

It appeared that the street in question was described in the plaintiffs' notice as a "back road" only—a definition used in the Local Act of 1882.

By sect. 26 of the Blackburn Improvement Act 1882 the plaintiffs, as the Corporation of Blackburn, were empowered by notice given to the owners or occupiers of lands fronting, adjoining, or abutting upon certain streets or parts of streets as therein mentioned to require them to

sewer, drain, level, pave, flag or channel, metal, and make good such streets or parts of streets, and, if the requirements of such notices were not complied with, to execute the works referred to therein; and it was thereby further enacted that "the expenses incurred by them"—that is to say, the corporation—"in so doing shall be paid by the owners in default in such proportions as shall be settled by the surveyor."

By sect. 232 of the same Act provision was made for the recovery of such expenses by summary proceedings "or, if the corporation think fit, in the superior courts or any court of competent jurisdiction."

By sect. 234 the surveyor's apportionment of expenses was made conclusive unless objected to within one month from notice thereof.

By sect. 235 provision was made with regard to payment of interest, and it was enacted that

Notice of the surveyor's apportionment shall be deemed a sufficient demand for all purposes whatsoever.

By sect. 245 it was (amongst other things) enacted that

In all summary proceedings by the corporation for the recovery of expenses incurred by them in works of private improvement the time within which such proceedings may be taken shall be reckoned from the date of service of the notice of demand.

By an order of the master, dated the 9th July 1900, it was ordered that the action should be tried in Middlesex by a judge alone instead of with a special jury, as directed in the order for directions.

Accordingly, on the 19th Dec. 1900 the action came on for trial before Mathew, J., when the following judgment was delivered:

MATHEW, J.—Upon the first point which has been raised here I should have no doubt whatever. The notice here is ample. On the second point I cannot distinguish this case from the authorities that have been cited to me, and the construction of sect. 232 of the Blackburn Improvement Act 1882 seems to me to be governed by the cases referred to—*Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514), and the more recent case of *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278). Sect. 232 in the earlier part makes expenses recoverable within six months by summary method. That is the effect of the earlier part of the section, and there follows an option—"or, if the corporation think fit, in the superior courts, or any court of competent jurisdiction." Now the two authorities that I have referred to, it seems to me perfectly reasonably, say that on the whole of the section taken together, that limitation of six months was intended to apply not merely to the summary proceedings, but to the alternative and optional proceedings given by the section. Then an argument has been suggested upon the section as to successive owners. I have no doubt it struck one at first as a singular thing that a debt should be gone as against the original owner, and should revive against the successive owner, and should further become a permanent charge upon the property and yet not be recoverable by an action in a superior court. All I can say is that the section as to successive owners applies to successive owners, and does not apply to original owners. Therefore, that section

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does not seem to me to control sect. 232. I think that section must be construed as contended by the defendants, and that there must be judgment for them with costs.

From the decision on the second point the plaintiffs now appealed.

Danckwerts, K.C. (with him *Macmorran, K.C.* and *W. Mackenzie*) for the appellants.—With regard to sect. 232 of the Blackburn Improvement Act 1882, it is admitted that the period of limitation is six months under sect. 11 of the Summary Jurisdiction Act 1848, if the expenses are sought to be recovered in a summary manner. But the six months' limitation has no application if the plaintiffs bring their action "in the superior courts or any court of competent jurisdiction." The defendants say that because there are alternative remedies under sect. 232 the action must be brought within the time specified. But that is, I submit, not the true construction. The plaintiffs must give a month's notice of their demand, and six months must follow, so that seven months may elapse. But the six months was not intended to be the limit of time in any event. *Mathew, J.* relied upon the cases of *Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514), and *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278), which his Lordship considered governed the present case, and by which he felt himself bound. But those cases are, I submit, quite distinguishable. Those cases, it is true, are very like the present, but it was a wrong view to hold that they applied here, as each was decided under a different statute. He referred also to

Huber v. Steiner, 2 Bing. N. C. 202, at p. 210;

West Ham Local Board v. Maddams, 33 L. T. Rep. 809; 40 J. P. 470;

Mayor, &c., of Leeds v. Robshaw, 51 J. P. 441.

[*WILLIAMS, L.J.* referred to *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477.]

C. A. Russell, K.C. and *S. G. Lushington* for the respondents.

Danckwerts, K.C. replied.

Cur. adv. vult.

March 17.—The following written judgments were delivered:

WILLIAMS, L.J.—Upon the first point I agree with *Mathew, J.* The notice here is ample. In my judgment the mistake in the description of the road as a "back road" could not have misled the defendants. But I cannot agree that the construction of sect. 232 of the Blackburn Improvement Act 1882 is governed by the different cases referred to in *Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514). In that case, as also in the case of *West Ham Local Board v. Maddams* (33 L. T. Rep. 809; 40 J. P. 470), the expenses recoverable were, before the passing of the Act which gave the County Court jurisdiction in proceedings for the recovery of demands below 20*l.*, recoverable only before two justices within six months and not afterwards; and the court held in each case that if the party exercised the option of proceeding in the County Court he must do so within the same limit of time. The court held, that is, that the Act giving the option to proceed in the County Court continued as long as the right to proceed before the justices existed, and no longer; but that, when the six months had elapsed, the

right to proceed before the justices was gone, and therefore no option could be exercised, and the right to sue in the County Court was at an end. By the earlier Acts the period for recovery was limited to that which was incident to a summary remedy. The Legislature did not say that the six months' limitation imposed on the right of action so created was to be altered when it enacted by a later Act that the statutory right of action might be enforced in a County Court. This is the view of the meaning of those decisions which was taken by the court in *Mayor, &c., of Leeds v. Robshaw* (51 J. P. 441), and I think that it is the plain meaning. But I agree with *Mr. Russell* that that case is not conclusive of the present case, because in that case the right was a right which the original statute creating the right allowed to be enforced by proceedings which had no limitation like that contained in the Summary Jurisdiction Act in force in 1877; and then in 1877 an Act of that year gave a remedy by way of summary proceedings limited to one year. All that the court held in that case was that the limit to the summary proceedings allowed by the Act of 1877 did not constitute a limitation of the remedies given by the former statutes in relation to the same subject-matter. *Mathew, J.* goes on in his judgment to refer to the case of *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278) as a decision governing the construction of sect. 232 of the Blackburn Improvement Act 1882. But although that case comes much nearer to the present case than the cases of *West Ham Local Board v. Maddams* (*ubi sup.*) and *Tottenham Local Board v. Rowell* (*ubi sup.*) do, yet I cannot think that they govern the construction of sect. 232. The words of clause 2 of sect. 11 of the Public Health Act (London) 1891, which *Cave and Wills, JJ.* had to construe in that case, were "such costs and expenses and fines incurred in relation to any such nuisance may be recovered in a summary manner, or in the County Court or High Court," and the court held that this triple option ceased to exist if one of the options ceased to be available by a lapse of time by reason of a limitation applying to that option only—viz., limitation of six months in the case of summary procedure. Now I would remark, with reference to that case—first, that the words there construed are not the same as the words we have to construe in the Blackburn Act; and I would say further that, although the court held the case to be governed by the decision of *Tottenham Local Board v. Rowell* (*ubi sup.*), not only were the right and the remedies all given by one Act—unlike the cases of *Tottenham Local Board v. Rowell* (*ubi sup.*) and *West Ham Local Board v. Maddams* (*ubi sup.*), in which a right subject to a limitation was created by the original Act, and jurisdiction given by a later Act to enforce that right in the County Court—but also in the case of *Vestry of Hammersmith v. Lowenfeld* (*ubi sup.*) it seems to me that to have held the limitation in the Summary Jurisdiction Act not to apply to actions under sect. 11 of the Public Health Act would not have led to the absurdity of holding that there was a different limitation in the case of actions brought to recover sums under 20*l.* from that which was to prevail in cases above 20*l.*, which was a consideration which weighed very much with the court in the decision of both those cases. I now proceed to deal with the words of sect. 232.

It runs thus: "All damages, costs, and expenses recoverable under this Act or the local Acts or any of them or under any bye-law made thereunder, and all penalties under any such Act or bye-law, shall be recoverable by the corporation either according and subject to the provisions of the Railways Clauses Consolidation Act 1845, with respect to the recovery of damages not specially provided for and penalties, and of the determination of any other matter referred to justices, and as if the word "corporation" were inserted therein instead of the word "company," or, if the corporation think fit, in the superior courts or any court of competent jurisdiction." Now, I think that there is nothing in these words, or in the decisions to which I have referred, to make the court hold that, because the summary remedy under the Railways Clauses Consolidation Act 1845 is barred by a six-months' limitation—that after that lapse of time proceedings in the superior courts or any court of competent jurisdiction are barred. Certainly the reasons upon which the *West Ham* case (*ubi sup.*) and the *Tottenham* case (*ubi sup.*) were decided are not available, and the words are different from those in sect. 11 of the Public Health Act 1891, which were construed in *Vestry of Hammersmith v. Lowenfeld* (*ubi sup.*); and I think that upon the words themselves, the meanings of sect. 232 is that the corporation during the period of six months may recover the damages by summary proceedings, and after that only by proceedings in the High Court or some other court of competent jurisdiction. But this view of the meaning of the words is much strengthened by consideration of other sections of the Blackburn Act. In the first place, we find in sect. 247, which deals with the liability of successive owners, that these expenses shall be recoverable from successive owners in a summary manner within six calendar months of their succession, and after that period may be recovered by the corporation from the owner for the time being of land, &c., by action at law in any court of competent jurisdiction, provided that no debt shall be recovered under the provisions of this section after the expiration of six years from the completion of the works in respect of which such debt is due. It seems plain from this that the six months' limitation is not intended to be applied in the case of successive owners; and it seems most improbable that the Legislature should have intended this limitation of six months not to apply in the case of successive owners, and to apply in the case of the original owner at the time when the works were executed, the expenses of the execution of which is the subject-matter of recovery. There are many other sections of the Act of Parliament which seem to indicate that the limitation with regard to summary proceedings is applicable only to that mode of procedure; as, for instance, the last words of sect. 245. These words are: "And in all summary proceedings by the corporation for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand." Why are these words not expressed to apply to all proceedings if the limitation is to apply to all proceedings? And, again, sect. 252, under which the corporation may allow seven years for repayment of expenses due from owners,

tends to negative such a limitation in proceedings other than summary proceedings. I have only to add that, in my judgment, if you find in an Act of Parliament the power to take the remedy in divers courts, that remedy will, in each court, be subject to the *lex fori* of that court, and the *lex fori* includes the limitation of actions, which goes to the remedy and not to the right. I think, therefore, that this appeal must be allowed.

STIRLING, L.J.—I am of the same opinion on both points. As to the first point on which we agree with the decision of Mathew, L.J. (then Mathew, J.) I do not desire to say anything. On the second point, with reference to which we differ from him, I desire to state very briefly the grounds on which my opinion rests. The Corporation of Blackburn, acting under sect. 26 of the Blackburn Improvement Act of 1882, have executed certain paving works, and the Act provides that the expenses incurred by them in so doing shall be settled by the surveyor and be paid by the owners in default, and in such proportion as shall be settled by the surveyor. An apportionment has duly been made, and the action is brought to recover the amount due from the defendants who are owners affected by the apportionment. Now, as regards the mode of recovery of these expenses sect. 232 applies; but it does not apply, it is to be observed, to expenses alone. It is a general clause which provides that "All damages, costs, and expenses recoverable under this Act, or the local Acts, or any of them, or under any bye-law made thereunder, and all penalties under any such Act or bye-law, shall be recoverable by the corporation either according and subject to the provisions of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, and as if the word 'corporation' were inserted therein instead of the word 'company,' or, if the corporation think fit, in the superior courts or any court of competent jurisdiction." Now that clause contains no express enactment as to the period of time within which proceedings are to be taken. But on reference to the provisions of the Railways Clauses Consolidation Act 1845 we find it provided by sect. 140 that: "In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount in case of dispute shall be ascertained and determined by two justices." That clause brings into operation the limitation of time which is imposed by the Summary Jurisdiction Act regulating proceedings before two justices. It is therefore contended that, inasmuch as the proceedings taken according and subject to the provisions of the Railways Clauses Consolidation Act 1845 must be brought within a certain limit of time, the proceedings in the superior courts or in any court of competent jurisdiction which the corporation are by that clause authorised to take must be brought within the same limit of time. Now I confess, speaking for myself, that if this question were free from authority, I should not arrive at that conclusion upon that language. It seems a very extraordinary and obscure mode of prescribing

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the limit of time which has been chosen by the Legislature, and one can see other reasons for giving such an option as here exists to the corporation. The clause is a wide one, as I have already pointed out. The "damages, costs, expenses, and penalties" there referred to vary necessarily very much in amount, and the questions which arise with reference to them may vary very much as regards their legal difficulty, and even if the section were limited to paying expenses alone such would be the case. Where the amount which is sought to be recovered is small, and no difficulty arises, it is for the benefit both of the corporation which have to enforce payment of those damages, costs, expenses, and penalties, and also for the benefit of those who are to pay them, that a cheap and speedy mode of enforcing payment should be provided. In other cases where the amount is large, and there are legal difficulties which arise, it is desirable to provide that recourse may be had to the higher courts. In those circumstances I should not myself infer from these words that it was the intention of the Legislature to impose on proceedings in the superior courts or other courts of competent jurisdiction the same limit of time as is imposed on proceedings in courts of summary jurisdiction. But it is quite possible to find in the other clause of the Act dealing with the same matter, or dealing with the special matter under consideration, language which would indicate that such was not the intention of the Legislature. Beginning with sect. 234 and going down to sect. 249, there is found a series of clauses which deal with the question of paying expenses. I have read those sections carefully, and it seems to me that the language of those sections is so far from being favourable to the view that a limitation of time was intended to be imposed that it points in a contrary direction. That language has been pointed out to the Lord Justice, and I will merely say this, that sect. 247, which deals with the liability of successive owners of the lands, and shows plainly that the proceedings against successive owners were not limited to the time prescribed by the Summary Jurisdiction Act, appears to me to afford a strong indication that no limitation of time was intended to be imposed by sect. 232. But the matter is not free from authority, and the authorities I should desire briefly to refer to, as those were relied on by the learned judge who decided this case in the court below. The first two which were referred to are those of *West Ham Local Board v. Maddams* (33 L. T. Rep. 809; 40 J. P. 470) and *Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514). Those both arose under very similar circumstances. There was in each case an Act of Parliament which gave a summary remedy before the justices alone. That was followed by the Local Government Amendment Act 1861, which provided that "Proceedings for the recovery of demands below 20l., which local boards are now empowered by law to recover in a summary manner, may, at the option of the local board, be taken in the County Court as if such demands were debts within the cognisance of such courts." So that, as regards demands above 20l., the summary jurisdiction was the only one which could be had recourse to, and as regards demands below 20l. there was an option to proceed either in a summary way or in the County Court. If the

option with regard to the demands below 20l. were held to be an option to proceed beyond the time which was limited with reference to the proceedings in the summary jurisdiction, the result would be this: that as regards demands above 20l. there would be a limit of time within which the proceedings were to be taken, but as regards demands below 20l. there would be no limit. Now, in these two cases that circumstance was relied on, and it appears to me it was rightly relied on, as showing strongly that the intention of the Legislature must have been to impose the same limit of time whether the proceedings were taken before justices or in the County Court, and we find that Blackburn, J., as he then was, in the case of *West Ham Local Board v. Maddams* (*ubi sup.*), pointed out what he termed an absurdity and relied on it; and that Mellish, L.J., in the Court of Appeal, in *Tottenham Local Board v. Rowell* (*ubi sup.*), also pointed it out and relied upon it. I think, therefore, that those two cases do not govern the present, being dependent on special circumstances. But in the case of *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278) we find, no doubt, enactments which much more closely resemble that which we find in the statute with which we have to deal. The action there was brought under sect. 11 of the Public Health Act, and the 2nd sub-section of that clause provides that the costs and expenses in question might be recovered in a summary manner or in the County Court or the High Court. A subsequent clause, sect. 117, provides by subsect. 1 that "All offences, fines, penalties, forfeitures, costs, and expenses under this Act or any bye-law made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts." And then subsect. 2 provides this: "Proceedings for the recovery of a demand not exceeding 50l. which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the County Court as if such demand were a debt." Now, dealing with sect. 117 alone, it seems to me that there are circumstances which closely resemble those of the two cases of *West Ham Local Board v. Maddams* (*ubi sup.*), and *Tottenham Local Board v. Rowell* (*ubi sup.*), and it was admitted in argument, and I think rightly admitted, that if the action was brought under sect. 117 the limitation would apply. The case was decided by a Divisional Court, consisting of Cave and Wills, JJ. Cave, J. says this (at p. 281 of (1896) 2 Q. B.): "The first mode pointed out by the Act of obtaining and enforcing a nuisance order is to go before the magistrate. If the order be made, or if a fine be imposed and not paid, an option is given of recovering the costs and expenses or the fine, either by summary proceedings or by an action in the High Court or County Court. The first and most natural thing to do is to proceed summarily; and if that course be taken, the limitation of time provided by sect. 11 of the Summary Jurisdiction Act 1848 applies. The decision in *Tottenham Local Board v. Rowell* (*ubi sup.*) is that when an option is given to proceed either summarily or in the County Court, and a limitation

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of time is imposed with respect to proceeding summarily, that limitation applies also to the proceeding in the County Court." Now, with the utmost respect, I am unable to agree that that is the true effect of the decision in *Tottenham Local Board v. Rowell* (*ubi sup.*), though I think if the learned judge had applied that reasoning to sect. 117, it would have been quite in accordance with the actual decision. It seems to me that the learned judge there expressed the view that where an option was given to proceed either summarily or in the County Court, and a limitation of time was imposed with respect to proceeding summarily, the limitation must also apply to proceedings in other courts. With that I am unable to agree. With regard to the judgment of Wills, J. I am not sure that I differ. His reasoning appears to me to have been different. He begins with dealing with sect. 117 of Public Health (London) Act 1891, and holds that proceedings under it would be governed by the decision in *Tottenham Local Board v. Rowell* (*ubi sup.*). I agree. Then he proceeds to say: "I think it is impossible to draw a distinction between sect. 117 and sect. 11 of the Summary Jurisdiction Act 1848. The language of sect. 11 is somewhat different, but there is no difference in substance. Sect. 11 says that 'such costs and expenses may be recovered in a summary manner or in the County Court or High Court.' What is that but saying that the person entitled to recover them may at his option select either the court of summary jurisdiction or the County Court or the High Court in which to pursue his remedy? I cannot see that the option given is any the less an option because the words 'at the option' are not used. If that view be right no real distinction can be drawn between sect. 11 and sect. 117." If the learned judge meant to lay down the same proposition of law as Cave, J., then, again, speaking with the utmost respect, I am unable to agree; but I am not sure that really he meant to do so. It may be that his view was, and I rather think it was, that whatever might be the meaning of sect. 11 standing by itself, it was possible to find in other clauses of the Act an indication of meaning on the part of the Legislature, and as to that there can be no doubt that that is perfectly possible. Wills, J. found that indication of meaning in sect. 117, and if his decision was on reading sect. 11 in the light of sect. 117, I need only say that this case is entirely distinct. In the Blackburn Improvement Act of 1882 there is not only no clause similar to sect. 117, but there is a clause which points strongly in the opposite direction—namely, the section which I have already referred to, 247. In these circumstances, I think the appeal ought to be allowed, and I think at the same time that we are really hardly differing from Mathew, J. who was bound by the case of the *Vestry of Hammersmith v. Lowenfeld* (*ubi sup.*), by which we are not bound.

COZENS-HARDY, L.J.—I agree that the appeal must succeed. Apart from authority, it seems to me that the true effect of sect. 232 of the local Act is to entitle the corporation to recover expenses payable by an owner under sect. 26 either by summary proceedings before magistrates, which must be taken within six months, or by action in the superior courts or in any court of competent jurisdiction. I can see no reason

for holding that the limitation of six months must apply to the alternative proceedings in the High Court; and any doubt which might be felt is removed by reference to sect. 247. That section deals with the rights of the corporations against successive owners. It deals with a matter falling within sect. 232, and it expressly states that the expenses may be recovered from a succeeding owner in a summary manner within six months of his succession, and after that period by action at law. Reading the two sections together, it seems clear that the limitation of six months cannot apply to an action in the High Court. As to the authorities, the *Tottenham* case (*ubi sup.*) was plainly distinguishable for the reasons given by Williams and Stirling, L.J.J., and which I need not repeat. As to the *Hammersmith* case (*ubi sup.*), it may be sufficient to say that there was no such section as the present sect. 247 in that case, and thus to distinguish it. But, if necessary, I should hold that the decision of the Divisional Court in the *Hammersmith* case cannot be supported and ought not to be followed.

Appeal allowed.

Solicitors for the appellants, *Robbins, Billing, and Co.*, agents for *R. E. Fox*, Town Clerk, Blackburn.

Solicitors for the respondents, *Bower, Cotton, and Bower*, agents for *Ainsworth, Sanderson, and Howson*, Blackburn.

Feb. 24, 25, 26, and 27.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.J.J.)

BAILY AND CO. v. CLARK, SON, AND MORLAND LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Watercourse—Artificial stream—Riparian owners—Abstraction and fouling of water by superior riparian owner—Right by presumed grant or prescription to flow of water and reasonable enjoyment.

The plaintiffs were owners of a mill situate upon an artificial cut or channel, whereby a certain portion of the water of a river was carried from a point in its course for a distance of about a mile and a half before rejoining the river. The water in this channel passed first the defendants' factory and about 200 yards lower down a factory of the plaintiffs closely adjoining their mill.

The inflow of water from the river was regulated by means of an artificial structure with removable boards, which was, and always had been, under the control of the millowner, upon whom also had fallen the task of keeping the bed of the cut clean and clear.

The defendants carried on at their factory, which was on the site of an old tannery, the business of fellmongers and skin rug manufacturers, and used for the purposes of their business the water coming down the artificial channel.

The plaintiffs alleged that the defendants in the course of their business, by the washing, soaking, and scouring of sheep and other skins in the stream after they had been previously subjected to dyeing processes, and by returning into the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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stream the effluent liquid which had been used in the various processes of manufacture, polluted and fouled the stream in the cut; and that they also abstracted water therefrom to such an extent as to seriously interfere with and diminish the flow thereof to the plaintiff's mill and factory. The plaintiffs accordingly brought an action to restrain the defendants from (1) fouling or polluting the stream in the cut, (2) diverting or abstracting the water, and (3) obstructing or diminishing the flow of the stream.

Held (affirming the decision of Byrne, J.), that there had been an unjustifiable pollution of the stream; but (reversing his Lordship's decision) that as to the abstraction of water, what had been done by the defendants had not been done in violation of the plaintiffs' rights as riparian owners, there being no evidence that they had abstracted any larger quantity of water than was reasonable.

THE plaintiffs, A. W. S. Baily and H. S. Baily (carrying on business under the style of A. Baily and Co.), were the owners in fee simple and occupiers of an ancient mill, lands, and hereditaments called Beckery Mill, situate near Glastonbury, Somersetshire, upon an ancient mill-stream which flows from and after a course of about one and a half miles rejoins the river Brue.

The plaintiffs claimed to be entitled by virtue of their riparian rights as owners of Beckery Mill to the natural and accustomed flow of water through and along the millstream to their property for the purpose of working the mill and for domestic and other necessary and proper purposes.

Alternatively the plaintiffs claimed to be entitled to such flow of water for the purposes aforesaid by enjoyment thereof by themselves and their predecessors in title from time immemorial, or, under the Prescription Act 1832 (2 & 3 Will. 4, c. 71), by the uninterrupted enjoyment thereof as of right by themselves or their predecessors in title for forty years and upwards, prior to the 8th Aug. 1877, the date of the commencement of the action hereinafter mentioned.

The plaintiffs were also the owners in fee simple of certain lands and buildings (also abutting on the millstream, but above Beckery Mill), erected in the year 1865 by the then partners in the firm of A. Baily and Co., on which premises that firm had ever since carried on the business of rug manufacturers.

By virtue of their riparian rights as owners of the last-mentioned premises or, alternatively, under and by virtue of the Prescription Act 1832, by reason of the uninterrupted enjoyment thereof as of right for upwards of twenty years before the commencement of the present action, the plaintiffs claimed to be entitled to the natural and accustomed flow of the water through and along the millstream to their premises for the purposes of their manufactory and other reasonable and proper purposes.

The defendants, Clark, Son, and Morland Limited, were the owners in fee simple of certain lands, buildings, and works, situate partly on the right or eastern bank and partly on the left or western bank of the millstream above the plaintiffs' premises. The buildings and works were erected by the predecessors in title of the

defendants, then trading in partnership under the style of Clark, Son, and Morland, some time subsequently to the year 1870, and the premises were used by the defendants as a factory for the manufacture on an extensive scale of sheepskin and other rugs.

The site of the defendants' factory, which was acquired by the partnership of Clark, Son, and Morland in the year 1870, consisted of an old tanyard and some gardens and orchards. Until a few years previous to the acquisition by the partnership of the site a tannery business was carried on in the tanyard by the owners or occupiers thereof. The tannery business (as the plaintiffs alleged) in no material way interfered with the natural and accustomed flow of the water in the millstream, nor was the water therein thereby polluted, obstructed, or diverted so as to injuriously affect its natural and accustomed flow either in quantity or quality to the plaintiffs' premises.

The business carried on by the defendants at their factory was a large one, and was continually increasing.

In the year 1877 John Baily, the then owner of Beckery Mill, brought an action in the Chancery Division against the predecessors in title of the defendants to restrain the injury done to him as owner of Beckery Mill by reason of the waters of the millstream being polluted, obstructed, diverted, and abstracted by the then owners of the factory. That action was compromised upon the terms of an agreement contained in an indenture dated the 10th Oct. 1879. The agreement was duly determined in Jan. 1900, and the parties thereto and their successors in title had accordingly been relegated to their respective original rights and liabilities in respect of the millstream as they existed at the date of that action as provided by the agreement.

By their statement of claim in the present action, the plaintiffs alleged that the defendants, in the course of their business, polluted and fouled the millstream and obstructed the same, and diverted and abstracted therefrom large and unreasonable quantities of water, so that the flow of the millstream to the plaintiffs' mill and factory was seriously interfered with and materially diminished; that such diminished flow was so polluted and fouled that it was unfit for use for the purposes of the plaintiffs' mill or factory; and that they were deprived of the beneficial use thereof.

The plaintiffs also alleged that the pollution was caused by the defendants washing, scouring, and soaking sheep and other skins in the millstream, some of which had been previously subjected to dyeing processes; that the filth and dyes emanating from the skins were of an extremely deleterious character while they were being soaked, and seriously polluted the millstream; and that the effluent from the liquid which was used in dyeing the skins in the factory was also turned back by the defendants into the millstream and caused further pollution.

The plaintiffs also alleged that the defendants, for the purposes of their business, also drew off and diverted from the millstream, by means of a system of pipes laid into the millstream at a low level, large and unreasonable quantities of water, which were not returned to the millstream; and that thereby the flow of water in the millstream

was rendered insufficient for the purposes of the plaintiffs' mill.

The plaintiffs further alleged that the defendants had also obstructed the flow of the millstream by placing or maintaining in the bed thereof large iron cages or gratings, into which were thrown the sheepskins; that the cages or gratings and other obstructions placed or maintained by the defendants in the millstream seriously obstructed the flow of water thereof to the plaintiffs' premises; that, in addition, the defendants threw into the millstream large quantities of filth and refuse, both solid and liquid, consisting of washings of skins, dyes, and other matter used by them in their business; and that the water in the millstream was thereby further polluted and the flow thereof to the plaintiffs' premises further impeded.

The plaintiffs accordingly brought this action against the defendants claiming an injunction to restrain the defendants from wrongfully (1) fouling or polluting the millstream; (2) diverting or abstracting the water from the millstream; (3) obstructing or diminishing the flow of water in the millstream; (4) doing any other act in relation to the millstream to the injury of the plaintiffs' premises.

The plaintiffs also claimed damages.

By their defence the defendants denied that the plaintiffs had either as owners of Beckery Mill or by prescription any rights to the flow of the water in the millstream, except for the purpose of working the mill; and they alleged that such rights as the plaintiffs might have were subject to the rights hereinafter mentioned which the defendants had to the water and the millstream. The defendants denied that the plaintiffs as owners of the lands and buildings above Beckery Mill had any rights, either as riparian owners or otherwise, to the natural and accustomed flow of water through and along the millstream; and they stated that the millstream was an ancient artificial channel through which water was diverted from the river Brue.

The defendants denied that they, except as hereinafter mentioned, in the course of their business polluted and fouled the millstream or obstructed it or diverted and abstracted therefrom large and unreasonable quantities of water; and that the flow of water in the millstream to the plaintiffs' mill and factory was seriously or at all interfered with or materially diminished.

The defendants denied that the tannery business carried on upon the tanyard in any material way interfered with the flow of the water in the millstream, and did not pollute, obstruct, or divert the water therein. They alleged that for more than forty years before the commencement of the present action they and their predecessors in title had enjoyed as of right and without interruption the right for manufacturing purposes to place obstructions in the millstream, and to divert and consume a part of the water, and to pollute the millstream by discharging into it solid and liquid refuse and otherwise; and, alternatively, that they had enjoyed as of right and without interruption such rights for twenty years before the commencement of the present action; that for more than forty years before the commencement of the action brought in 1877 the defendants and their predecessors in title had enjoyed as of right and without interruption the right for manufactur-

ing purposes to place obstructions in the millstream, and to divert and consume a part of the water, and to pollute the millstream by discharging into it solid and liquid refuse; and that in that action the plaintiffs alleged that by reason of certain obstructions caused by the defendants the water in the said stream was banked up and diverted over a weir, or clyce, instead of flowing in the bed of the millstream to the plaintiffs' mill, and the defendants alleged that the water in the millstream fell over the weir, or clyce, by reason of the neglect of the plaintiffs and one John Gooden Bishop to use and maintain in a proper state of repair certain boards which should be maintained and used at the weir or clyce.

The defendants admitted that they did take and consume appreciable quantities of water for domestic purposes and for the purposes of their business; but they denied that they took unreasonable quantities of water, and alleged that for forty years, and in the alternative for twenty years, before the commencement of the present action they and their predecessors in title had taken and used water for such purposes from the millstream.

In the alternative the defendants, while not admitting that any of the acts alleged in the statement of claim to have been done by them had obstructed the flow of water in the millstream to the plaintiffs' premises, stated that John Gooden Bishop, the predecessor in title of the plaintiffs of Beckery Mill, was aware of and acquiesced in the doing of such acts.

The action came on for trial before Byrne, J., and his Lordship reserved judgment.

On the 4th Feb. 1901 the following written judgment was delivered by

BYRNE, J.—The present action is brought to restrain the defendants from (1) fouling or polluting the stream in the cut; (2) diverting or abstracting the water; and (3) obstructing or diminishing the flow of the stream. The plaintiffs claim, both as owners of Beckery Mill and of their factory, a right to the whole and unpolluted flow of the water of the stream as it enters the cut, as well for the use of the mill as for the use of their factory. By reason of an action brought in 1877, and of certain subsequently executed deeds of arrangement to which I need not refer in detail, the defendants cannot have, as against the plaintiffs, as millowners, by prescription or otherwise, any rights in respect of the stream, other than such (if any) as had been acquired in right of Northover prior to that year. It is necessary to keep the plaintiffs' claim as millowners distinct from their claim as factory-owners, and I propose first to deal with the case as though they claimed only in respect of the millowners' title. But I will clear the way by saying that the plaintiffs have failed to prove to my satisfaction any obstruction of the flow of the stream by reason of erections in or extending into the channel. I think that the stream flows substantially as well as it has ever done; and that, having regard to what has actually taken place, the channel is capable of passing just as much of the water entering it as it ever was. I am referring only to physical obstruction, not to the question of obstruction of water. Before proceeding to deal further with

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the issues of fact it will be convenient to examine some legal points which arise, and I will first read a passage from the decision of the Privy Council in the case of *Rameshwar Pershad Narain Singh v. Koonj Behari Pattuk* (4 App. Cas. 121, at p. 126), which appears authoritatively to state the law applicable to riparian owners as contrasted in the cases of natural and artificial watercourses in general terms. It is as follows: "There is no doubt that the right to the water of a river flowing in a natural channel through a man's land and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land do not rest on the same principle. In the former case each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin." In *Kensit v. Great Eastern Railway Company* (51 L. T. Rep. 862; 27 Ch. Div. 122, at p. 134) Cotton, L.J., after citing the passage I have mentioned, proceeds: "That is to say, in one case it would be what we call by grant or prescription; in the other case it is a natural right from the natural stream flowing through a man's land which gives him the rights incident to the ownership of the land." In the same judgment Cotton, L.J. points out that it is impossible to say that any natural rights can ever be acquired in an artificial cut, but says (at p. 134 of 27 Ch. Div.): "Possibly after a length of time it might be difficult in some cases to say that a cut was not part of the natural stream." It is also, I think, good law that the rights of a riparian owner may be as extensive in respect of the stream in an artificial cut as they can be in respect of a natural stream: (see *Sutcliffe v. Booth*, 32 L.J. 136, Q. B.). This seems to be a necessary result of the application of the law relating to lost grant. If lost grant may be inferred from circumstances, I think that if the circumstances lead to such an inference lost grant of rights, as good and as extensive as those enjoyed by a riparian owner on a natural stream, may be inferred in favour of an owner on an artificial stream. In like manner, in the case of prescription, to the extent to which prescriptive rights can be acquired, I think that if such rights have been exercised for the period necessary to establish them they may be as extensive in the case of an artificial stream as in the case of a natural one. In applying the law to the particular case, I do not think that I ought to treat the matter as though the cut were a simple diversion and part of the natural bed of the stream; and I propose to deal with it upon the footing that the cut is artificial, and that the right of the plaintiffs to the flow of the water, and to its reasonable enjoyment, are those in respect of an artificial stream, and must therefore rest upon some grant to be presumed, or upon prescription. So, also, the defendants' right (if any) to use and foul the water must depend upon grant or prescription. In giving the judgment of the Privy Council in the case to which I have referred, Sir Montague Smith, after refer-

ring with approval to passages he cited from *Wood v. Waud* (11 Ad. & Ell. 586), *Greatrex v. Hayward* (8 Exch. 293), and *Sutcliffe v. Booth* (*ubi sup.*), proceeds to deal with the facts, and he commences with the inquiry: "What then is the character of the reservoir and watercourses now in dispute, and what are the circumstances under which they were presumably created and have been actually enjoyed?" I commence with a similar inquiry—viz., What is the character of the cut and watercourse in question, and what are the circumstances under which they were presumably created and have been enjoyed? No direct evidence has been adduced to show the actual date when, or the circumstances under which, the artificial cut or watercourse was originally made, or when or under which Beckery Mill was first built. The watercourse has undoubtedly existed for a long period, probably for some centuries. Having regard to the nature of the cut and to the existence of the mill, as well as to the actual user of the mill and watercourse so far back as it can be traced, I think it is a right presumption to make that the cut was originally made with the assent of the lower riparian owners on the banks of the river Brue, as and for the purposes of Beckery Mill, not necessarily the present structure, but a mill on the site of and now represented by the mill belonging to the plaintiffs. In other words, I think the watercourse is what is commonly called a millstream. It may be that when the cut was made the whole of the land through which it runs was in one ownership, or it may have been in several. I think I ought to infer a legal origin for it, and a legal right to the uninterrupted flow of the water passing along it for the purposes of the mill in the same condition as it enters the cut. It has been argued for the defendants that the only right of user of the water which ought to be presumed (if any) is a right of user for the purpose of turning the mill-wheel. But I do not accept this view. So far back as living memory extends, and probably always, the miller has lived at the mill, and up to a time within living memory the water of the stream has been used for drinking and domestic purposes. Pester, the miller, who has lived there for thirty-seven years, has himself used it for those purposes in the days before the defendants' factory (Northover) was built. I do not doubt that at the present day, and with modern notions, any reasonable miller would refuse to drink the water even at the intake from the river, where it is, no doubt, fouler than it formerly was, but I am not at all prepared to say that except for the defendants' operations it might not still be used for some domestic purposes. I do not infer any less right to the unpolluted flow of the stream, as it enters at the intake, because the tenement is a mill than I should have done had it been a tenement without the mill. I think that I ought to presume such a right as the millowner would have had by grant, not only for purposes of affording power, but for the purposes of an inhabited dwelling. I hold, therefore, upon the facts proved, and to be properly inferred or presumed, that, subject to any rights in derogation of the millowner's rights (if any) which may since have been acquired by prescription or grant by the defendants or their predecessors in title as superior riparian owners upon the cut, the plaintiffs are now entitled to the unimpeded flow of

water in the same condition and in the same volume as it enters the cut, as well for the purposes of driving the mill-wheel as for the purposes of the millowner or occupier, for all purposes appropriate to an inhabited tenement. This involves the right to an unpolluted as well as to an uninterrupted flow, save so far as pollution is due to what takes place prior to the intake from the river. Before 1866 the mill and the site of the plaintiffs' factory were in common ownership; but in that year the then owner granted the site of the factory to the plaintiffs' predecessors in title for the purpose of building a factory; and they have since about 1867 abstracted water from the stream and have also polluted it in carrying on their business; but the pollution does not take place above the mill, as the effluent is discharged below it. The millowner, having granted a site for a purpose involving a certain abstraction of water, could not complain of it unless exercised in excess of the requirements of the contemplated works; and no surrender of rights beyond that involved in the grant ought to be inferred. As between the plaintiffs, in their right as factory owners, and the defendants, as superior riparian owners, the plaintiffs could not have acquired a right to the unpolluted and undiminished flow of the stream except by grant or prescription; and I do not find that they have proved such a right, inasmuch as they have not enjoyed it for the necessary period. If, however, the plaintiffs are entitled in their right as millowners, this will incidentally protect them in their business at the factory. The defendants' predecessors acquired the site of their factory at Northover in the year 1870. There was on the property at that time a tannery, and for the purposes of that business the owners of it had been accustomed to withdraw a certain quantity of water from the cut, and had acquired a prescriptive right so to do. This was withdrawn by means of a hand-pump. Amos Webb, who formerly worked there, put the quantity taken, in his examination in chief, at about an average of a hogshead a day. On cross-examination he said that there were four lime pits, and it required about five hogsheads of water to fill one. These were filled once or twice a fortnight. I think the amount used for this purpose may be put at about two hogsheads a day. In addition, a certain quantity of water was taken for the tan pits, of which there were from thirty to forty, but there was no loss of water taken for these except from evaporation or absorption, and the abstraction of water for this purpose must have been very slight. As well as I can judge, the total abstraction of water for the use of the tannery certainly did not exceed 1000 gallons a week, of which a very large proportion, say three-fourths at least, went back into the stream. Of course I can only make a rough approximate estimate from the evidence, but I should think that the water abstracted and not returned to the stream would not exceed some 250 to 300 gallons a week for all purposes, allowing for water lost by being taken up in soaking and washing skins. A certain number of skins were soaked in a crate or cage in the stream, and skins were washed in the stream to get rid of the lime after unhairing. Webb puts the number of skins treated at from forty to fifty a week. No dyeing process affecting the effluent was carried on. The lime pits

were used to be emptied in a somewhat unscientific way, and I have no doubt that the effluent water passing into the stream contained a certain proportion of lime; the greater part of the thick lime was kept out and carted away. I think it probable that there was occasionally some other comparatively slight pollution, but it is quite certain that there was nothing to compare, either in amount of water abstracted from the stream or in volume of effluent, with what the defendants are and have been doing. Shortly after acquiring the Northover Tannery and adjoining property the defendants (who are fellmongers and rug manufacturers) erected a factory and works for their business. They have from time to time increased and enlarged their buildings and plant. They employ about ten times as many hands as were formerly employed at the tannery. They take out of the stream, at the most favourable estimate, at least 107,000 gallons a week. There is a considerable difference between the plaintiffs' and defendants' figures, which are but estimates after all, as to the quantity of water taken from and returned to the stream after being used for the various processes; but I think it is certain that the amount consumed or lost in the course of the processes is many thousands of gallons a week more than it was in the time of the old tannery. There is also a direct cause of pollution in the soaking of skins in the stream, and there are several hundred more skins a week soaked by the defendants than in the time of the existence of the old tannery. Water is returned to the stream after being mixed with lime, soda, dye, and other matters, and having been used in dyeing the skins and rugs, and after having been subjected to a purifying process by means of settling in tanks and being treated by a method known as the alumina ferric process. The comparative purity of the effluent depends upon the efficiency of the purifying system and on the care with which it is worked; and I have to balance the evidence, professional and other, which I have heard. In considering the analyses I have made allowances for the fact that some of the samples were taken for the plaintiffs in a rough-and-ready way, although, as I believe, perfectly honestly. I have also to consider the evidence of what has been actually seen, felt, and experienced by the witnesses who have known the stream before and since the erection of the defendants' works. On the whole case I have come to the conclusion that there is at times a very considerable fouling of the stream by the defendants' effluent, far beyond any possible fouling which could have been occasioned by the old tannery. On the question of loss of water power at the mill, I think that the evidence shows the loss of a substantial and material amount of water, caused by the defendants' operations, which does sometimes interfere with the working of the mill in the summer and autumn. It must of course be borne in mind that the abstraction and return of water is not a constantly equal operation, and it does not give a fair test of result on the working of the mill to treat the matter as though it were. If water is abstracted during working hours and the effluent returned at night, for instance, at a time when the stream is very low, this may well have a very appreciable result in the working of the mill, which might not be noticeable if the reverse process were adopted. But apart from all theories

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and calculations, from all figures and descriptions of the excellence and infallibility of the process of purification, I am satisfied upon the evidence of what has been seen, felt, and experienced by the witnesses that there is from time to time a very considerable diminution in the flow of the stream, and a very considerable fouling of the stream, and that caused, not merely by operations similar or analogous to those formerly carried on at the old tannery, but also by operations of an entirely different character, as, for instance, dyeing. I think that a right had been acquired by the owners of the old tannery, as against the millowner, to abstract water and foul the stream to a certain extent, and had the same business been carried on that right might still have been claimed by the defendants to the same extent, and possibly even to such greater extent as the ordinary reasonable trade development of the old business required, but they are fellmongers and skin-rug manufacturers, and are making use of the stream for these businesses, not for a tannery. At the same time there are certain processes, at all events, such as soaking and washing skins, which if I have rightly understood the evidence are common both to the business of a tannery and to those of fellmongers and rug manufacturers; and, having regard to this fact, I am not prepared to say that the defendants are not still entitled as against the plaintiffs to abstract and use the water of the stream and to pollute it for the same process or processes and to the same extent as it was used and polluted for the purposes of the old tannery, and I propose to limit the injunction to which the plaintiffs are entitled in this respect. Then with regard to the precise words of the injunction, I have put them down roughly. I think it will be something of this sort—an injunction to restrain the defendants, their servants and workmen, from wrongfully fouling or polluting and from diverting or abstracting the water of the stream in the statement of claim mentioned further or otherwise than to the same extent as such water was formerly fouled or polluted, diverted, or abstracted for the same process or processes (if any) as were formerly carried on at the old tannery and which has or have since been carried on at the defendants' new works. I think that is substantially right; but if it is desired to have any change in the phraseology it may be suggested to me. The defendants must pay the costs of this action; but the injunction is not to come into operation for at least six months, so as to give the defendants time to rearrange their process as far as possible.

From that decision the defendants now appealed.

Levett, K.C. (with him *R. Cunningham Glen*), for the appellants, contended that there had been no unjustifiable pollution of the millstream, nor an unreasonable abstraction of water therefrom. Upon the latter question he referred to

Butcliffe v. Booth, 32 L. J. 136, Q. B.;

Ivimey v. Stocker, 14 L. T. Rep. 427; L. Rep. 1 Ch. App. 396, at p. 406;

Rameshwar Pershad Narain Singh v. Koonj Behari Pattuk, 4 App. Cas. 121;

Wood v. Waud, 11 Ad. & Ell. 586.

Rowden, K.C. and *Ward Coldridge*, for the respondents, were called upon only as to

the question of abstraction of water. They referred to

Greatrex v. Hayward, 8 Exch. 293;

Wills and Berks Canal Navigation Company v. Swindon Waterworks Company, 30 L. T. Rep. 443; L. Rep. 9 Ch. App. 451; on appeal 33 L. T. Rep. 315; L. Rep. 7 E. & I. App. 697;

Miner v. Gilmour, 12 Moo. P. C. 131, at p. 156;

Attorney-General v. Great Eastern Railway Company, 25 L. T. Rep. 867; L. Rep. 6 Ch. App. 572.

[*WILLIAMS, L.J.* referred to *Earl of Sandwich v. Great Northern Railway Company* (10 Ch. Div. 707).]

Levett, K.C. replied.

WILLIAMS, L.J.—It is better, before I deliver judgment, to say at once in form what we have just been referring to in the course of the argument about the pollution and also about the prescriptive right set up by the defendants in their counter-claim. With regard to the pollution, I shall presently say what we consider to be the conditions under which this artificial watercourse was constructed. And, when it appears what those conditions were, it will be seen that according to our view there was unjustifiable pollution of this stream. Under those circumstances the injunction, so far as it relates to pollution, either will have to remain in its present form or will have to be renewed in the order that we propose making. But we have already heard from the defendants that they have acquired some five acres of land which will enable them so to treat the effluent as to prevent there being any obnoxious discharge into the stream, and we should think it right to extend the time for the injunction coming into force—that is to say, suspend the injunction for such time as may be necessary to enable the defendants to do this. Then with regard to the prescriptive right, *Byrne, J.* has affirmed that right so far as the tannery is concerned. We do not think that in that respect there ought to be any alteration in the order—that is to say, we do not think any further prescriptive right has been established. Now, then, coming to the main case, I want to say, to start with, that this case has been argued on both sides upon the basis that the stream in question is an artificial watercourse; and I propose to deal with this stream, as both sides have dealt with it, as being an artificial watercourse. I only wish to safeguard myself in what I say in that respect that it must not be taken as if I had myself decided that upon the evidence it is clear that this is within the meaning of the cases an artificial watercourse. I am not quite sure about that. With respect to a stream of this sort that runs out of a river and after making a detour comes back again into the river, it is quite plain, *quod* the riparian proprietors or the river itself lower down than the point where the stream returns, that they and the riparian proprietors on the backwater do stand in the relation to each other of upper and lower riparian proprietors. And I should have thought that the obligations of the upper riparian proprietors, and to a certain extent their privileges, would, as between themselves and the people lower down on the river, be the same as those in respect of a natural stream. That would be the same independently of any grant or any prescription. I have not, however, to decide that point.

I am only suggesting that I am not sure that this might not be treated as a natural stream, at all events for some purposes. And I have mentioned one of the purposes for which I think possibly it might be so treated. Really I am not quite sure that it makes any difference to the conclusion that I have come to in this case whether you regard this watercourse as an artificial stream or a natural stream. That, however, does not matter. I am going to deal with it as being an artificial watercourse. If this were a natural watercourse, each riparian proprietor would obviously have had the rights which are so well stated by Lord Kingsdown in the case of *Miner v. Gilmour* (12 Moo. P. C. 131, at p. 156), where he says: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land—for instance, to the reasonable use of the water for his domestic purposes and for his cattle—and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him; subject to this condition, he may dam up the stream for the purpose of a mill or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." If, on the other hand, one deals with this as an artificial watercourse, any right to the flow of the water must have its basis on some grant, whether in the nature of an easement or otherwise. With regard to an artificial stream, the basis of all rights must be really an agreement either expressed or presumed from the user by the owners of the land through which the artificial watercourse runs. That being so, it is quite plain that the circumstances might be such as to lead to a proper inference that the artificial watercourse was constructed on the terms that each of the riparian proprietors on the watercourse should have all the same rights as the riparian proprietors upon a natural stream, and no more than those rights. In the first place, as an authority for that proposition one may take the case of *Sutcliffe v. Booth* (32 L. J. 136, Q. B.). As I said before, I am not at all sure that it would not be sufficient for the defendants if we were to hold that the rights of the riparian proprietors on this backwater were the rights of riparian proprietors on a natural stream and no more. But it is not necessary to discuss that, because in my judgment they are somewhat wider. To put it in another way, in my judgment it is perfectly clear—at all events having regard to the evidence of the prior user—that what has been done by the defendants in the way of abstraction of water has not been a violation of the rights of the plaintiffs as riparian proprietors on this artificial stream. When one comes to look at the evidence as to this stream, it is quite plain to my mind that there has been a withdrawal of water from the stream in times gone past for purposes other than domestic purposes. It is quite plain that there was a withdrawal of water for the purpose of the old tannery. And, although Byrne, J. has allowed the defen-

dants to claim in respect of the tannery rights of abstracting water as prescriptive rights, it seems to me they may equally be supported as rights arising under the conditions concerning which it must be presumed that the artificial watercourse was originally constructed. Then also I think that one should bear in mind what the user has been by the plaintiffs themselves, which I do not understand it to be suggested was unlawful or inconsistent with the original conditions of the creation of this backwater. There is a new and modern piece of evidence as to the conditions under which this watercourse has been in fact used. Then also we have the evidence that in addition to the Beckery Flour Mill there was another mill higher up the stream. Under those circumstances I come to the conclusion that this backwater was originally constructed under such conditions that the water might be withdrawn for manufacturing purposes equally by all the riparian proprietors, provided the abstraction of water was reasonable. Of course it is always a difficult thing to determine the measure of what is reasonable in such a case. But, speaking for myself, I think you must take into consideration, amongst other things, the size of the stream—that is to say, the total quantity of water there—and all the other conditions which are present, the other mills and factories and places there are there, and also causes of waste and necessity for the user of the quantity proved to be used. I repeat, therefore, that the result is that according to my judgment one ought to find here upon this evidence that this artificial watercourse was constructed upon terms giving all the riparian proprietors equally a right reasonably to withdraw the water for manufacturing purposes. And I am of opinion that there is no proof here that the defendants have withdrawn any larger quantity of water. I want at this point to mention that if one takes in the very strictest way the words of the judgment of Lord Kingsdown in *Miner v. Gilmour* (*ubi sup.*)—"But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury"—there is, in my opinion, really no evidence here upon which one can find that the defendants have, by the water they took out of the stream and returned to the stream, less the amount which was naturally evaporated, done anything to interfere with the lawful use of the water by other proprietors, or to inflict upon the plaintiffs a sensible injury. The suggested injury here was that they had interfered with the working of the mill. In my judgment there is no evidence of that. There is, it is true, some vague evidence that the working of the mill was interfered with by the shortness of water. But there is nothing in that evidence which is inconsistent with that interference having been caused by the withdrawal of the 25,000 gallons a day by the plaintiffs themselves, of which 25,000 gallons a day, be it observed, none went back into the stream above the mill, but the whole of it was discharged below the mill. Under these circumstances, my view is naturally that the user by the defendants, or the abstraction by the defendants, of the quantity of water which they are proved to have abstracted and to a large extent returned was a reasonable user; but that that user, whether reasonable or not, has not been proved to have caused any inter-

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ference whatever with the plaintiffs' mill, or any sensible injury to the plaintiffs as millowners. Now I want to deal with one other matter. It is said that it may be that the circumstances are such that they do give rise to an inference that by grants from or arrangements with the various riparian proprietors this artificial watercourse was originally constructed upon conditions either a little wider than, or at least equal to, the conditions under which the riparian proprietors on a natural stream take privileges and incur obligations. But it is said that all that may be subject to some special rights of these plaintiffs as millowners. It is suggested that the millstream backwater was originally made expressly for them, but to my mind the evidence about the fulling mill absolutely disposes of that suggestion. It is suggested that either by some such original grant, or by some prescription arising from user since the original grant, the plaintiffs have gained paramount rights and larger rights than the other riparian proprietors, and that the riparian proprietors must be taken to have their rights and privileges subject to this paramount right of the plaintiffs as millowners. I do not say that such a state of things is impossible, but in my judgment it is a state of things that we ought not to infer from the evidence before us. I really do not think that I should be justified in occupying time by going into this question at any length, or in attempting to define what evidence would justify the inference of grant or prescription giving such paramount rights to the owners of this mill, because I am clearly of opinion myself that no possible inference which one could draw from the facts could give the plaintiffs a right to every drop of the water that passed over the weir. I agree with Mr. Rowden and Mr. Coldridge that if they could establish that they would have established their case. But it seems to me that it is really absolutely impossible to suggest that there are any circumstances here from which one ought to draw such an inference. There is nothing in the facts to suggest that this was the only mill, or that the stream was only made for the benefit of that mill, or anything from which we ought to draw that inference. I do not think that we ought to have drawn it if the fact had been established—but the fact has been negatived. Then it is also said that we ought to draw that inference because there is never as much water in this stream as this mill could take and utilise. It seems to me that, assuming that to be true, one ought not to draw this inference. Speaking for myself, I most unhesitatingly say that I am of opinion that there is nothing to justify the inference that the plaintiffs had a grant entitling them to the whole of the water coming over this weir. The entire history of the user seems to me to negative their having any such grant. Then, if they had not that grant, what was the grant that they had? The grant may have been that they had the right to have the water flowing into this backwater course down to their mill without any interference with it except by the exercise of the riparian rights of the people up the stream. If that is their right, in my judgment on this evidence, as I have already stated once before, there is nothing to justify the conclusion that the defendants have in any way caused interference with or sensible injury to the rights of the plain-

tiffs as millowners. Really, on the evidence, it is tolerably plain that if there has been any material shortness of water at all, it is attributable rather to the acts of the plaintiffs themselves than to anybody else. Under those circumstances, in my judgment we ought to vary the order of Byrne, J., leaving the injunction against the pollution and negating any larger prescriptive rights than those which are recognised by the order, but discharging absolutely so much of the order as relates to the abstraction of water. If that is the proper conclusion to come to, the appellants have substantially won on this appeal, and they ought to have the costs of the appeal. As to the costs in the court below, I think that the plaintiffs and the defendants came off about equally as to what they won. Under those circumstances, I think that the order ought to be, as regards the hearing in the court below, that each side pays its own costs.

STIRLING, L.J.—I am of the same opinion. The question relates to the relative rights of the plaintiffs and the defendants to the user of an artificial watercourse. It is a watercourse which is an ancient one, having been in existence for some 400 years at least. The plaintiffs are the owners of a flour mill upon it, and also the owners of an adjoining factory, the mill having existed there for an unknown period, but the factory having been recently erected. Now, the watercourse runs from a place called Clyce Hole, on the river Brue, which is a natural stream and conveys water to the mill and the factory, passing by the land of the defendants, and after passing the plaintiffs' mill it goes on and again empties its waters into the stream. Its whole length is about one mile and a half. There is no question that the plaintiffs and their predecessors in title have been entitled, so far as can be discovered, to the user during that period of the watercourse for the purposes of their flour mill. It also appears that the miller has had, so far as it has been discovered, from time immemorial the control of the flow of the water. He has been able, therefore, so to deal with the water as to avail himself of it at such times as he pleased, and as was beneficial for the purpose of working the mill. It seems that he had also cast upon him the obligation of cleaning the watercourse and repairing its banks. Now, it cannot be doubted that in that state of things the plaintiffs are entitled to the benefit of the flow of the stream and to a reasonable use of the water, at all events for the purposes of their mill, returning the water after such use to the natural stream in the river Brue. But the plaintiffs are not content with that, and they assert that they are entitled to the exclusive use, for the purposes of the mill of the whole flow of water along this artificial watercourse. Now in dealing with this we have to inquire, first of all, on what principles those rights are to be ascertained. The principle has been laid down in various cases, of which I may mention *Wood v. Waud* (11 Ad. & Ell. 586), *Sutcliffe v. Booth* (32 L. J. 136, Q. B.), and the case in the Privy Council of *Rameshwar Pershad Narain Singh v. Koonj Behari Pattuk* (4 App. Cas. 121). It appears from those authorities, as it seems to me, that you must take into account, first of all, the character of the watercourse, whether it is of a temporary or permanent character; secondly, the circumstances under which it was created; and, thirdly, the mode

in which it has been actually used and enjoyed as a matter of fact. As regards this watercourse, it is obviously of a permanent character, and there is no question, therefore, that rights and easements may be acquired in it. As regards the circumstances under which it was created we know nothing. It has existed for hundreds of years, but we know not who at the time of the creation of this watercourse were the owners of the various properties which now belong to the plaintiffs and the defendants respectively, or in fact as to the ownership of any portion of land along the watercourse. I have stated what we know shortly as regards the user by the mill-owner for the time being. I have said that he claims the exclusive right for the purposes of the mill of the whole flow of water along this watercourse. That right was put as high as this, that the plaintiffs are entitled to the use of every pailful of water in the stream; and, further, it was said that the stream is of such a nature that every pailful is of importance to the owner of the mill. Let us consider what are the facts with regard to the rights which have been exercised by the other owners of property abutting on this watercourse. First of all, the owners of the properties which adjoin have, it is stated, used the water for the purpose of watering their cattle, and the ordinary purposes for which riparian owners would use the adjoining stream. Secondly, the defendants and their predecessors in title were owners of a tannery, and they used the water for the purposes of their business. Thirdly, the plaintiffs' predecessors in title sold their property with rights of water for the purposes of the erection of a manufactory, and the plaintiffs use it for the purposes of a manufactory and not exclusively for the purposes of a mill. If their right be as they claim, that for the purposes of the mill they have the exclusive right to the use of every pailful, then they are not entitled to use a single pailful for the purpose of anything else. What conclusion are we to come to with regard to these acts of the owners? They ought, it seems to me, to be taken *prima facie* to have been acts done in the exercise of a legal title rather than as acts which they had no right to do. I think, therefore, that it ought to be inferred that the owners abutting on the watercourse reserved to themselves at the time when the watercourse was created the right to a reasonable use of the water as it passed their lands. The plaintiffs are in like manner entitled to a similar right to the reasonable use of the water for all reasonable purposes, and not merely for the purposes of the mill. In substance, apart from the peculiar use of the water for the purposes of the mill, both the plaintiffs and the other adjoining owners are entitled to such rights as the owners of lands adjoining a natural stream would be entitled to *inter se*. Then, if this be the nature of the plaintiffs' title, have the plaintiffs' rights been infringed? Byrne, J. came to the conclusion upon the evidence that they had. He says: "I think that the evidence shows the loss of a substantial and material amount of water, caused by the defendant's operations, which does sometimes interfere with the working of the mill in the summer and autumn. It must of course be borne in mind that the abstraction and return of water is not a constantly equal operation, and it does not give a fair test of result on the working of the mill to treat the matter as though it

were. If water is abstracted during working hours and the effluent returned at night, for instance, at a time when the stream is very low, this may well have a very appreciable result in the working of the mill, which might not be noticeable if the reverse process were adopted." That being so, I have been desirous to see the evidence by which that conclusion is supported, and, having heard and paid attention to all the passages that were referred to by the learned counsel for the plaintiffs, I am unable to arrive at the same conclusion as Byrne, J. The right of the defendants to use their water is limited by this, that they must not so use the water as to cause sensible injury to the plaintiffs. Therefore the plaintiffs coming here to complain of the user must prove sensible injury. Now, there are two classes of evidence which have been adduced, as there are in all cases which involve questions of nuisance. There is, first of all, what has been termed direct evidence of injury; and, secondly, the evidence of experts, which is adduced also by persons who have not worked the mill or dealt with it, but have paid a visit to it and drawn conclusions from what they have seen there. To my mind, the first is that which we have to regard, at any rate to begin with. I do not say expert evidence is to be excluded, because it is most valuable and useful if once you arrive at the conclusion that what is properly termed direct evidence of injury is satisfactory in tracing the origin of the injury to the defendants' operations and showing that it is due to them. But if the direct evidence of injury is unsatisfactory, then, to say the least, it wants a very strong case of expert evidence to prove a case for an injunction. It then substantially comes to a case of *quia timet*, and very strong evidence is wanted to induce the court to interfere. Now, what is the evidence of direct injury? [His Lordship reviewed the evidence upon this question, and continued:] That is the direct evidence, and it is far from satisfying me that any sensible injury whatever is caused by the operation of the defendants' works. If there is any injury caused at all, it is much more probably caused by the devotion of a large portion of the stream to the works carried on by the plaintiffs. I will not pass over altogether the expert evidence. Now, on that, as usual, there is great conflict. The defendants' witnesses admit a certain amount of abstraction of water. They put it down, I think, at 1500 gallons a day, which they say they do not return. The plaintiffs' witnesses put it much higher, and I will give them the benefit of their calculation and a little more. I will allow them to suppose that 8000 gallons a day are taken by the defendants—that is to say, about one-third of what is taken by the plaintiffs for their own works. Now, what does it come to? The quantity of 8000 gallons a day is taken. The minimum flow is 3,000,000 gallons a day, and that comes as near as may be to about $\frac{1}{4}$ per cent. of the stream. That is not sufficient abstraction, as it seems to me, to establish a case of *quia timet*. Again, the learned judge in his judgment suggests that there may be something due to the irregularity of the mode in which the water is abstracted and sent down. I am not prepared to say that to take a larger quantity of water out of the river at one time and to send it down at another would not be a ground for such an interference with

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the flow of the stream as to cause sensible injury to the plaintiffs. But I have not found any evidence of that in the present case. It is mere suggestion from first to last. There is no direct evidence on that at all, but it is a mere suggestion of the experts that they found a large quantity is pounded up, and they say it may cause injury to the stream. Upon these grounds I think that it is not made out the defendants have caused such a sensible injury to the plaintiffs as to call for the interference of the court. One matter more I should desire to call attention to. It was said frequently in argument by the counsel for the plaintiffs that a right was claimed and it was not necessary for them to prove any damage. I agree that if they claimed a right to do a thing which the court thought was an assertion of title to a particular thing, it would not be necessary for them to prove damage. There are assertions in the defendants' statement of defence of rights by prescription, but that has not been insisted upon at the bar. There is also a right claimed by the defendants to use the stream reasonably, and an assertion that the acts of the defendants have been consistent with the reasonable user of the stream. I think that when we are varying the judgment of the learned judge in the court below it ought to be provided by our order that we negative any right by prescription or otherwise beyond holding that the defendants are entitled to use the water in this watercourse in a reasonable way, not causing any sensible injury to the plaintiffs.

COZENS-HARDY, L.J.—I entirely agree, and it is only out of respect for the learned judge in the court below, from whose decision we are differing, that I think it right to add a few words. I doubt whether this ought not to be treated as a natural stream, having regard to its length, to the great and unknown antiquity of its construction, and to all the other circumstances. But I am content to treat it as an artificial watercourse, and, that being so, it becomes necessary to consider and ascertain, so far as one can, what are the mutual rights which have been created in that artificial watercourse; or, to put the matter in more technical legal phraseology, what are the terms of the lost grant which from the nature of the case must be found to have existed in some shape or other. Now, the plaintiffs here contend that the presumption we ought to make is a grant of all the water coming over what I will call the "intake" and going thence down to the mill, and that nobody else along the course of this artificial watercourse, which is considerably more than a mile in length, has a right to take a paiful of water out of it. That is the construction which, upon the whole, I think Byrne, J. has adopted. I cannot follow that. It seems to me to be absolutely inconsistent with all the evidence we have and with all we know about the origin and user of this artificial cut for many years. On the other hand, the defendants raised a contention which I am equally unable to accept. It was very strenuously and ably argued by Mr. Levett, in opening the appeal, that the implied grant did not extend to the whole of the water in the artificial channel, but only to so much as was necessary to work the mill. I am quite unable to follow that. It seems to me the subject-matter of the grant must be everything that comes into the artificial cut from the intake. And the only difficulty is to

ascertain who were the grantees and what were the mutual rights which were conferred upon the adjacent riparian owners and occupiers. Now, we know something, although not very much—but that something is very interesting—about this watercourse and this Beckery Mill. In a matter of this kind one of course is entitled to refer to a county history, and on referring to Collinson's History of Somerset I find there a verbatim extract from the terrier of Richard Bure, the last Abbot of Glastonbury but one. He was the Abbot of Glastonbury from 1497 to 1524, and I find this statement in the terrier: "There is another mill called Beckery Mill and a new fulling mill lately erected by the said Lord Abbot." From that I think it is apparent that this artificial watercourse was used more than 400 years ago, and probably constructed many hundred years before that. It was certainly used more than 400 years ago not merely for the purpose of the Beckery Mill, which is the plaintiffs' mill, but also for the purpose of a fulling mill on the banks of the cut as we know, and therefore affording a clear proof of the user of this cut for manufacturing purposes. That is enough to negative entirely that which is the foundation of the respondents' argument, viz., that the sole grantee—the only person entitled to the benefit of the lost grant—was the miller. In my judgment the true inference from all the facts is that the rights of the riparian owners and occupiers must be regarded in the same way as they would have been had this been a natural watercourse. But I think that the evidence shows that the riparian owners and occupiers are entitled to a reasonable use of the water, whether for domestic or for manufacturing purposes. That being so, I entirely agree with what my learned brothers have said, that although there is evidence which would have been material and would justify the finding of the learned judge in the court below if we had adopted his view as to the meaning and operation of the lost grant—viz., if it had been a grant of all the water—still I think that there is no evidence whatever to which any court ought to attach the slightest weight that there has been anything more than a reasonable user of the water by the defendants as against the millers and riparian owners lower down. In saying "reasonable user," it must not be assumed that I am forgetting the pollution. To that extent the user was not reasonable. But I mean that no more than a reasonable quantity has been taken out for manufacturing purposes by the defendants. For these reasons I think that the judgment of the learned judge in the court below cannot stand, and I entirely adopt the views which have been expressed by my learned brothers.

Order varied.

Solicitors for the appellants, *Crowders, Vizard, and Oldham*, agents for *Bulleid and Nixon*, Glastonbury.

Solicitors for the respondents, *James, Mellor, and Coleman*, agents for *Hobbs and Brutton*, Portsmouth.

Friday, March 14.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

SKENE v. COOK. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Limitations, Statute of—Land tax—Redemption—Capital sum paid for redemption—Yearly sum payable by way of interest—Recovery of—Lapse of time—Land Tax Redemption Act 1802 (42 Geo. 3, c. 116), ss. 123, 125—Real Property Limitation Act 1833 (3 & 4 Will. 4, c. 27), s. 1—Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), ss. 1, 8.

An action to recover the yearly sum payable under sect. 123 of the Land Tax Redemption Act 1802 to the person who has redeemed land tax, by way of interest upon the capital sum paid for redemption, is barred by sect. 1 or sect. 8 of the Real Property Limitation Act 1874 unless brought within the time thereby limited, either because it is "rent" within the meaning of sect. 1, or because the principal sum is a "sum of money charged upon land" within the meaning of sect. 8.

THIS was an appeal by the plaintiff from the judgment of the Divisional Court (Channell and Bucknill, JJ.) dismissing an appeal from the Westminster County Court.

The plaintiff brought this action in the County Court to recover the sum of 9*l.* for a payment in lieu of land tax in respect of two houses.

On the 4th Nov. 1873 Sir T. Brinckman, the owner in fee of two houses, demised them to one Purkis for a term of forty years.

Under the covenants contained in the lease the lessee covenanted to pay the land tax upon the premises.

On the 19th Feb. 1874 Purkis contracted with the commissioners, acting under the Acts for the redemption of the land tax, for the redemption of the land tax upon the demised premises, which was then assessed at 4*l.* 10*s.* each in respect of the two houses.

In Sept. 1874 Purkis paid to the Land Tax Commissioners the sum of 327*l.* 16*s.* 6*d.* for the redemption of the land tax, which was thereupon redeemed as from the 24th June 1874, and this was duly registered on the 10th Oct. 1874.

Purkis thereupon became entitled, under the provisions of the Land Tax Redemption Act 1802 (42 Geo. 3, c. 116), to an annual payment of 4*l.* 10*s.* in respect of each of the two houses.

On the 23rd June 1874 Purkis assigned the lease of the two houses to one Plumb, and ultimately by an assignment of the 27th Aug. 1885 this lease became vested in the defendant.

On the 30th June 1879 Purkis handed the certificate of the redemption of the land tax to the plaintiff, with the intention of transferring to him the benefit thereof. A formal assignment of the benefit of the certificate was made by Purkis to the plaintiff on the 9th Oct. 1899.

The plaintiff, upon receiving the certificate of redemption from Purkis in 1879, put it away with his title deeds and forgot all about it. He never made any claim upon the defendant or his predecessors for any annual payment in respect of either of the two houses until he claimed the payment of 9*l.* due on the 1st Jan. 1900, for which this action was brought.

The defendant gave notice of the special defence that the claim was barred by a Statute of Limitations.

The Land Tax Redemption Act 1802 (42 Geo. 3, c. 116) provides:

Sect. 123. Where any person or persons having any estate or interest (other than an estate of inheritance) in any manors, messuages, lands, tenements, or hereditaments, shall redeem the land tax charged thereon by or out of his, her, or their own absolute property, such manors, messuages, lands, tenements, or hereditaments shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, administrators, or assigns with the amount of the three pounds per centum bank annuities which shall have been transferred, or with the amount of the moneys paid as the consideration for the redemption of such land tax, as the case may be, and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land tax redeemed: Provided always, that no person or persons in remainder, reversion, or expectancy, or having any future interest in such manors, messuages, lands, tenements, or hereditaments as aforesaid, who shall afterwards, in order of succession, come into the actual possession or be beneficially entitled to the rent and profits of any such manors, messuages, lands, tenements, or hereditaments, shall be liable to the payment of any yearly sum or sums of money by way of interest as aforesaid, save only from the time they shall respectively come into possession or be beneficially entitled as aforesaid: Provided also, that where the land tax charged on any manors, messuages, lands, tenements, or hereditaments, shall be redeemed by any bodies politic or corporate, or companies, or any feoffees or trustees for charitable or other public purposes, or other person or persons having any estate or interest in remainder, reversion, or expectancy therein, or being substitute heirs of entail entitled in their order to succeed thereto, such bodies politic or corporate, or companies, or feoffees or trustees for charitable or other public purposes, or other person or persons in remainder, reversion, or expectancy, or being substitute heirs of entail as aforesaid, shall in the meantime, until their respective estates and interests vest in possession by reason of the determination of the preceding estate, be entitled to have a yearly sum issuing out of such manors, messuages, lands, tenements, or hereditaments, equal in amount to the land tax so redeemed.

Sect. 125. In all cases where any bodies politic or corporate, or companies, or other person or persons redeeming any land tax, shall by virtue of this Act be entitled to have and receive out of any manors, messuages, lands, tenements, or hereditaments, any yearly sums of money by way of interest, or by way of rent or of rentcharge, equal in amount to the land tax redeemed, such yearly sum shall be payable on the same days as such land tax was payable at the time of the redemption thereof (unless where any other days are herein specified for that purpose), and shall be recoverable by action, suit, distress, or any other means whereby rents reserved on leases are recovered by law:

The Real Property Limitation Act 1874 (37 & 38 Vict. c. 57) provides:

Sect. 1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Sect. 8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

The County Court judge held that the claim was barred by lapse of time, and gave judgment for the defendant.

The plaintiff appealed, with leave.

The Divisional Court (Channell and Bucknill, JJ.) held that the annual sum claimed was "rent" within the meaning of sect. 1 of the Real Property Limitation Act 1874, and that therefore the claim was barred by lapse of time: (84 L. T. Rep. 684).

The plaintiff appealed, with leave.

Martelli for the appellant.—The decision of the learned County Court judge and of the Divisional Court was wrong. There is no Statute of Limitations which bars this claim. The question arises under sects. 123 and 125 of the Land Tax Redemption Act 1802, and is whether the person who redeems the land tax has any right of action in respect of the principal sum or the annual payment to which he is entitled under those sections. The nature of the charge given by those sections was considered in the case of *Cousins v. Harris* (12 L. T. Rep. O. S. 44; 12 Q. B. 726), and it was there held that there was no right of action in respect thereof. If there is no right of action, then the case is not within any of the provisions of the Real Property Limitation Act 1833 or the Real Property Limitation Act 1874, and there is no other Statute of Limitations which can apply. [ROMER, L.J.—Why can a suit in equity not be brought to raise the amount of the charge, just as in the case of any other charge?] This is an anomalous charge in respect of which there is no remedy at all to recover the principal sum. It is not a sum of money charged upon land, within the meaning of sect. 8 of the Real Property Limitation Act 1874, because there is no right of action in respect of it. It would be most onerous if the person in possession of the land could be compelled to pay the principal sum, or were liable to have the land sold in order to pay off the charge. That was not the intention of the Act. That which is called the principal sum is really only the price fixed at which the owner of the land can, at his option, redeem the annual sum; but he cannot be compelled to redeem, and is not liable to have his land sold to pay off the principal sum. The only way in which the owner of the charge can realise the principal sum is by selling and assigning his charge. If there were an enforceable charge for the principal sum, the provisions of sect. 125, which give remedies for the recovery of the annual payment, would be unnecessary. Remedies are expressly given in respect of the annual sum, but no remedy is given in respect of

the principal sum. The annual sum is not "rent" within the meaning of sect. 1 of the Act of 1874, or the interpretation clause, sect. 1, of the Act of 1833. "Rent" there means a separate incorporeal hereditament and not rent service:

Grant v. Ellis, 9 M. & W. 113.

This annual sum is not made by the statute a rentcharge, but is described simply as "a yearly sum of money by way of interest." If it is rent at all, it is the same as rent reserved upon a demise, which is not "rent" within sect. 1 of the Act of 1833 or sect. 1 of the Act of 1874. Sect. 125 of the Land Tax Redemption Act 1802 in terms makes the annual payment recoverable in the same way as rent reserved on a demise. The only provision of these statutes applying to rent due under a demise is that by which not more than six years' arrears can be recovered, and that does not apply to this claim.

Warrington, K.C. and *Duka*, for the respondent, were not called upon to argue.

COLLINS, M.R.—This was an action by the assignee of a person, who had redeemed the land tax upon certain land, to recover one year's payment of the yearly sum of money payable by way of interest upon the principal sum paid for redemption. The question is whether the claim is barred by a Statute of Limitations. The redemption of land tax took place in 1873. The plaintiff, in 1879, became the assignee of the person who redeemed. No payment, or demand of payment, was ever made since that year. The rights which are created upon redemption of land tax are defined by sect. 123 of the Land Tax Redemption Act 1802 (*ubi sup.*). This yearly sum, therefore, was recoverable by distress or action. The point taken by the defendant was that this claim was barred by the Statutes of Limitations. For the plaintiff it was contended that the claim did not come within the provisions of any Statute of Limitations. The defendant contends that the case comes within sect. 1 or sect. 8 of the Real Property Limitation Act 1874 (*ubi sup.*). It is beyond doubt that this claim was not made within twelve years from the time when the right accrued, if this yearly sum can properly be called "rent" within the meaning of sect. 1. The Divisional Court has held that it is "rent" within the meaning of that section. Channell, J. pointed out that by sect. 1 of 3 & 4 Will. 4, c. 27, the word "rent" is made to extend to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land. No doubt that has been held not to include rent payable under a lease, in *Grant v. Ellis* (9 M. & W. 113); but, for the reasons given by Channell, J., I think that this annual payment is not excluded from that definition. If, however, that is a wrong view, and this yearly sum is not "rent" within sect. 1 of the Real Property Limitation Act 1874, then it seems to me that the case comes within sect. 8 of that Act (*ubi sup.*). Is this a charge upon land or not? If it is a charge upon land, it comes within the express words of sect. 8. It is admitted that it is a charge, but it is contended that it is not within sect. 8 because no action, suit, or other proceeding could be brought to recover it. It is said that that contention is supported by the case of *Cousins v. Harris* (12 L. T. Rep. O. S. 44; 12

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Q. B. 726), but that case when properly examined does not bear out that contention, because it does not deal with equitable rights and remedies at all. This is a charge which can be enforced in the ordinary way by proceedings in equity like any other charge. It is, therefore, a charge which is enforceable by proceedings in equity, and sect. 8 applies. Therefore, in either view of the case, the claim is barred by the Real Property Limitation Act 1874, and this appeal fails.

ROMER, L.J.—I am of the same opinion. If there is an owner of a charge in equity, though there is no obligation upon anyone to pay the charge, the right of the owner of the charge is to bring an action in Chancery to have the amount of the charge raised by a sale of the land, and it has been so held and is settled law, and the charge is within sect. 8 of the Real Property Limitation Act 1874, and time begins to run from the time of the last payment in respect of principal or interest. In the present case we find, under the Land Tax Redemption Act 1802, that a person having an interest in land charged with land tax may redeem the land tax and then has a charge upon the land. For what has he a charge? In the very words of the statute the land is charged with the amount of the moneys paid for the redemption and with the payment of a yearly sum by way of interest thereon. Is there, then, anything in the statute to take away the ordinary rights of a person who has a charge upon land for a principal sum and interest? There is nothing. It is true that there is no personal remedy against the owner of the land. That is what was decided in *Cousins v. Harris* (*ubi sup.*). But that case did decide that the person who redeemed the land tax had a charge and could assign that charge. That means that he had a charge upon the land. The consequence is that his claim is barred by lapse of time just like the owner of an ordinary charge is barred. Suppose, however, that this is not a charge for principal and interest within sect. 8, then it must follow that the yearly sum falls within sect. 1 as "rent." Therefore, in any case, the plaintiff's claim is barred by the Real Property Limitation Act 1874, and must fail. I agree, therefore, that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. I think that this was a charge upon land because the Land Tax Redemption Act describes it as a charge, and I think that it is not necessary to give any other reason. I agree, therefore, that the Real Property Limitation Act 1874 applies, and that the plaintiff's claim is barred.

Appeal dismissed.

Solicitor for the appellant, *T. Parsons.*

Solicitors for the respondent, *Bayley, Adams, Hawker, and Noble.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, Feb. 18.

(Before BUCKLEY, J.)

Re SOUTH-WESTERN OF VENEZUELA (BARQUISIMETO) RAILWAY COMPANY LIMITED. (a)

Company—Directors—Remuneration—Appointment of directors as receivers and managers at salary.

Two of the directors of a railway company were appointed, in a debenture-holder's action, receivers and managers of the railway and undertaking of the company at a salary.

Held, that in the winding-up of the company each was entitled to prove for the whole of his remuneration as a director under the articles.

THE company, which was incorporated in 1888, owned a railway in Venezuela. The railway had been worked by other companies under agreements, the last of which expired on the 31st Aug. 1899, when the railway was handed over to the company.

The interest on the debenture bonds of the company being in arrear, a debenture-holder's action was commenced against the company, and on the 20th Sept. 1899, in that action, two of the directors of the company, Cornfoot (the chairman) and Allen, were appointed receivers of the undertaking, railway, and real and personal property and assets of the company comprised in the securities, and to manage and work the railway, business and undertaking of the company.

On the 12th March 1901 the master allowed the receivers and managers a fee of 2500*l.* to cover their remuneration and office rents from the date of their appointment to the 31st May 1901. There were several meetings of the board after the appointment of the receivers and managers.

On the 19th April 1901 the company went into voluntary liquidation for the purpose of carrying out a scheme for reconstruction.

This was the hearing of a summons in the winding-up by Messrs. Cornfoot, Allen, Meates, and De Neufville, four out of the five directors of the company, for an order that a claim for directors' fees under the articles from June 1898 to March 1901 might be admitted by the liquidators. As to the remuneration from June 1898 to Sept. 1899 there was no dispute. The other director, a Mr. Smith, did not claim remuneration. Art. 90 of the company's articles of association was as follows:

The remuneration of the directors shall be at the rate of 1000*l.* a year. . . . Such remuneration shall be divided among the board of directors in the manner which may be agreed upon amongst themselves, and in default of agreement equally by quarterly payments on the usual quarter days.

The directors, who had been paid their fees down to the 30th June 1898, had resolved that the yearly remuneration should be divided so that 300*l.* should be paid to the chairman, and 175*l.* to each of the other four directors.

By art. 91 of the articles of association the management of the business and the control of the company was vested in the directors.

There was a conflict of testimony as to what

(a) Reported by H. PROCTOR, Esq., Barrister-at-Law.

CHAN. DIV.]

Re SETON SMITH; BURNARD v. WAITE.

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took place before the master when the remuneration of the receivers and managers was fixed, the liquidators alleging and the claimants denying that the remuneration was fixed upon the footing that it should cover all the remuneration of Cornfoot and Allen as directors from the date of their appointment as receivers and managers, but his Lordship, having seen the master, held that it was fixed without any bargain that the directors should give up their fees as directors.

Danckwerts, K.C. and *Martelli* for the claimants.

Jenkins, K.C. and *Howard Wright* for the liquidators. — We do not dispute that the claimants other than Cornfoot and Allen are entitled to their fees, but we contend that Cornfoot and Allen cannot claim fees as directors from the date of their appointment as receivers and managers in addition to their fees as receivers and managers. The bargain between the company and the directors, as evidenced by arts. 90 and 91 of the articles of association, was that the directors were to be paid for managing all the business of the company, not for managing a part. As receivers and managers, Cornfoot and Allen managed and controlled the business of the company, and their fees for so doing are payable out of the company's assets. They ought not to be paid twice over for doing the same work.

Danckwerts in reply.—Notwithstanding the appointment of receivers and managers, the directors, including Cornfoot and Allen, continued to exercise all such ordinary duties of directors as would have to be exercised if persons not directors had been appointed receivers and managers—e.g., they passed transfers of debenture stock and ordinary shares, and issued new certificates. Besides, they considered the scheme for reconstruction.

BUCKLEY, J.—The question I have to decide is whether Cornfoot and Allen have a claim for remuneration as directors from the date of their appointment as receivers and managers to the 31st March 1901, when it is conceded the work of the board of directors came to an end. Now, under art. 90, there is a right to be paid at the rate of 1000*l.* a year. That was a subsisting contractual obligation until the company went into liquidation. It is said that under the articles of association the directors were to have the management of the business of the company, that after the order of the 20th Sept. 1899 Cornfoot and Allen managed the business of the company, that they were paid for that 2500*l.* for the period from their appointment to the 31st May 1901, and that, therefore, they ought to give credit for that in some way as between themselves and the company, because, of course, the company pays the remuneration of the receivers and managers, as well as the remuneration of the directors. In my opinion, that is not so. The directors are entitled to their 1000*l.* a year as the payment to be made to them for doing that which, for the time being, they have to do as directors of the company. If by reason of the appointment of the receivers and managers they have less to do, that does not diminish in any way, as it appears to me, the salary which they are to get. Their salary as receivers and managers was a payment to them for doing what they had to do as receivers and managers, and if, in the latter character, they

did something which made their work lighter in the former character, I do not see that that diminished in any way the amount which they were entitled to receive as acting in the former character. The result, therefore, is this: That Cornfoot and Allen seem to me to be entitled to that which was given to them as receivers and managers without any obligation to forego their directors' fees, and also to the amount to which they were entitled as directors' fees. As regards the other two, De Neufville and Meates, there is no question as to them, because they were not receivers and managers at all, and they are entitled to their fees.

Solicitors: *Maddisons; Stephenson, Harwood, and Co.*

Wednesday, March 12.

(Before BUCKLEY, J.)

Re SETON SMITH; BURNARD v. WAITE. (a)

Will—Construction—“Furniture and other personal effects”—Effects connected with business—Tenant's fixtures.

A testator, who carried on the R. Hotel as a yearly tenant and resided on the premises, bequeathed “all the furniture and other personal effects belonging to me and which at the date of my death are at the R. Hotel aforesaid” to W.

Held, that all the furniture and personal effects at R. Hotel, whether used in connection with the business or not, passed to W., but not the tenant's fixtures.

HAROLD SETON SMITH, the testator in this case, carried on business as a hotel proprietor at the Roebuck Hotel in Berkshire. No lease of the premises had ever been granted to him, and he held as a yearly tenant. Miss Gertrude Waite lived in the house, and assisted him in the management of the business.

By his will, dated the 10th May 1901, the testator appointed two trustees and executors, and he bequeathed “all the furniture and other personal effects belonging to me and which at the date of my death are at the Roebuck Hotel aforesaid to Gertrude Waite who is now residing at the said hotel”; and he bequeathed all the residue of his personal estate to his trustees upon certain trusts as therein mentioned.

The personal effects in the hotel belonging to the testator consisted of: (a) Trade or tenant's fixtures and trade implements; (b) furniture and personal effects independent of the business; (c) linen, plate, glass, china, &c., used in connection with the business. Doubts arose as to what articles passed under the specific legacy, and the trustees took out an originating summons to determine the question.

G. Lawrence for the trustees.

Cann for Miss Waite.—All three classes of goods pass to Miss Waite under the specific legacy:

Cole v. Fitzgerald, 3 Russ. 301;

Swinfen v. Swinfen, 4 L. T. Rep. 194; 29 Beav. 207.

Christopher James for persons interested in the residue.—I say that the gift includes only the furniture and personal effects not connected with

(a) Reported by A. L. MORRIS, Esq., Barrister-at-Law.

CHAN. DIV.] *Re DEVELOPMENT COMPANY OF CENTRAL & WEST AFRICA LIM.* [CHAN. DIV.]

the business. The general rule is that a bequest of household furniture will not pass tenant's fixtures:

Finney v. Grice, 10 Ch. Div. 13.

The words "other personal effects" must be construed as *ejusdem generis* with the previous words "all the furniture," and do not include anything more. In *Swinfen v. Swinfen* (*ubi sup.*) there was no residuary gift as there is here; and that case was not followed in *Northey v. Paxton* (60 L. T. Rep. 30). He also referred to

Pratt v. Jackson, 2 P. Wms. 302; reversed on appeal, 1 Bro. P. C. 222; English Reports, vol. 1, p. 528;

Le Farrant v. Spencer, 1 Ves. Sen. 96;
Manning v. Purcell, 7 D. M. & G. 55.

BUCKLEY, J. (after stating the facts, continued:—) It is contended that under the bequest of "all the furniture and other personal effects belonging to me and which at the time of my death are at the Roebuck Hotel" Miss G. A. Waite is entitled to tenant's fixtures which were in the hotel. I do not think she is. It is true that they belonged to the testator in a certain sense; but it is probable that he intended by the bequest which I have read to give Miss Waite the right to take down the roller blinds and such things? If a testator, being entitled to a leasehold house containing tenant's fixtures, bequeaths the house to A. and all furniture and household effects to B., can it be said that B. may take away the tenant's fixtures? I think there is no doubt he cannot, but that A. is entitled to them. It seems to me that the same applies here. I find authority in *Finney v. Grice* (10 Ch. Div. 13), where Sir George Jessel, M.R. takes the same example as I have taken. There a testator bequeathed to his wife all his "household furniture, plate, linen, and china articles and things except stock-in-trade, money, securities for money, books of account, and manuscripts, and also all my household consumable stores that may be within my dwelling-house at the time of my decease, for her own absolute use and benefit"; and he devised and bequeathed his residuary real and personal estate, including leaseholds, in trust for sale. Sir G. Jessel held that tenant's fixtures in a leasehold house occupied by the testator did not pass to the widow. So here I do not think the tenant's fixtures passed to Miss Waite. Passing to the next point, at the testator's death there was a considerable quantity of furniture in the hotel, some of which was used by the testator himself, some by Miss Waite, and some was used for the general purposes of the hotel by visitors. There was also the ordinary apparatus of a hotel, china, glass, plate, and such things. It is argued on behalf of the residuary legatee that the whole of this furniture and other articles did not pass to Miss Waite, but only such as belonged to the testator in the particular sense that he personally used them, and it is said that such articles as were required for the trade or business of the hotel did not pass to her. But I think that view is wrong. I am of opinion that all the articles, whether used for the purposes of the hotel business or not, passed to her. The cases which were cited in support of the opposite contention seem to me to be distinguishable. In *Pratt v. Jackson* (2 P. Wms. 302) a man named Jackson had a house in which he lived in London,

and he had also a house in Gosport which was used as an hospital for invalid seamen, and was provided with beds, sheets, and other articles for the use of the patients who were received there and taken care of. The question arose under articles executed by Jackson and his wife before marriage by which it was agreed that in consideration of a provision made for the wife by the intended husband the wife should have no claim out of his real or personal estate, "provided this should not extend to what he, the said intended husband, should or might leave her by will, nor to all or any of the household goods, or utensils, or household stuff, &c., of him the said Nathaniel Jackson at the time of his death, all which she was to receive and enjoy." The husband having died, the wife claimed the beds, sheets, and other things in the house at Gosport, and the question was whether she was entitled to them as household goods or utensils or household stuff within the intent of the marriage articles. It was held that they were not. The material word in that case was "household." Whose household was referred to? The answer was, the testator's. The beds and sheets in the house at Gosport were not his household goods or stuff in that sense. That case was followed in *Le Farrant v. Spencer* (1 Ves. Sen. 96), where a bequest of "household furniture, linen, plate, and apparel whatsoever" was held not to include goods which the testator had for trade and merchandise as distinguished from his own domestic use. In *Manning v. Purcell* (*ubi sup.*) the testator bequeathed to his wife "all my moneys, household furniture, plate, books, linen, wearing apparel, &c." He had a tavern as a house of business and also a private residence, both containing furniture, and he lived at the latter, but sometimes slept at the former. The decision of that case was grounded on the word "my," and it was held that the bequest did not include furniture used at the tavern, but that it meant furniture which was used in "my" household. I therefore hold that under the bequest of furniture and other personal effects in this will there passed to Miss Waite all the furniture, linen, plate, glass, china, and other effects belonging to the testator which at the date of his decease were at the Roebuck Hotel, whether they were used for the trade or business of the hotel or not, but not including tenant's fixtures.

Solicitors for the trustees and residuary legatees, *Morris and Bristow*.

Solicitors for Miss Waite, *Gribble and Co.*, for *Hewett*, Reading.

Tuesday, Feb. 18.

(Before EADY, J.)

Re DEVELOPMENT COMPANY OF CENTRAL AND WEST AFRICA LIMITED. (a)

Company — Reduction of capital — Scheme to increase capital — Illegality.

A company desirous of extinguishing its deferred shares petitioned the court for a reduction of its capital by the amount of its deferred shares, pursuant to a scheme supported by all the shareholders for increasing its ordinary share capital and allotting to each deferred share-

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

CHAN. DIV.] *Re* DEVELOPMENT COMPANY OF CENTRAL & WEST AFRICA LIM. [CHAN. DIV.]

holder 100 ordinary shares for each deferred share.

The petition was supported by all the shareholders and there were no creditors, the only debts of the company being for its current expenses.

Held, that, according to the case of British and American Trustees and Finance Corporation v. Couper (70 L. T. Rep. 882; (1894) A. C. 399), the court must look at the scheme as a whole, which involved not reduction, but increase of capital and was illegal; and the petition was refused.

PETITION for the sanction of the court to a reduction of capital.

The Development Company of Central and West Africa Limited was incorporated on the 7th Feb. 1901, under the Companies Acts 1862 to 1900, with a capital of 100,000*l.*, divided into 99,300 ordinary shares of 1*l.* each and 700 deferred shares of 1*l.* each.

The holders of the ordinary shares were entitled to a non-cumulative preference dividend of 10 per cent., and to one vote for each share on a poll.

The holders of the deferred shares were entitled to one-half the annual profits after payment of the 10 per cent. dividend on the ordinary shares and making due provision for a reserve fund; to one-half of any surplus assets after repayment of the paid-up capital in case of a winding-up; the other half of the surplus profits and surplus assets falling to the holders of the ordinary shares.

The deferred shareholders were also entitled to twenty votes for each deferred share in case of a poll.

The company had power to increase its capital and to issue any original or new shares with any special rights or preferences, so that the rights attached to the deferred shares should not be infringed; also to reduce its capital by (*inter alia*) paying off capital, or in such other manner as might seem expedient.

The whole of the deferred shares had been issued, but only about 16,000 ordinary shares, all of which were fully paid up; and it appeared desirable in the interests of the company to get rid of the deferred shares and place all shareholders on an equal footing.

By a conditional agreement, dated the 23rd Nov. 1901, made between the deferred shareholders and the company it was provided that the company should take proceedings to obtain the sanction of the court to a reduction of the capital by the amount of the deferred shares which should be cancelled, and that when an order sanctioning the reduction had been obtained the company should increase its capital to 250,000*l.*, divided into 250,000 ordinary shares of 1*l.* each, and should allot to the deferred shareholders 70,000 ordinary shares fully paid up in exchange for the 700 deferred shares surrendered by them.

On the 25th Nov. 1901 the shareholders passed a special resolution, which was confirmed on the 12th Dec. following, authorising the reduction of the capital of the company to 99,300*l.*, the amount of their ordinary share capital, by cancelling the deferred shares in accordance with the terms of the conditional agreement.

The company had not issued any debentures, and its whole indebtedness amounted only to about 300*l.* for current expenses.

This was a petition by the company for an order authorising the proposed reduction.

Eve, K.C. and *Wurtzburg* for the company.—The shareholders unanimously support the proposed scheme for reduction of capital and cancellation of the deferred shares. Neither the public nor the creditors of the company are injured by it. The court has power to sanction the proposed scheme:

British and American Trustees and Finance Corporation v. Couper, 70 L. T. Rep. 882; (1894) A. C. 399.

W. Gordon Fellowes, for the shareholders, supported the petition.

EADY, J.—The mode in which it is proposed to carry out this arrangement is by reducing the company's capital in the first instance by extinguishing the 700 deferred shares, and then increasing the capital of the company to 250,000 ordinary shares and allotting 70,000, part thereof, to those who were the holders of the deferred shares without any further consideration or payment to the company. In form the petition asks for the sanction of the court to a reduction of capital—that is, a reduction by the extinction of the 700 deferred shares—but the scheme of which what is called a reduction of capital forms part is really a scheme for an increase of capital. It is not suggested that any part of the capital has been lost, or is not represented by available assets, or is to be returned to the shareholders as being in excess of the wants of the company, but the whole of the proposed arrangement is frankly stated in the petition. In the case of *British and American Trustees and Finance Corporation v. Couper* (*ubi sup.*) Lord Macnaghten said that the court must look at the arrangement as a whole and the consequences which the reduction involved. I therefore am bound to look at the scheme as a whole and see whether or not I ought to sanction it. It is really a scheme for an increase of capital to the extent of 69,300*l.* nominal capital for which the company in its corporate capacity would receive no consideration. The assets would remain the same, and the result would be that the 700 deferred shares would be cancelled and the rights of the shareholders *inter se* altered. The scheme involves the issue of 69,300 shares, not only at a discount, but without any consideration at all moving from the shareholders to the company in its corporate capacity. It is not sufficient for the arrangement to be beneficial or adequate as between the different classes of shareholders. They are the best judges of that, and they all support the scheme which I assume to be made in good faith and to be advantageous to them. The question I have to consider is whether the scheme is legal. In my judgment it is not. It involves the issue of 70,000*l.* nominal capital in exchange for a surrender of 700*l.* nominal capital without any consideration to the company. In my judgment such a scheme is *ultra vires*. It is not supported by the decision in the case of *British and American Trustees and Finance Corporation v. Couper* (*ubi sup.*), which applies to a genuine reduction, and not to a case where there is no real reduction, but an increase of capital. I therefore must refuse the petition.

Solicitor: *Albert J. Schroeder*.

KING'S BENCH DIVISION.

Wednesday, Feb. 26.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PEARKS, GUNSTON, AND TEE LIMITED (apps.) v. HOUGHTON (resp.). (a)

Adulteration of food—Sale of mixed or blended article—Notice in shop that article is blended—Protection of seller by notice—Sale to prejudice of purchaser—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 8.

To a purchaser who asked for half a pound of 1s. butter, the appellants, who were grocers, sold in their shop butter which contained nearly 8 per cent. excess of water, this excess of water not being added separately, but being derived solely from milk added to the butter by a process of blending.

On the wall behind the butter counter in the shop there was a notice in large letters that the butter sold at the establishment was blended with full cream milk whereby it retained from 20 to 24 per cent. of moisture. This notice was visible to anyone going into the shop, though the purchaser, who was an inspector, did not observe it, and his attention was not called to it.

Held, that, as an ordinary purchaser going into the shop would see and must be taken to have seen the notice, the article sold must be taken to have been in fact sold not as ordinary butter simply, but as blended butter, and therefore the sale could not be considered to be to the prejudice of the purchaser within sect. 6 of the Sale of Food and Drugs Act 1875, and there was no offence committed under that section.

CASE stated by justices of the peace for the borough of Richmond, in the county of Surrey.

At a court of summary jurisdiction held in the borough of Richmond on the 8th Aug. 1901 an information was preferred by Houghton (the respondent) against Pearks, Gunston, and Tee Limited (the appellants) under sect. 6 of the Sale of Food and Drugs Act 1875, charging that the appellants on the 12th July 1901, at the borough of Richmond, did unlawfully sell to the prejudice of the purchaser a certain article of food—to wit, half a pound of 1s. butter—which was not of the nature, substance, and quality demanded, the same having had water added thereto to the extent of 7·8 per cent. of water beyond the usual limit of 16 per cent. of water natural to butter.

This information was heard and determined by the justices, and upon such hearing the appellants were convicted of the offence, and the justices adjudged that they should forfeit and pay a penalty of 20*l.* and costs.

The appellants were grocers and provision merchants, and carried on business, amongst other places, in the borough of Richmond, their registered office being in the city of London.

The respondent was an inspector under the Sale of Food and Drugs Acts for the borough of Richmond.

On the 12th July 1901 the respondent caused one Alfred Houghton to ask for and purchase on his (the respondent's) behalf at the appellants' shop in Richmond half a pound of 1s. butter for the purpose of analysis.

Immediately after such purchase the respondent entered the shop, and Alfred Houghton thereupon handed the butter as purchased by him to the respondent, who then in the shop divided the butter into three parts for the purpose of analysis.

The public analyst certified that the butter "contained 23·8 per cent. of water, which was 7·8 per cent. more water than the extreme limit of 16 per cent. natural to butter."

The butter so purchased was handed by the assistant who sold the butter in the appellants' shop to Alfred Houghton, and by him to the respondent, wrapped in two pieces of paper.

On the inside paper or wrapper there was printed in large type the words "Pearks' Butter," and underneath, in much smaller type, a statement that the butter was blended with pure English cream milk by new and improved machinery whereby it retained about 20 to 24 per cent. of moisture. This inside wrapper was as follows:

Pearks' Butter.—This is choicest butter blended with pure English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture and acquires that delicacy of flavour which has made Pearks' butter so famous.—Half-pound.

The outside wrapper was a piece of opaque paper which had no writing or print of any kind on it, a specimen of which was annexed to the case.

When the respondent took off the outside paper wrapper in the appellants' shop in order to divide the half a pound of butter into three parts for analysis, he saw that there was something printed on the inside wrapper, but did not read it, and his attention was not called to it.

It was proved by the appellants that it is a common practice in the trade to blend different kinds of butter, and that the process of blending adopted by the appellants was to put the butter into a churn with full cream milk and this is re churned.

Any excess of water in the butter in question was derived solely from the milk so added during this process of blending. No water was separately added to the butter.

It was stated in evidence on behalf of the appellants that the object of blending the butter with milk in this way was to give it uniform colour and flavour and to give it freshness, but there was no evidence that the milk was so added to the butter because it was required for the preparation of the butter as an article of commerce fit for carriage or consumption.

The price of full cream milk was three farthings a pound.

In a frame on the wall behind the butter counter in the appellants' shop there was a printed notice in large letters to the same effect as the notice on the wrapper, stating that the butter sold in the establishment was blended with pure English full cream milk whereby it retained about 24 per cent. of moisture. This notice on the wall of the appellants' shop was as follows:

Notice.—Pearks' butter, as sold at this establishment, is choicest butter blended with pure English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture and acquires that delicacy of flavour which has made Pearks' butter so famous.—By order, JOHN DUMPREYS, Secretary.

(a) Reported by W. W. ORR, Esq., Barrister at-Law.

K.B. Div.] PEARKS, GUNSTON, AND THE LIMITED (apps.) v. HOUGHTON (resp.). [K.B. Div.]

This notice was on the wall in the shop as above stated at the time the respondent purchased the half a pound of butter. The butter counter faces the front of the shop, and the above-mentioned notice was visible to anyone going into the shop, but the respondent did not observe it, and his attention was not called to it.

It was contended on behalf of the appellants that the inside paper wrapper, in which the butter was handed to the purchaser, was a label within the meaning of sect. 8 of the Sale of Food and Drugs Act 1875; that the printed notice in the shop was sufficient notice to the respondent apart from the label, and that there was no evidence of fraud. Also, that as such wrapper and printed notice in the shop accurately stated the nature and composition of the article sold, there was no evidence of a sale to the prejudice of the purchaser within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875.

It was contended by the respondent: (1) That the sale was complete before he entered the shop, and that notice by label or otherwise was then too late; (2) that as the butter was delivered in a piece of plain opaque paper which prevented the printing on the inside wrapper being visible until removed, and as the respondent did not in fact read it and did not purposely abstain from reading it, and his attention was not called to it, the inside wrapper did not constitute notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of sect. 8 of the Act of 1875; and (3) that as he did not observe the notice on the wall in the shop and his attention was not called to it, it was no notice to him at all.

The justices were of opinion (1) that the printed matter on the inside wrapper was in its terms inaccurate and misleading, and on that ground was not a sufficient notice by label within the meaning of sect. 8, inasmuch as it stated the result of the blending to be to "retain" in the butter about 20 to 24 per cent. of "moisture," whereby it acquired delicacy of flavour, whereas the true and only result was to "add" 7·8 per cent. of "water" to the extreme limit of 16 per cent. natural to the butter; (2) that for the like reasons the notice on the wall of the shop was not a sufficient notice; (3) that as the butter was delivered in a piece of plain opaque paper which until removed effectually concealed the inside wrapper and the printing thereon, and as the respondent did not in fact read the printing and did not purposely abstain from so doing, and having regard to the nature of the article asked for and to the fact that his attention was not called to the printing, the inside wrapper did not constitute a notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of sect. 8 of the Act of 1875; (4) that as the respondent did not observe the printed notice on the wall in the shop, and having regard to the nature of the article asked for and the fact that his attention was not called to the notice, the same was no notice to him at all; (5) that the sale of the article was complete before the respondent entered the shop, and that notice by label or otherwise was too late; and (6) that the excess of 7·8 per cent. of water found in the butter was added fraudulently to increase its bulk and weight, and that on that

ground also notice by label or otherwise was no protection to the appellants.

The justices therefore convicted the appellants.

The questions for the opinion of the court were: (1) Whether the inside wrapper in which the butter was delivered was a sufficient notice by label within the meaning of sect. 8 of the Sale of Food and Drugs Act 1875; (2) whether upon the facts stated there was sufficient notice otherwise than by label to the purchaser of what he was purchasing; and (3) whether upon the facts stated there was any evidence that the excess of water in the butter was added fraudulently to increase the bulk or weight.

If the court should be of opinion that the inside wrapper was sufficient notice by label within the meaning of sect. 8 of the Act of 1875, or that the purchaser had sufficient notice otherwise than by label of what he was purchasing, and that there was no evidence that the excess of water was intended fraudulently to increase the bulk or weight, then the conviction was to be quashed; otherwise the conviction was to stand.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), provides:

Sect. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say, (1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

Sect. 8. Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

Asquith, K.C. (Avory, K.C. and Bonsey with him) for the appellants.—The point is whether the article sold was sold to the prejudice of the purchaser within sect. 6, and also whether there was a notice by label having regard to sect. 8. The justices were wrong in holding that there was not a sufficient notice. The only offence here is that of selling to the prejudice of the purchaser, and it is quite independent of the question which may arise under sect. 8, as the case is not made out unless it be shown that there is a sale to the prejudice of the purchaser within sect. 6. Where the seller, as in this case, brings to the knowledge of the purchaser the fact that the article sold is not of the nature, substance, and quality demanded, then the sale is not "to the prejudice of the purchaser" within sect. 6, and there is no offence:

Sandys v. Small, 39 L. T. Rep. 118; 3 Q. B. Div. 449.

Cockburn, C.J. there says: "If a man puts up in a conspicuous position a notice in large letters, and it is clear that it must have come under the

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observation of the customer, the 6th section would not apply." That applies here. Any customer coming into the appellants' shop had notice that what was sold was blended butter. Secondly, there was a notice by label, within sect. 8, that the article sold was blended butter. In *Jones v. Jones* (58 J. P. 653), where cocoa was packed in a tin and a label on the tin stated that the cocoa was mixed, it was held that there was a sufficient notice by label, although the label, as here, was wrapped in opaque paper. So in *Platt v. Tyler* (58 J. P. 71), where a label on a tin of milk stated the milk to be skimmed milk, it was held to be a "sufficient disclosure of the alteration" within the analogous sect. 9. The judgment of Lord Russell, C.J. in *Spiers and Pond v. Bennett* (74 L. T. Rep. 697; (1896) 2 Q. B. 65), which was also under sect. 9, shows that there was here a sufficient disclosure of the alteration. But the appellants are not bound to resort to sect. 8 at all; that section is only a second defence. They rely more strongly on sect. 6 than on sect. 8, and in the material part of sect. 6 the words "fraud" or "fraudulently" do not occur. All sect. 6 says is that the sale must not be to the prejudice of the purchaser. The real point here is that the article was a mixed or blended article, and if the vendor has given—as the appellants have done by the notice in the shop—notice to the purchaser that the article was blended, then there is no evidence that the sale is to the prejudice of the purchaser and no offence within sect. 6; but even under sect. 8 the authorities show that the label was a sufficient notice by label within that section. He also referred to

Pope v. Tearle, 30 L. T. Rep. 789; L. Rep. 9 C. P. 499.

A. Glen for the respondent.—The justices were right in holding that the notices were not sufficient notices to the purchaser and that the sale was to the prejudice of the purchaser within sect. 6. In *Pearks, Gunston, and Tee Limited v. Knight* (85 L. T. Rep. 379; (1901) 2 K. B. 825), the appellants were convicted under sect. 6 of selling this blended butter as butter simply without giving any notice to the purchaser that it was blended. Since that decision this notice has been adopted. There is a finding by the justices that the excess of water was added to the butter fraudulently to increase its bulk and weight. That brings the case clearly within the decision in *Liddiard v. Reece* (44 J. P. 233), where coffee was mixed with chicory and where the justices found as a fact that the mixing was done fraudulently to increase the bulk. There Lush and Manisty, JJ. held that, as there was a finding that the coffee was fraudulently mixed with intent to increase the bulk, the conviction under sect. 6 was right, and that the label did not protect the seller. *Horder v. Meddings* (44 J. P. 234) is to the same effect. What the prosecutor has to show under sect. 6 is that the sale is to the prejudice of the purchaser. He does that by establishing fraud, because if he shows fraud then the sale is to the prejudice of the purchaser, and if the seller wants to get out of that he must show that the purchaser had notice of the fraud, as if the purchaser had notice of the fraud there would be no sale to his prejudice. With regard to the notice, the suggestion is that there is some operation which is performed on the butter by

which the moisture which ought to be in the butter is prevented from disappearing, whereas in fact the effect is that nearly 8 per cent. of water is added to the butter which did not belong to it originally and which ought not to be in it. There was abundant evidence of fraud, and evidence on which the justices were justified in finding as they did and in convicting the appellants.

Asquith, K.C. in reply.

Lord ALVERSTONE, C.J.—I must say that this case is not stated in a satisfactory way. If the court were satisfied that this compound had been sold as butter, and nothing else had been said about it, there would be evidence of an offence under sect. 6. I think that was practically decided in the case of *Pearks, Gunston, and Tee v. Knight* (*ubi sup.*), cited in the argument, and I should have come to the same conclusion, but certainly that is not the way in which we ought to regard this case. The purchaser asked for half a pound of 1s. butter, and the butter was purchased. If it should turn out that there were various classes of butter at Messrs. Pearks' establishment, and that this was merely butter at a different price from the other butters, notice of that ought to be given, but I understand the facts in this case to be that Messrs. Pearks are selling one sort of butter only—namely, blended butters. That is the conclusion I draw from the facts, and I do not intend anything I say now to apply to a case where different kinds of butter are being sold. There are three questions left by the justices for us to decide. With regard to the first, whether the inside wrapper delivered to the purchaser was a sufficient notice within sect. 8, speaking for myself only, I am not satisfied that, if an offence had been made out under sect. 6, this label would have protected the appellants. Sect. 8 provides that a person shall not be guilty of such an offence in respect of the sale of an article not intended fraudulently to increase the bulk, or weight, if at the time of delivery he shall supply the purchaser receiving the same with a notice by label. If we were dealing with that section only, we should undoubtedly have to consider to a greater extent the words "intended fraudulently to increase its bulk or weight"; and we should have to say whether or not at the time of delivering such article the purchaser was supplied with notice by means of the label. Speaking for myself, I have very grave doubt whether delivering an article such as this with notice on an internal label would be delivery with notice by label to the purchaser at the time of purchase or at the time of delivery of the article. I do not think the case of *Jones v. Jones* (*ubi sup.*) is sufficient authority on the facts of this case. The second question is a most important one—namely, whether there was sufficient notice otherwise than by label. As to this, it has been found by the justices that the large notice referred to, an exact copy of the smaller notice on the wrapper, was hung in the shop behind the butter counter, and was visible to everyone going into the shop. This is a finding that an ordinary purchaser going in to buy this butter would see this notice, and that is not at all qualified by the statement that the respondent did not see it and that his attention was not called to it. The purchaser, having got the butter, went into the shop to fulfil the condi-

K.B. Div.] PEARKS, GUNSTON, AND TEE LIMITED (apps) v. HOUGHTON (resp.). [K.B. Div.]

tions of the Act and to tell the sellers that he was going to divide the sample; and if the finding that the respondent did not see the notice was meant to be a finding against Messrs. Pearks that the notice would not have come to the notice of an ordinary purchaser, then I cannot understand why these words were put in the finding that the "notice was visible to anyone going into the shop." Reading that notice, which was placed on the wall, I think it is quite impossible in the face of that notice to assume that it only applied to one kind of butter or article sold in that shop. I have come to the conclusion that it cannot be taken to be a sale of one of many classes of butter at different prices; but the statement in the case is as to the purchase of Messrs. Pearks' butter, meaning the same thing as the butter described in the notice. That being so, I think we are bound by the cases of *Sandys v. Small* (*ubi sup.*) and *Spiers and Pond v. Bennett* (*ubi sup.*), which I understand lay down the proposition that if a purchaser is told at the time of the purchase, and it is brought to his knowledge, that the article sold is a blended article, it cannot then be said that the article is being sold to the prejudice of the purchaser. I think no question arises here under sect. 24, and I think that the prosecutor has to prove that there is a sale to the prejudice of the purchaser. It is good law and good sense that when a person is told he is buying butter blended with something, he is not entitled to come to this court and say he was buying something which was not mixed with anything at all. As to the terms of this notice, they are not particularly happy, but I do not intend to give any guidance as to it. To the person who understands the chemistry of butter and knows it has only 16 per cent. of moisture ordinarily, I think it would be wrong to say "it retains about 20 to 24 per cent. of moisture"; but to the ordinary purchaser—who within the ruling of *Sandys v. Small* (*ubi sup.*) has to be considered—it is a statement that the butter is mixed with milk and has in it some 23 per cent. of moisture. I do not think that any misleading statement in that notice can do away with the broad statement that the butter sold at that shop is in accordance with the notice. I think, therefore, the answer to the second question must be in favour of the appellants, and that there was no evidence of an offence. There remains the third question, which has become immaterial. When once we get that there is no offence under sect. 6, this question of supposed fraudulent addition does not arise at all, and it is only because the justices have overlooked the true view of the law, having regard to *Sandys v. Small* (*ubi sup.*), that they have left it to us. I think this case comes within the definition of Cockburn, C.J. in *Sandys v. Small* (*ubi sup.*), and of Lord Russell, C.J. in *Spiers and Pond v. Bennett* (*ubi sup.*), and that there was no sale to the prejudice of the purchaser, and that this appeal should therefore be allowed.

DARLING, J.—I am of the same opinion; but I must say that in what the appellants have done here they have gone exceedingly close to the line. In my view they are saved only by the large notice which they had put up in the shop. If it had not been for that notice and if they had relied simply upon the label, my opinion is that they would not have brought themselves within

the protection of the statute. I do not wish to say a word against the case of *Jones v. Jones* (*ubi sup.*), because I do not think what was done here comes within the rule in *Jones v. Jones* (*ubi sup.*). There the paper covering was the usual way of giving the article to the purchaser. I do not think that anyone would say that the usual way of selling butter is to put it into a piece of paper which says it is butter mixed with something else and then to wrap round it a piece of opaque paper which prevents the person reading what is on the inner wrapper. I should not think of saying there was no label; there was a label, but it was wanting in all the elements present in that case. The label was not, as I understand, put round the butter at the time of delivering the article to the purchaser. I gather that the butter was kept wrapped up in the wrapper with the print on it, and then had the thick outer wrapper put round. With regard to the large notice, I think the wording is very suspicious; but to say that it makes one suspect the article which it praises is one thing, and to say that it convinces one that it is prepared fraudulently to increase the bulk or weight of the article is another thing; and, except this, I cannot see any evidence that the preparation was made fraudulently to increase the bulk or weight. It is suspicious because it says: "Made by improved machinery whereby it retains moisture and acquires delicacy." That is not expressing the thing properly. To my mind one verb would have done for the two things, and if they had put "acquires 23 per cent. of moisture and delicacy," that would put the facts of the case properly. It much more acquires moisture than it does delicacy. I have not much doubt that that notice was not drawn by a butter merchant. It was an attempt to gain the protection of the statute, and the words, no doubt, were really used because they had been used in some reported case, and were selected by somebody with a knowledge of other things than butter.

CHANNELL, J.—The substance sold is a perfectly legitimate substance to deal in, but it is not butter, and therefore the court in the previous case of *Pearks, Gunston, and Tee v. Knight* (*ubi sup.*), where the article was sold as butter, decided that there was an offence against this 6th section of the Act for selling a thing not of the nature, substance, and quality demanded, and that selling it simply as butter, without anything further, was a sale to the prejudice of the purchaser. But it is an article which it is legitimate to sell as blended butter. Whether there is sufficient evidence of a sale to the prejudice of the purchaser seems to depend upon whether it was in fact sold as blended butter or as butter. Now, it is obvious that after the previous decision the appellants took steps intended to meet the case decided against them, and intended to protect themselves by selling this article solely as blended butter. Both these notices may be criticised, but they both begin by saying that it is choicest butter, blended, and then go on to say that it has more than the ordinary amount of moisture. Consequently, if the sale took place on these documents, it is a sale of blended butter, and not of ordinary butter. The difficulty in dealing with these cases as to sales to the prejudice of the purchaser always arises from the fact that the purchaser before the court is nearly always an

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inspector who is buying for the purpose of analysis and not for his own consumption, and so one has to look at the circumstances and see whether, if he had been an ordinary purchaser, he would have been prejudiced. There always arises the difficulty when there is a notice in the shop whether an ordinary purchaser would have seen it. The inspector is not likely to go about the shop searching for notices; but we have to consider what an ordinary purchaser would do. In the present case there was a large notice in a conspicuous place in the shop, so that anyone would see it. That brings this case within the case of *Spiers and Pond v. Bennett* (*ubi sup.*), which says that under such circumstances as those the sale could not be considered to be a sale to the prejudice of the purchaser. That sufficiently disposes of this case. The process was done to increase the weight, bulk, and measure, but it does not follow that it was done fraudulently. If it was done with the honest intention of selling it as what it was—namely, blended butter—there was no fraud in doing something which would increase the weight and bulk.

Appeal allowed. Conviction quashed.

Solicitors for the appellants, Neve, Beck, and Kirby.

Solicitor for the respondent, T. Weeding, Kingston-upon-Thames.

Judicial Committee of the Privy Council.

Feb. 28, March 1, 5, and 19.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.)

KARUNARATNE v. FERDINANDUS AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Practice—Appeal—Point not raised in court below—Validity of will.

The respondents, the next of kin of a testator, presented a petition for the revocation of the probate of his will on the ground that he was not of sound mind, and that the will was obtained by undue influence.

The court of first instance decided in their favour. The executrix appealed, and the Court of Appeal held the will good so far as regarded the personal estate of the testator, but invalid so far as regarded his real estate, which was considerable.

No such point had been raised at the trial, at which the will was attacked and defended as a whole.

The executrix appealed, but there was no cross-appeal by the next of kin.

Held, that the course taken by the Court of Appeal was not correct according to the rule laid down by the House of Lords in The Tasmania (63 L. T. Rep. 1; 15 App. Cas. 223), that a Court of Appeal ought only to decide in favour of an appellant on a ground put forward for the first time on the hearing of the appeal if it be satisfied that it has before it beyond all doubt all the facts bearing upon the new contention as

completely as if it had been raised at the trial; but, in the absence of a cross-appeal by the next of kin, the decision must be affirmed, but without costs.

THIS was an appeal from a judgment of the Supreme Court of Ceylon (Bonser, C.J. and Withers, J., Lawrie, J. dissenting), who had varied a judgment of the District Court.

The question in the action was as to the validity of the will of John Aron Ferdinandus, deceased, who died on the 8th Jan. 1895, leaving property of the value of between 18,000*l.* and 20,000*l.*, more than three-quarters of which was in real estate.

The appellant was the executrix and widow of the deceased, and the respondents were his next of kin.

The respondents alleged that the testator was not of sound mind, and that the will was obtained by the undue influence of the appellant and her family.

The district judge, before whom the case was tried, decided in their favour, and made a decree revoking the probate which had been granted to the appellant.

On appeal to the Supreme Court, the majority of the court held the will valid so far as regarded the personalty, but invalid so far as regarded the real estate, and varied the order of the district judge by granting probate limited accordingly.

Lawrie, J. dissented, and took the view that the will was good for all purposes.

The executrix appealed from this judgment, but there was no cross-appeal by the next of kin.

The facts are fully set out in the judgment of their Lordships.

Inderwick, K.C. and Hinde appeared for the appellant.

Haldane, K.C. and Corbet for the respondents.

In addition to the cases cited in the judgment, the following were also referred to:

In the Goods of Boshm, 64 L. T. Rep. 806; (1891). P. 247;

Harwood v. Baker, 3 Moo. P. C. 390;

Smith v. Atkins, 22 L. T. Rep. 247; L. Rep. 2 P. & D. 169;

Hampson v. Guy, 64 L. T. Rep. 778.

And on the question of costs:

Mitchell v. Gard, 9 L. T. Rep. 491; 3 Swab. & T. 275;

Williams v. Henry, 3 Swab. & T. 471; 33 L. J. 110, P. M. & A.;

Ram Coomar Coondoo v. Chunder Canto Mooharjee, L. Rep. 4 Ind. App. 23, at p. 47;

Kunwar Ram Lal v. Nil Kanth, L. Rep. 20 Ind. App. 112.

Inderwick, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 19.—Their Lordships' judgment was delivered by

Lord LINDLEY.—The will in question in this case is dated the 10th Nov. 1894. The testator died on the 8th Jan. 1895. The will was propounded for probate by his widow as an uncontested will, and on the 1st March 1895 an order was made for the grant of probate to her. Shortly afterwards the heirs of the testator entered a caveat to prevent the issue of probate to her, and proceedings were taken to impeach the will. Some difficulty arose, and some mistakes

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were made in the procedure; but on the 21st Dec. 1895 probate was granted to the widow, and on the 12th Feb. 1896 the heirs presented a petition for its revocation, and three issues were directed to be tried. They were as follows: (1) Had the applicant for probate any reason to suppose that her application would not be opposed by the present petitioners? (2) Was the deceased John Aron Ferdinandus at the time he made his will of sound mind, memory, and understanding? (3) Was the will of the deceased obtained and procured by the undue influence or fraud of the respondent, her mother, brother, and cousin? The first of these issues was tried before the Acting District Judge (Mr. F. R. Dias) in Dec. 1897, who decided it in favour of the widow. Nothing turns upon it now. The second and third issues were tried by the Permanent District Judge (Mr. Browne), and the evidence upon them was heard by him. The district judge (Mr. Browne) on the 18th Jan. 1899 delivered a long and careful judgment, and decreed that the probate granted on the 21st Dec. 1895 to the widow should be revoked with costs. It is material to observe that there was no issue raising the question whether the will was valid as to the testator's movable property, but invalid as to his immovable property. The will was attacked and defended as a whole, and it was adjudged invalid. From this decision of the district judge the widow appealed to the Supreme Court; and that court then made the following order: "It is considered and adjudged that the decree made in this action by the District Court of Colombo, and dated the 18th Jan. 1899, be and the same is hereby varied by declaring that the late John Aron Ferdinandus died intestate as to his immovable property, and for the purpose of giving effect to this declaration expunging from the residuary clause in the will propounded as the will of the said John Aron Ferdinandus the reference made therein to immovable and real properties. And it is further ordered and decreed that all costs be paid out of the estate." This order is dated the 22nd March 1899; it was affirmed on a petition for review by an order dated the 6th Dec. 1899. From these two orders of the Supreme Court the widow has appealed to His Majesty in Council. The appellant by her petition of appeal asks not only that these orders of the Supreme Court may be discharged, but that the validity of the will as originally propounded by her may be upheld, and that probate thereof may be granted to her. The respondents have presented no cross-appeal; they do not object to the orders as they stand, but they do object to probate of the will as executed being granted without modification. Under these circumstances their Lordships have felt considerable difficulty in arriving at a conclusion as to what ought to be done. They cannot think that the course taken by the Supreme Court was correct unless the court was prepared to pronounce against the will and only forbore to do so because the testator's heirs were content with less. But the court did not say that they were prepared to dismiss the widow's appeal, and it would rather seem that they were not. If so, the order appealed from ought not to have been made unless, indeed, it was the result of a compromise come to between the parties, which apparently it was not. On this part of the case

their Lordships adhere to the sound principle acted upon by the House of Lords in the case of *The Tasmania* (63 L. T. Rep. 1; 15 App. Cas. 223). There negligence on the part of the captain of a ship was relied upon before the Court of Appeal although not investigated at the trial. Lord Herschell said: "I think that a point such as this, not taken at the trial and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested, and it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground then put forward for the first time if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box." The second and third issues rendered it necessary to investigate the capacity of the testator and his freedom from undue influence, but practically such a general investigation is very different from an investigation of a more limited range and pointed to the specific question whether the testator when he made his will was able to understand and understood that he was disposing of his tea and cocoa estates. This question was never raised at the trial, and not having been so raised, their Lordships are of opinion that the will should have been upheld or set aside; and not have been upheld as to the movable property and set aside as to the immovable property. In *Fulton v. Andrew* (32 L. T. Rep. 209; L. Rep. 7 H. L. 448), *Morrell v. Morrell* (46 L. T. Rep. 485; 7 P. Div. 68), and other cases of that sort, where words or clauses have been omitted from the probate, the court has always acted on evidence pointedly addressed to the words or clauses said to have been improperly inserted in the will, and it is obviously most important that this practice should not be departed from. Their Lordships, however, have the satisfaction of feeling that no injustice has been done in this case, for they have come to the conclusion that the decision of the district judge was correct, and that the widow's appeal from it ought to have been dismissed. They have, however, thought it right to point out the objection in principle to the order appealed from in order to prevent a repetition of the mistake which has been made. Passing now to the merits of the case, the evidence is as follows: [His Lordship went through the evidence, and continued as follows:] The case is not like *Rhodes v. Rhodes* (46 L. T. Rep. 463; 7 App. Cas. 192) and others of that kind, where a testator has given instructions which he understood, and has left a solicitor to embody them in a will in proper form, and a blunder has been made which the testator did not discover and the court cannot correct. Their Lordships are satisfied that, although the testator may have given some instructions for a will, the testator never gave instructions for any such will as was prepared; and that the testator, although he

Ct. of App.] *Re BURBIDGE—Re MEXBOROUGH; SAVILE v. MEXBOROUGH.* [Ct. of App.]

may have read the will, was induced to sign it by undue influence of his wife and her relations, or some of them, and without appreciating its contents. Their Lordships, having carefully reviewed the whole evidence, have come to the conclusion that the Supreme Court ought to have dismissed the widow's appeal and affirmed the decision of the district judge setting aside the will. The order varying it was unfortunate, and encouraged the present appeal. If the respondents had not been content with the order as it stands, their Lordships would have felt bound to advise His Majesty to discharge the orders appealed from and to affirm the order of the district judge; but, as it is, they think that they may properly and they therefore will humbly advise His Majesty to leave matters as they are, and simply to dismiss the appeal. Their Lordships do not think that a new trial ought to be granted, but, owing to the unsatisfactory state in which the case stood when the appeal was brought, no order will be made as to the costs of the appeal.

Solicitor for the appellant, *Chalton Hubbard*.
Solicitor for the respondents, *Arthur Cayley*.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Feb. 24.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re BURBIDGE. (a)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunacy—Inquisition—Jurisdiction to direct—Domiciled foreigner temporarily resident in England—Property situate in foreign country.

Where a domiciled foreigner, temporarily resident in this country, manifests symptoms of insanity, the court has jurisdiction to direct an inquiry as to his state of mind, even although he possesses no property here other than a few articles for personal use and some cash in hand. *Re Sottomaior* (L. Rep. 9 Ch. App. 677) applied.

A PETITION was presented asking that an inquisition should be directed as to the state of mind of a lady who was alleged to be of unsound mind.

The petitioner was the brother of the lady, and he resided in this country.

The lady was originally a British subject, but had married a citizen of the United States of America and was now a widow.

Her property consisted mainly of realty situate in the State of New Jersey.

She was temporarily resident in England, where she had no property other than a few articles for personal use and some cash which she had brought with her.

She had manifested symptoms of insanity, and had been placed in an asylum in England.

Newton Crane for the petitioner.—There is no reported case that a petition will lie for an inquisition in lunacy where the alleged lunatic is an

alien and has no property within the jurisdiction. But I submit that the court has jurisdiction to direct the inquiry in the present case. [WILLIAMS, L.J.—You do not doubt that there is some sort of jurisdiction in the court in respect of foreign lunatics within the jurisdiction?] No; I do not doubt that nor that the court ought to have such jurisdiction to inquire into the state of a lunatic's mind in order to do what is for the welfare of the lunatic. The object of such an inquiry is to benefit the lunatic, as well as to protect any property he may possess. The court would not have to exercise any extra-territorial jurisdiction. The case of *Re Houstoun* (1 Russ. 312) is differentiated by the text-writers from a case at bar; but I submit that it supports the position which I take in the present case. So also does *Re Bariatinski* (1 Ph. 375). Again, in *Re Sottomaior* (L. Rep. 9 Ch. App. 677) the court was asked to direct an inquiry as to the date when the lunacy of a domiciled Portuguese, who was residing in England, had commenced. The court refused to do that, though the Portuguese court desired that it should be done. But the court did direct the ordinary inquiry into the alleged lunatic's state of mind. He had real estate in Portugal, and his only property in England was a dividend of 208*l.* payable under a composition deed. In the present case the alleged lunatic has real estate situate in the State of New Jersey. It is probable also that she has some small articles for personal use in this country. There is no evidence upon the matter; but it is to be assumed that she must have brought something of the kind with her, and some cash.

WILLIAMS, L.J.—We are all of opinion that we have jurisdiction to order this inquiry. If authority were required, I should have thought that *Re Sottomaior* (L. Rep. 9 Ch. App. 677) supplies ample authority. In that case, although the court did not grant an inquiry as to the commencement of the lunacy, it did order an inquiry into the alleged lunatic's then state of mind, and the subject of the inquiry was judged to be a lunatic. In the present case I have no doubt that this alleged lunatic has some personal property of some kind in this country. It is not necessary to consider now what the consequences of the inquiry may be.

STIRLING and COZENS-HARDY, L.JJ. concurred.

Application allowed.

Solicitors for the petitioner, *Indermaur and Brown*, agents for *Percy Hignett*, Colwyn Bay.

Monday, March 24.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re MEXBOROUGH; SAVILE v. MEXBOROUGH. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Bequest of sum "sufficient to pay and discharge all estate duty"—Claim of limited owner to charge settled estates in respect of estate duty—Finance Act 1894 (57 & 58 Vict. c. 30), ss. 8 (4), 9 (1) (6).

A testator, by a codicil to his will executed after the passing of the Finance Act 1894, bequeathed

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Re MEXBOROUGH; SAVILE v. MEXBOROUGH.

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to his eldest son, to whom entailed estates would pass on the testator's death, a sum of money "sufficient to pay and discharge all estate duty" which might be payable by him.

The residuary legatee claimed that the legacy was impressed with a trust to pay the estate duty, and that the legatee consequently lost his right to recoup himself by a charge on the settled estates under sect. 9 (6) of the Act, the object of the gift being to discharge the estate duty, and so to free the settled estates from liability. The legatee, on the other hand, claimed that the legacy was one for his own benefit, being a gift to him measured by the amount which he would have to pay for estate duty.

Held (dissentiente Stirling, L.J.), that, there being no words indicative of a desire on the part of the testator to give the legatee absolute property, the inference could not be drawn that he should take the legacy unfettered by any purpose of the testator; and that this was not a legacy with a motive added, but an imperative direction, the purpose here, as distinguished from a motive, being the discharge of the estate duty.

Decision of Farwell, J. reversed.

JOHN CHARLES GEORGE, Earl of Mexborough, duly executed a codicil, dated the 18th Feb. 1899, to his will dated the 20th July 1888, which, after reciting the death of his wife, whereby the bequest in his will to her of all his residuary personal estate and effects and the appointment of her as executrix thereof had respectively failed to take effect, continued as follows:

Now I hereby bequeath unto my only son by my first marriage, John Horatio, Viscount Pollington, such a sum of money as shall be sufficient to pay and discharge all the estate duty which may be payable by the said John Horatio, Viscount Pollington, on the real estate and on any money liable to be laid out in the purchase of real estate passing on my death to the said John Horatio, Viscount Pollington, under the indenture of settlement dated the 23rd day of April 1867 and made between myself of the first part, the said John Horatio, Viscount Pollington, of the second part, William Savile of the third part, the Hon. and Rev. Arthur Savile and Sir William James Farrer of the fourth part; and I direct that the said sum of money shall be paid to the said John Horatio, Viscount Pollington, out of the money belonging to me at my death in the hands of Messrs. Leatham, Tew, and Co., of Pontefract; and I bequeath the residue of the last-mentioned money which shall remain after payment thereout of the said sum of money hereinbefore bequeathed to the said John Horatio, Viscount Pollington; unto my two sons by my second marriage, the Hon. John Henry Savile and the Hon. George Savile, in equal moieties. But if there should not at my death be a sum in the hands of Messrs. Leatham, Tew, and Co. sufficient to discharge the said estate duty, then I declare that no other part of my estate shall be liable to make good the deficiency.

The testator bequeathed his personal estate and effects whatsoever and wheresoever (including his personal property which he had power to dispose of in the exercise of any general power) not otherwise disposed of by his will, or by this or by any other codicil to his will, subject to and after payment of his funeral and testamentary expenses, debts, and legacies, unto his son the Hon. John Henry Savile for his own benefit absolutely, and he appointed him sole executor.

The testator died on the 17th Aug. 1899.

There was at the date of the death of the testator a sum in the hands of Messrs. Leatham,

Tew, and Co. more than sufficient to pay the legacy given to Viscount Pollington (now Lord Mexborough) by the codicil.

The estate duty upon the hereditaments and premises comprised in the indenture of settlement of the 23rd April 1867 had been assessed at the sum of 28,027l. 10s., which had been paid to the Inland Revenue by Lord Mexborough.

The Hon. John Henry Savile as the sole executor of the will had out of the sum in the hands of Messrs. Leatham, Tew, and Co. paid the sum of 28,538l. 2s. 9d., being the whole amount of the assessed estate duty, to Lord Mexborough with interest thereon at 4 per cent. per annum as from the 17th Aug. 1900 to the day of actual payment.

Lord Mexborough claimed not only to be entitled beneficially to the legacy given to him by the codicil, but claimed also the right to charge the hereditaments comprised in the indenture of settlement of the 23rd April 1867 with a sum equal to the amount of the estate duty assessed in respect of the hereditaments.

An originating summons was accordingly taken out by the executor against Lord Mexborough, asking for a declaration that upon the true construction of the codicil the legacy thereby bequeathed to the defendant was subject to a trust for, and ought to be applied by the defendant in payment of, the estate duty payable on the death of the testator in respect of the hereditaments at such death comprised in the indenture of settlement of the 23rd April 1867 and of any moneys at such death liable to be laid out in the purchase of hereditaments to be settled to the uses of that indenture of settlement, or in the payment, discharge, or satisfaction of any mortgage of or charge upon the hereditaments and moneys or any part thereof created by the defendant for the purpose of paying the duty or raising the amount thereof when already paid or to which the defendant might be entitled by virtue of the provisions of the Finance Act 1894.

By sect. 8 (4) of the Finance Act 1894 it is enacted that

Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession . . . shall be accountable for the estate duty on the property.

By sect. 9 (1) it is enacted that

A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is payable. . . .

By sect. 9 (6) it is enacted that

A person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge,

being a first charge on the property in respect of which duty is leviable.

The summons was adjourned into court and came on to be heard before Farwell, J. on the 2nd April 1901, when the following judgment was delivered:—

FARWELL, J.—Lord Mexborough was tenant for life of the settled estates. He had a son, Lord Pollington, by his first wife. He had two other sons by his second wife. His wife died between

the date of his will and of his codicil. He had left her the residuary personal estate under the will. He alters that by the codicil, and he begins in this way: [His Lordship read the codicil, and continued:] Lord Pollington, under the Finance Act 1894, was liable personally to the estate duty, but, being only a limited owner, he was entitled on payment of it to a charge upon the settled estates under sect. 9, sub-sect. 6, of that Act. He had on the death of his father to find the money to pay off the duty. Then, having paid it, the statute gave him a charge. The contention is that the sum of money necessary to pay off the estate duty—I am told that the sum is 28,000*l.*—is to be deemed to be paid in exoneration of the settled estates, and not to be treated as a legacy to Lord Pollington. Whether that was or was not the testator's intention it is not for me to speculate. I can only say that I cannot find words enough to express such an intention and to deprive Lord Pollington of the charge which he has got by statute on making the payment. First of all, I find no declaration of trust at all, or any words that I can twist into a declaration of trust, compelling Lord Pollington to apply the money which he receives under the will for that specific purpose. On the contrary, the testator contemplates that Lord Pollington is personally liable already, apart from anything he directs, because he gives him the money to pay the estate duty that may be payable by Lord Pollington on the real estate and so on. So that he knows that Lord Pollington is liable, and gives him the money for which he is liable. He does not impose a trust on him to pay, but gives him a sum, the motive of the gift being that Lord Pollington may have moneys in hand to make that payment. I can find nothing amounting to a trust there—to take the example that I suggested in the course of the argument—which would prevent the money coming to Lord Pollington under this codicil from passing to a trustee in bankruptcy if he by any chance became bankrupt after the testator's death. Then, further, it is the estate duty payable on any money payable under the indenture of settlement, and the testator directs that the sum shall be paid to Lord Pollington "out of the money belonging to me," and he bequeaths the residue of the money to "remain after payment thereof of the said sum hereinbefore bequeathed to the said John Horatio, Viscount Pollington, unto my two sons"—treating it as a bequest to Lord Pollington, which it is on the words of the will. Then comes these words: "If there should not at my death be a sum in the hands of Messrs. Leatham, Tew, and Co. sufficient to discharge the said estate duty." I think that that provision simply refers me back to the first gift—the estate duty that may be payable by Lord Pollington. Whether the testator did or did not intend that when this money had been paid by Lord Pollington he was to be entitled to the right given to him as a limited owner under sect. 9, sub-sect. 6, of the Finance Act 1894, I am not at liberty to speculate. All I find here is a legacy, the amount of which is to put Lord Pollington in funds to pay a liability already imposed on him extraneously to the codicil, and I find no words negating, destroying, or taking away from him the right which the Legislature gave him by the section of the Act of Parliament. Whether, I repeat, I am giving effect to the testator's inten-

tion, I do not know. All that I say is that I cannot adopt Mr. Butcher's suggestion as to its being an absurdity, and that I cannot possibly construe the will in this way, because, after all, Lord Pollington was the testator's eldest son, and I can see nothing absurd in his giving to his eldest son a legacy of 28,000*l.* There will be a declaration, therefore, that there is no trust for payment of the estate duty on the settled estates or for the discharge of any mortgage or charge created for the purpose of satisfying the estate duty.

From that decision the plaintiff now appealed.

Levett, K.C. and *Butcher, K.C.* (with them *Pember*) for the appellant.—Under sect. 8, sub-sect. 4, of the Finance Act 1894 the defendant, as the tenant for life in possession, is the person who has to pay the estate duty leviable on the settled estates. The Act makes the estate duty a charge on the settled estates: (sect. 9, sub-sect. 1). If a tenant for life pays the estate duty, he can raise the money again (sect. 9, sub-sect. 5); and he is entitled to a charge upon the settled estates: (sect. 9, sub-sect. 6). That is the code which applies to the payment of estate duty by a limited owner; and that was what this codicil was designed to meet. The testator has prepared for the discharge of the duty so that there shall be no burden lying on the settled estates; he has not made a gift to the defendant of the amount of the duty. It was the intention of the testator that the estate duty should be discharged. We do not put it as a trust; it is an obligation. We admit that if the balance in the bank at the time of the testator's death had been insufficient by, say, 5000*l.* to pay the estate duty, then the defendant, having paid the whole of the estate duty, would be entitled to charge or to raise by mortgage of the settled estates that 5000*l.* What we really rely upon is the presence of the word "discharge" in the first gift—"to pay and discharge"—and the absence of the word "pay" in the final clause. That shows an intention to discharge as entirely distinct from keeping a charge on the settled estates on foot. So far as the defendant is concerned, he is in the same position as if he had paid no estate duty, and had got no legacy. But he says: "Although I have paid nothing out of my own pocket, the testator has given me a charge for 28,000*l.* on the settled estates." It is not possible, however, to spell out of this codicil in any way a legacy of a charge on the settled estates which the defendant would have if he paid the money himself out of his own pocket. In cases relating to precatory trusts, the first step is to have certainty. Here there is an absolute certainty of the subject-matter defined by the rule laid down by the Finance Act 1894 operating upon the value of the settled estates. The next step in order to get such a trust or obligation is a certainty of the object:

Re Williams; Williams v. Williams, 76 L. T. Rep. 600; (1897) 2 Ch. 12.

Here the very object is most carefully defined by the settlement referred to. We have, therefore, the two things: The amount certain and the object as certain as it is possible to make it. You do not want any word like "trust" or "order"; you do not want any special word. You want to find an intention expressed in some wording which according to the English language means: "I

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Re MEXBOROUGH; SAVILE v. MEXBOROUGH.

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intend that money to be applied in discharge of the estate duty." We submit that there is enough in this will to show a distinct intention that the person who took the legacy took with it an obligation to free or discharge the settled estates from the estate duty. [WILLIAMS, L.J.—Who is interested in this estate duty being paid?] Every person who is entitled under the limitations of the settlement. The question is, Is the estate to go down burdened with this charge, or is it to go down free? If it goes down free, then every person, however remote he is in remainder, is interested, and, if you go down to the ultimate limitation in fee, you get every possible person who can have an interest in the estate.

Haldane, K.C. and Curtis Price for the respondent.—The testator may have thought that the defendant had no means of getting back what he was compelled to pay in the shape of legacy duty; he may not have known that the defendant had the right to any such charge as has been mentioned. Suppose that he did not know it, his language is the very aptest to meet such a case. The distinction referred to in *Thorp v. Owen* (2 Hare, 607) is a distinction which must be applied here. We may conjecture from one point of view that the testator intended this legacy to be applied in the discharge of the estate duty; and from another point of view that the draftsman did not know about the statutory charge—knew nothing except that the tenant for life was under personal liability to pay the money. Either of those two modes of expressing will make the language of the will equally intelligible. But the cardinal feature to guide the court in construing this codicil is that it is not enough to have a motive expressed—the motive of putting the tenant for life in funds to discharge his obligation to pay:

Lord Amherst v. Duchess Dowager of Leeds, 12 Sim. 476.

You must have also a trust or obligation. Here there is no word of trust or obligation. You may conjecture that the draftsman thought it necessary to do so; you may conjecture just as much the other way that the draftsman did not know the statutory charge which was given on the estate under sub-sect. 6 of sect. 9. But you have nothing except words measuring the amount of the money which is to be given—namely, the amount which is requisite to enable the tenant for life to discharge the estate duty, which is a personal liability of his own. It is plain that the word "discharge" is used as equivalent to "pay," because in the clause at the end the word "pay" is not repeated. There is no word pointing to a benefit *in rem* or to a benefit of any person or thing other than the defendant himself. It is quite open to conjecture that the testator should have drawn a distinction in his mind between the hardship of the burden upon the defendant who had to pay personally and the estates where the successive takers would only be charged with interest upon this legacy of 28,000*l*. There is measured out as much money to the defendant as is requisite to enable him to discharge the statutory debt. And there is nothing that takes away the charge which, not this will and not any instrument to which the testator was a party, but the Act of Parliament, gives to the

defendant when he has paid the money, from whatever source it may have come.

Levett, K.C. replied.

WILLIAMS, L.J.—I think that this appeal must be allowed. I will begin by putting aside all those cases in which the legatee and the person who is the *cestui que trust*, the beneficiary, under the alleged trust are the same person. Of course where a trustee and *cestui que trust* are the same person the obligation necessarily does not arise. But this case, it seems to me, is not a case of that sort. As I construe the clause in this codicil, Viscount Pollington is by no means the only person who will be benefited by the purpose being carried out which the testator has indicated here. Everybody, beginning with the Crown, and going on with mortgagees, and going on further to the persons who, in respect of their interest, are liable or might be liable to this duty, are benefited by this purpose of the testator being carried out if that purpose is read as the purpose of discharging the estate from this estate duty. Now, this is not a case in which there are, as there often are, any words indicative of a desire on the part of the testator to give the legatee an absolute property. Sometimes you have the word "absolutely" expressed; there is nothing of that sort. Sometimes you have a will in which you find the legacy given by separate words, and then afterwards words of direction or the expression of a hope or desire how the money shall be expended. In those cases sometimes one is able to draw an inference from words of that sort that the legatee is to take a legacy unfettered by the purpose of the testator. At all events one has got nothing of that kind here. It is quite plain when you take the original words of the legacy that the purpose runs throughout it. The codicil is as follows: "Now I hereby bequeath unto my only son by my first marriage, John Horatio, Viscount Pollington, such a sum of money as shall be sufficient to pay and discharge all the estate duty which may be payable by the said John Horatio, Viscount Pollington," under the indenture of settlement of 1867. "And I direct that the said sum of money shall be paid to the said John Horatio, Viscount Pollington, out of the money belonging to me at my death in the hands of" certain bankers. "And I bequeath the residue." Then the testator gives the residue to his two sons by his second marriage. On purpose I have stopped at that point, and am only dealing with the words of the gift itself. It seems to me that if one looks at those words they are, to say the least of it, consistent with the view that it was the purpose of the testator that this money should be employed in discharging this estate duty in such a sense as to leave John Horatio, Viscount Pollington, no discretion in the matter, but having an obligation so to expend the money. This, at all events, is not a case in which there is any doubt as to the amount of money to be employed. The amount is described as being the amount which is "sufficient to pay and discharge" the estate duty. It is not a case in which the testator could possibly have intended to give the legatee a discretion as to how much he would expend for the purpose. Under those circumstances it seems that if one takes the words alone coupled with this exact measure the

words are not inconsistent—at all events with the testator intending imperatively to direct that the money should be so employed. But when one comes to the later words it seems to me that they are very strong to show that this legacy was not a legacy with a motive superadded, but was an imperative direction. Having used in the earlier part of the clause which I have read the word “pay,” then, when one comes to the words at the end, the testator says: “But if there should not at my death be a sum in the hands of Messrs. Leatham, Tew, and Co. sufficient to discharge”—what?—to discharge “the said estate duty.” Now, if the testator had intended merely to confer a benefit upon Viscount Pollington and to express this motive, one would not have expected to find the words there “sufficient to discharge the said estate duty,” but “sufficient to discharge the liability of Viscount Pollington in respect of the said estate duty.” It was so very simple and easy to say that if that had been the intention. And I cannot regard the use of the words “to discharge the said estate duty” as a slip or a careless mode of expression adopted for the sake of brevity. I cannot help reading those words as intending to describe the purpose of the testator, that purpose being to discharge the estate duty, and not merely to enable Viscount Pollington the better to discharge his personal liability in respect of the estate duty. I do not know that it is necessary to add anything else. Of course we have had mentioned to us the fact that if we were to read these words differently—to read them in the way argued by Mr. Haldane—that is, as not imposing any obligation upon Viscount Pollington—then he would be entitled under sub-sect. 6 of sect. 9 of the Finance Act 1894 to get a charge upon the estate for the amount which he has paid. Nobody contends that if the construction is put upon these words which I have put upon them he will have any such right, and so there is no need for me to say anything more on that part of the case. In my judgment there is sufficient here, without any speculation as to what it is likely the testator might have meant by his own words, to indicate that his intention was to discharge the estate duty and not to leave it to Viscount Pollington to discharge it.

STIRLING, L.J.—Cases of this class often run on very fine distinctions, and are very often difficult to determine. And, in my judgment, this is one of the cases in which there is great difficulty in arriving at a satisfactory conclusion. I feel that it is highly probable that the real intention of the testator was to discharge the settled estates from the estate duty which would be payable at his death. But, speaking for myself, I am unable to see that the testator has expressed that intention in this codicil. If the testator's object was to direct that the estate duty should be paid out of any moneys belonging to him at the time of his death in the hands of his bankers, it would have been very easy to say so; but that is not the direction that the testator has given. He bequeaths to his only son by his first marriage, John Horatio, Viscount Pollington, “such a sum of money as shall be sufficient to pay and discharge all the estate duty which may be payable by the said John Horatio, Viscount Pollington, on the real estate,” and on money settled. Now, that gives Viscount Pollington a legacy to the

amount that is specified, which is defined by the amount which is “sufficient to pay and discharge all the estate duty” which might be payable by Viscount Pollington on becoming successor to the settled estates. Then the testator goes on: “And I direct that the said sum of money shall be paid to the said John Horatio, Viscount Pollington, out of the money belonging to me at my death in the hands of Messrs. Leatham, Tew, and Co.” Then he goes on: “And I bequeath the residue of the last-mentioned money which shall remain after payment thereof of the said sum of money hereinbefore bequeathed to the said John Horatio, Viscount Pollington, unto my two sons by my second marriage,” whom he names. Down to that point we have simply a sum of money given to Viscount Pollington, and the amount defined by reference to the estate duty. Then he goes on: “But if there should not at my death be a sum in the hands of Messrs. Leatham, Tew, and Co. sufficient to discharge the said estate duty, then I declare that no other part of my estate shall be liable to make good the deficiency.” The object of that clause was to negative the idea that he had given in the prior part of his will something in the nature of a demonstrative legacy to Viscount Pollington—namely, a sum of the amount specified which would be payable primarily out of the funds in the hands of the bankers, but might, in case that proved insufficient, be a charge upon his general personal estate, which apparently was very large. No doubt the testator does use language in that clause which refers to the sum which has been given—he speaks of it there as “sufficient to discharge the said estate duty.” What is “the said estate duty”? Going back to the place where it first occurs in the codicil, “the said estate duty” is “all the estate duty which may be payable by the said John Horatio, Viscount Pollington, on the real estate.” And the object, so far as it appears on the face of the codicil, appears to be to relieve Viscount Pollington from the necessity which he would be under, upon succeeding on the death, immediately to provide a large sum of money. That seems to me to be all that appears on the face of this codicil. But I express that opinion with the greatest diffidence, seeing that my brothers differ from me upon it.

COZENS-HARDY, L.J.—This is a difficult case, and I think that it is quite on the border line. But, on the whole, I cannot agree with the view which Farwell, J. has taken. I will not read the codicil again; it has been read twice already by my colleagues. But I think that there is sufficient here to show a purpose as distinguished from a motive. What was the purpose? The discharge of the estate duty; not the mere transfer of the Crown's charge to the tenant for life if and when he paid it off, but the discharge of the settled estates from the estate duty. I have looked at the notice of motion, and in point of form it would be better to say, “And declare the estates are free from any charge.”

Appeal allowed.

Solicitors for the appellant, *Farrer and Co.*

Solicitors for the respondent, *Foyer and Hordern.*

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Re HILL; HILL v. HILL.

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March 19, 20, and 26.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re HILL; HILL v. HILL. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Heirlooms—Settlement—Absolute interest—Chattels to descend as heirlooms “as far as the rules of law and equity will permit.”

A testatrix, who died in Oct. 1891, by her will, dated in May 1891, bequeathed certain jewellery to her son until he should die, and after his death to each and every of the persons who should in turn succeed to the title and dignity of Viscount H., or any other title or dignity which might be granted to or assumed by any person for the time being entitled to the title and dignity of Viscount H., severally and successively as they should in turn succeed to such title and dignity, her intention being that the jewellery should “descend as heirlooms as far as the rules of law and equity will permit.”

The son survived the testatrix, and entered into possession of the chattels. He died in March 1895, being succeeded in the title by his son, who thus became fourth Viscount H. He married, but had not any issue. The heir-presumptive to the title was one of the brothers, who was unmarried.

The question was whether the fourth Viscount H. was entitled absolutely, or for life only, or otherwise, to the chattels bequeathed by the testatrix to descend as heirlooms with the title of Viscount H. Held, that the fourth Viscount H. was entitled absolutely to the chattels, the case being concluded by the decision in Tollemache v. Coventry (2 Cl. & F. 611; 37 R. R. 260).

Harrington v. Harrington (L. Rep. 5 E. & I. App. 87) distinguished.

Decision of Eady, J. (86 L. T. Rep. 146) affirmed.

ANN, Dowager Viscountess Hill, by her will, dated the 28th May 1891, bequeathed to her son, the Right Hon. Rowland Clegg, Viscount Hill, certain diamonds, consisting of a tiara, necklace, pendant, and earrings, and other chattels

Until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, or any other title or dignity which may be granted to or assumed by any person for the time being entitled to the said title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds and miniatures and ring shall descend as heirlooms as far as the rules of law and equity will permit.

The testatrix died on the 31st Oct. 1891, and her will was duly proved.

Her son, the third Viscount Hill, survived his mother, and entered into possession of the chattels.

He died on the 30th March 1895, and was succeeded in the title by his son, Rowland Richard Clegg, fourth Viscount Hill, who was born in 1863. The fourth Viscount was married, but had not any issue.

The heir-presumptive to the title was the fourth viscount's brother, Francis William Clegg Hill, who was born in 1866 and was unmarried. He was the residuary legatee under the will.

The fourth viscount, shortly after the death of his father, took proceedings to recover a portion of the chattels from his stepmother, Isabella Elizabeth, Dowager Viscountess Hill, who claimed the same on the ground of their having been subject in the hands of the testatrix to an alleged precatory trust.

The decision of the Court of Appeal established that the chattels were not subject to any precatory trust; and the result of that litigation was that it determined that the testatrix had power to dispose of them by her will: (*Hill v. Hill*, 76 L. T. Rep. 103; (1897) 1 Q. B. 483).

The nature and extent of the interest taken by the fourth viscount under the will of the testatrix did not arise in those proceedings, and had to be determined.

An originating summons in the matter of the trusts of the will and of the Settled Land Acts 1882 to 1890, was accordingly taken out by the fourth viscount against his brother, the heir-presumptive to the title, for the determination of the question whether he, the plaintiff, was entitled absolutely, or for life only, or otherwise, to the diamonds and other chattels bequeathed by the testatrix to descend as heirlooms with the title and dignity of Viscount Hill.

The summons was adjourned into court and came on to be heard before Eady, J. on the 14th and 15th Jan. 1902, when his Lordship reserved judgment.

On the 25th Jan. 1902 the learned judge delivered a written judgment, deciding (86 L. T. Rep. 146) that upon the death of the third Viscount Hill, to whom the chattels were given for his life, or until his death, the chattels passed absolutely to the fourth viscount, the plaintiff.

From that decision the defendant now appealed.

Brinton for the appellant.—The next in succession to the title and dignity of Viscount Hill after the fourth viscount, the plaintiff, is the defendant, who is likewise the residuary legatee under the will. Looking at the actual words of the bequest of the chattels, apart from authority, it would, I submit, be impossible to hold that the plaintiff has an absolute interest in the chattels. It is a defeasible interest merely. The testatrix clearly intended the plaintiff to take for life only. As he was born in her lifetime, she was able to effect this, and has by the terms of the bequest effectually done so. The words “as far as the rules of law and equity will permit” are sufficient for the purpose. Therefore the chattels did not vest absolutely in the plaintiff, but upon his death within twenty-one years after the death of the testatrix they would pass and belong to the next Viscount Hill, subject in turn to be similarly divested in favour of the next succeeding viscount if he should succeed to the title within the period of twenty-one years; and the person who should be Viscount Hill at the expiration of the period of twenty-one years would become indefeasibly entitled to the chattels. Whether entitled under the bequest or not, the defendant would claim the chattels absolutely as residuary legatee; for, if my first contention fails, the words of the bequest show an intention to create a gift which infringes the rule against perpetuities, and the chattels would fall into the residue. The whole gift would be bad. But, according to the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

judgment of Lord Cairns in the case of *Countess of Harrington v. Earl of Harrington* (L. Rep. 5 E. & I. App. 87), the words "as far as the rules of law and equity will permit" would justify the court in holding that no Viscount Hill could claim the chattels absolutely so long as there were persons living at the date of the death of the testatrix who could succeed to the title of Viscount Hill. The case relied upon by the plaintiff in the court below as an authority for his proposition was *Tollemache v. Coventry* (2 O.L. & F. 611; 37 R. R. 260). But that was a decision of one judge only—Lord Brougham—and it has been disapproved of by Lord St. Leonards and others:

Sugden's Law of Property, 1st edit., pp. 336-338;
Montagu v. Lord Inchiquin, 32 L. T. Rep. 427;
Re Johnston; Cockerell v. Earl of Essex, 52 L. T. Rep. 44; 26 Ch. Div. 538;
Countess of Harrington v. Earl of Harrington (ubi sup.).

[STIRLING, L.J.—Can we decide in your favour without going contrary to *Tollemache v. Coventry* (ubi sup.)? Yes; by following *Countess of Harrington v. Earl of Harrington* (ubi sup.).] [WILLIAMS, L.J.—You must provide us with an adequate reason for so doing.] I think that it will be found in *Harrington's* case, which, I submit, covers the present case. My main object in citing that case on the first contention which I raise is that it shows that in March 1871 the House of Lords thought that the meaning of the words "as far as the rules of law and equity will permit" was open. *Tollemache v. Coventry* (ubi sup.) was cited in *Harrington's* case (ubi sup.). [WILLIAMS, L.J.—As *Harrington's* case was decided after *Tollemache v. Coventry* (ubi sup.) and *Tollemache v. Coventry* was cited there, it may draw the sting out of any proposition that is based upon *Tollemache v. Coventry*.] He referred also to

Dungannon v. Smith, 12 Cl. & F. 546.

Micklem, K.C. and Errington for the respondent.—It is not disputed that under the will the son of the testatrix—namely, the third Viscount Hill—was entitled to possession of the chattels during his life. But we contend that upon his decease the chattels vested absolutely and indefeasibly in the plaintiff, as was decided by Eady, J. We say that the decision of Eady, J. was right upon two grounds: First, the case is expressly covered by authority:

Tollemache v. Coventry (ubi sup.).

Secondly, on principle, chattels cannot be settled by reference to the inheritance. An attempt to annex chattels to an estate is ineffectual. That cannot be done at law unless the estate is expressly limited to a life estate. If our contention is not right, the whole bequest is bad because it offends against the law of perpetuities. The chattels are settled as heirlooms upon a number of persons in succession to go with the inheritance, and the first tenant in tail male who becomes entitled takes them absolutely. After the death of the testatrix's son named in the bequest, to whom the chattels were given for life, they therefore became the absolute property of the plaintiff. If apt words had been used, the chattels could have been so settled as to make them go with the title and dignity of Viscount Hill until twenty-one years after the death of lives in being at the testatrix's

death. But that has not been done. The expression of an intention that the chattels should go as heirlooms "as far as the rules of law and equity will permit" is not enough. The words do not amount to a settlement as in

Re Sir J. Elvett Carnac's Will, 53 L. T. Rep. 81; 30 Ch. Div. 136.

All the preceding cases were summed up and the law was laid down in a very clear manner in

Lord Scarisdale v. Curzon, 1 J. & H. 40.

[COZENS-HAEDY, L.J. referred to *Vaughan v. Burslem* (3 Bro. C. C. 101).] The decision in *Dungannon v. Smith* (ubi sup.) was much the same as in *Tollemache v. Coventry* (ubi sup.). No force can be attributed to the word "heirlooms" in the absence of any contract or special circumstances:

Shelley v. Shelley, L. Rep. 6 Eq. 540.

We have more than one decision in favour of our contention, and there is no case really the other way. *Tollemache v. Coventry* (ubi sup.) is distinctly in our favour, and is not distinguishable as the appellant here contends. Since that case there never has been a clause in the form, as there, of limiting heirlooms to go with the title. In every case there has either been a proper clause of defeasance, or else the court has construed it as an executory trust. *Mackworth v. Hinzman* (2 Keen, 658; 44 R. R. 309) is in one sense even more in our favour than *Tollemache v. Coventry* (ubi sup.). *Viscount Exmouth v. Praed* (48 L. T. Rep. 422; 23 Oh. Div. 158) is also in our favour, and the decision of Chitty, J. in *Re Johnston; Cockerell v. Earl of Essex* (ubi sup.) is entirely so. There is not a single case which is against us except *Countess of Harrington v. Earl of Harrington* (ubi sup.). As to *Montagu v. Lord Inchiquin* (ubi sup.), that was hardly relied upon by the appellant here.

Brinton in reply.—My contentions are, first, that there is no transgression against the law of perpetuities in this bequest, and that, therefore, it is good throughout. Alternatively, if the law is transgressed, the clause is bad throughout, and the defendant takes the chattels as residuary legatees. I rely for both of my propositions upon *Countess of Harrington v. Earl of Harrington* (ubi sup.), where the point was fairly raised and fully considered, and the defendant here is in the same position as the party interested in that case. But I do not contend, first, that this is an executory trust; nor, secondly, that the gift of the chattels as heirlooms passes them on to successive tenants in tail. This is not a limitation of chattels to go with the inheritance. It is not even a limitation of them to go with the title. On the words of the bequest the intention is apparent. There is nothing in this bequest to annex the chattels to the title and dignity of Viscount Hill so as to give an estate tail in the chattels.

Cur. adv. vult.

March 26.—The following written judgments were delivered:—

WILLIAMS, L.J.—The question in this case is whether the plaintiff is entitled absolutely, or for life only, or otherwise, to jewellery bequeathed by will to descend as heirlooms with the Hill title. In my judgment the plaintiff is entitled absolutely to the jewellery. It seems to me that the case is really concluded by the

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case of *Tollemache v. Coventry* (2 Cl. & F. 611; 37 R. R. 260). The words in that case were almost identical with the words in the present case. In that case a life estate was given first to the widow and named only son of the testator. In the present case a life estate is given to the named son of the testatrix, and in each case there is what I will call the heirloom clause disposing of the heirlooms after the termination of the life estate. In the *Tollemache* case there were alive at the date of the will and of the death of the testator a son who took a life estate, and living grandsons who might succeed to the title; and in the present case there were likewise a son, Rowland Clegg Hill, the third viscount, who took a life estate, and living grandsons who might succeed to the title; and in my judgment the House of Lords did in *Tollemache v. Coventry* (*ubi sup.*) decide that the third Lord Vere—that is to say, the first taker under the description, “such person as shall from time to time be Lord Vere”—took the heirlooms in that case absolutely. I know that this has been doubted by some of the judges who wrote opinions in *Dungannon v. Smith* (12 Cl. & F. 546); but, for reasons which I will give presently, I am of opinion that the House of Lords did so decide, and did not, as has been suggested, merely negative the title of the fourth Lord Vere. If this view is right, it seems difficult to see why the plaintiff must not, on the basis of that judgment, take the heirlooms absolutely. The contrary contention can only be maintained on the assumption either that the third Viscount Hill only takes a life interest in the jewellery, or that he takes no interest at all in the heirlooms as being in his turn the person bearing the title of Lord Hill. The suggestion that he only takes a life estate, or only the use of the heirlooms, seems to be based upon the argument that, as the plaintiff and his brothers were all “lives in being” at the date of the will of their grandmother, they are all persons to whom the user of, as distinguished from the property in, the heirlooms might be given; and that, therefore, in pursuance of the obvious intention of the testatrix to preserve the jewellery as heirlooms as long as possible, one ought, if possible, so to construe her will as to limit the interest of all these grandsons living at the death of the testatrix to use and enjoyment only, and to treat the will as giving the absolute property to Lord Hill, who first takes the heirlooms on the determination of the “life or lives in being,” and who, therefore, must take within a period which does not offend against the rule against perpetuities. So to do would be really to give effect to the view of Sir John Leach, Vice-Chancellor of England, in the *Tollemache* case (*ubi sup.*), when before him under the name of *Deerhurst v. St. Albans*. This view he thus expresses: “By the rules of law and equity, any person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only. The son and the grandson of the testator were living at his death, and were both limited to the use and enjoyment only; but the child who succeeded the grandson as Lord Vere and Duke of St. Albans was not living at the death of the testator, and could not, therefore, by the rules of law and equity be limited to use and enjoyment only. He took, therefore, an absolute interest.” But, whatever else may be doubtful in

the decision of the House of Lords, there can be no doubt but that they negatived this view of Sir John Leach; for they held that the great-grandson did not take at all. It follows that in the present case it is impossible to treat all the persons living at the date of the will of the testatrix as taking (if they take at all as holders of the title) life estates—that is, mere use and enjoyment. Neither do I think it possible to hold that the present plaintiff takes no interest. The ground on which I understand it is suggested that this may be the case is that the bequest to the person for the time being holding the title (even when qualified with the words “as far as the rules of law and equity will permit”) is void as including persons who possibly might come into existence at a time so remote as to offend against the rule against perpetuities; and that, if such bequest is void as regards one person who might fall within the category of those the testatrix meant to benefit in succession, it is void as to all. I cannot assent to this argument. The answer to it is admirably put by Sir C. Pepys (afterwards Lord Cottenham) and Mr. Preston in the argument in *Tollemache v. Coventry*, as reported 2 Cl. & F., pp. 611 and 617, in which it is pointed out that the first member of the series, the Lords Vere, the first taker of the title of Lord Vere after the survivor of the holders of the life estate in the heirlooms, takes under a bequest which must of necessity vest, if it ever vests, in some person who either was in existence at the time of the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life, and was therefore, good in law; whereas the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or twenty-one years after the dropping of any such life, and, therefore, was not valid. The first member of this series must take on the death of the tenant for life, and, therefore, at not too remote a period, although the second and all the later members might take beyond the limits fixed by the rule against perpetuities; and I do not quite understand why Cresswell, J. in *Dungannon v. Smith* (12 Cl. & F., pp. 546 and 566) says that the whole of the reasoning of Lord Brougham in *Tollemache v. Coventry* (*ubi sup.*) shows that the executory bequest after the death of the second Lord Vere was void because it possibly might not vest in due time, and that the decision, therefore, must be taken to have been, not that the bequest was good as to the third Lord Vere, but that it was bad as to the fourth. I see nothing in the reasoning of Lord Brougham inconsistent with his adoption of the argument of Sir C. Pepys and Mr. Preston; and Lord St. Leonards, who, in his *Law of Property* (1st edit., p. 336) seems to have doubted this himself, in the case of *Ker v. Lord Dungannon* (1 Dr. & W. 509, 536) refers to the decision of the House in *Tollemache v. Coventry* (*ubi sup.*) as having been to that effect. The decision in this sense seems to me to have been frequently recognised in later cases—see the decision of Fry, J. (afterwards Fry, L.J.) in *Exmouth v. Praed* (48 L. T. Rep. 422; 23 Ch. Div. 158, 163) and *Re Johnston* (52 L. T. Rep.

44; 26 Ch. Div. 538). I wish to make an observation on *Harrington v. Harrington* (L. Rep. 5 E. & I. App. 87) which was much pressed upon us in argument. Mr. Brinton argued that that case showed that the words "as far as the rules of law and equity permit" would justify the court in holding that no Lord Vere could claim the jewellery absolutely so long as there were persons living at the date of the death of the testatrix who could succeed to the title. But that case turned upon a proviso preventing the personalty from vesting absolutely in a tenant in tail unless he should attain twenty-one, and it was contended that the proviso had the effect of carrying on to those who came next in remainder after the taker on the determination of the life estate, so exposing itself to be rendered void as aiming at perpetuity; but the House held that the proviso was an essential part of the gift, and therefore controlled by the words in the disposition clause "so far as the rules of law and equity permit." The effect of this was to limit the proviso so as that it should only apply to tenants in tail who took by purchase, and consequently it could not be said that the proviso was void as aiming at perpetuity. For the reasons I have given I think that the decision of Eady, J. must be affirmed, and the appeal must, therefore, be dismissed.

STIRLING, L.J.—I agree with the judgment that has been just delivered. I think in particular that we are bound by the decision of the House of Lords in *Tollemache v. Coventry* (*ubi sup.*). I think that the *ratio decidendi* in that case cannot be more clearly or more compendiously stated than in the following passage (at p. 617 of 2 Cl. & F.): "The gift was to a class of persons in succession—viz., Lords Vere—and not to individuals. The executory bequest of the chattels to the person who should be first taker of the title of Lord Vere, after the death of the survivor of the testator's widow and son, was a bequest which must of necessity vest, if it ever vested, in some person who either was in existence at the time of the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life; and was therefore good in law. But the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title, was not a bequest which must of necessity vest in any person who would be in existence at the testator's death or within any life then in being, or twenty-one years after the dropping of any such life; and therefore was not valid." It is true that these sentences are not found in the report of what was said by the Lord Chancellor in advising the House of Lords in that case, but occur at the commencement of the argument of Sir Christopher Pepys and Mr. Preston. Nevertheless I think that they do form the groundwork of the decision of the House of Lords. The most difficult step, in my opinion, appears to be the first—namely, that the gift was to a class of persons in succession, viz., Lords Vere, and not to individuals. Now, a large portion of what was said by the Lord Chancellor is devoted to dealing with that proposition. He appears to me to sum it up and put it abundantly clear at p. 631, where he says: "It is a fallacy, as it appears to me—it is a play upon words—to say that Lord Vere was *in esse*, because the individual

Beauclerk, who afterwards happened to become Lord Vere, was *in esse* at the time. There was not a Lord Vere *in esse*, nor *ex vi termini* could there be said to be a Lord Vere *in esse* till that individual whom, *quasi* individual, we admit to have been *in esse* came to be Lord Vere." As regards the illustration which is drawn in the argument between the difference in the possession with reference to the rule against perpetuities of the first taker of the title of Lord Vere after the death of the survivor of the testator's widow and son and that of the person who would be Lord Vere next in succession, it is explicitly stated in what was said by the Lord Chancellor. I cannot, however, but think that there is a distinction to which his Lordship alluded, when towards the end of his judgment he says this (at p. 633): "I must run in the face of authority if I denied the third Lord Vere's right; but I have no decision nor any authority supporting the other." For these reasons I think the appeal must be dismissed, the plaintiff being, in accordance with what was decided by the House of Lords, absolutely entitled.

COZENS-HARDY, L.J.—If it were now open for decision, I think it might be reasonable to hold that the words "as far as the rules of law and equity will permit" should be treated as a direction so to frame the limitations that the heirlooms should go with the title as long as possible, or, in other words, to regard the trust as an executory trust. But it has long been settled that such is not the effect of these words. It only remains to construe the words as they stand. I think it is not possible to avoid the conclusion that the present viscount takes the jewels and heirlooms, and that there is no shifting clause in favour of the successor in title. I entirely agree with the judgment of Williams, L.J., and I do not desire to add anything.

Appeal dismissed.

Solicitors for the appellant, *Chester and Co.*, agents for *Lucas and Salt*, Wem, Salop.

Solicitors for the respondent, *Upperton and Co.*

Feb. 14 and 15.

(Before COLLINS, M.R. and MATHEW, L.J.)

LONDON AND INDIA DOCKS COMPANY v. GREAT EASTERN RAILWAY COMPANY AND MIDLAND RAILWAY COMPANY. (a)

APPEAL FROM THE RAILWAY AND CANAL COMMISSION COURT.

Railway—Railway company—Dock company—Lines on docks—Traffic conveyed from docks over railway of railway company—Through rates—Right of dock company to claim through rates—Railway and Canal Traffic Act 1873 (36 & 37 Vict. c. 48), s. 3—Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25), s. 25.

The Railway and Canal Traffic Act 1888, by sect. 25, provides that the facilities which, by sect. 2 of the Railway and Canal Traffic Act 1873, every railway company is required to afford shall include the due and reasonable receiving, forwarding, and delivering by every railway company, at the request of any other such company, of through traffic at through rates; and sect. 3 of the Act of

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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1873 provides that "the term 'railway company' includes any person being owner or lessee of or working any railway constructed or carried on under the powers of any Act of Parliament, and the term 'railway' includes every station, siding, &c., of or belonging to such railway and used for the purposes of public traffic."

The plaintiffs, a dock company, had constructed and used under statutory powers lines of rails and sidings in their docks, which communicated with the railway of a railway company. Goods were conveyed over these lines and sidings, in trucks of the railway company drawn by engines of the dock company, to and from the quays and warehouses in the docks from and to the railway of the railway company. The private Acts under which these lines and sidings were constructed and used did not incorporate the Railways Clauses Consolidation Acts or contain the provisions usual in the case of railways.

Held (reversing the decision of the Railway Commissioners), that the dock company were not a "railway company" and the lines and sidings were not a "railway," within the meaning of sect. 25 of the Railway and Canal Traffic Act 1888, and that the dock company were not entitled to through rates under that section.

THIS was an appeal by the defendants from an order of the Railway Commissioners.

The plaintiffs applied to the Railway Commissioners, under sect. 25 of the Railway and Canal Traffic Act 1888, for an order allowing through rates for traffic passing over lines of rails belonging to the plaintiffs, in the Royal Victoria and Albert Docks, to various stations on the Midland Railway, by a route which passed over parts of the Great Eastern Railway.

The plaintiffs proposed certain through rates to be apportioned between themselves, the Great Eastern Railway Company, and the Midland Railway Company.

The London and India Docks Company was formed by the amalgamation into one company of the London and St. Katharine Docks Company and the East and West India Docks Company, under the London and India Docks Amalgamation Act 1900 (63 & 64 Vict. c. cxi.).

In 1864 the London Dock Company and the St. Katharine Dock Company were amalgamated into one company, under the name of the London and St. Katharine Docks Company, by the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.); and by that Act the London Docks, the St. Katharine Docks, and the Victoria Docks, and all the works and property belonging thereto, were vested in the new company.

The Victoria Docks were authorised to be constructed by the Victoria (London) Dock Company under the Victoria (London) Docks Act 1853 (16 & 17 Vict. c. cxxxi.), which was repealed by the London and St. Katharine Docks Act 1864, except as to those provisions thereof which were preserved by and incorporated in the Act of 1864, including sects. 28 and 69.

Sect. 28 of the Act of 1853 authorised the company, in connection with the docks, to make such timber ponds, basins . . . and tramways, and all such other works as were authorised by the Harbours, Docks, and Piers Clauses Act 1847, as the company might think proper; and, by

sect. 69, the company were required to allow the Eastern Counties Railway Company to lay down on their lands lines of rails, or trams, or railways, on both sides of the Victoria Dock communicating with the main lines of the North Woolwich Railway for the conveyance of goods between the dock and railway, and that the dock company should have the right to use those rails, trams, and railways in the ordinary course of their business.

The Companies Clauses Consolidation Acts, the Lands Clauses Consolidation Acts, and the Harbours, Docks, and Piers Clauses Act, except as expressly varied, were incorporated in the London and St. Katharine Docks Act 1864, but the Railways Clauses Consolidation Acts were not so incorporated.

The Act of 1864, by sect. 146, provided that it should be lawful for the dock company, on the one hand, and the Great Eastern Railway Company, the London and North-Western Railway Company, the North London Railway Company, the Great Northern Railway Company, the Midland Railway Company, and the Great Western Railway Company, on the other hand, to enter into agreements with respect to the rates and charges to be levied by the dock company upon railway traffic using the docks, and as to making any through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded to the traffic to and at the docks, and as to the use by the railway companies of the railways, tramways, jetties, and other conveniences at the docks.

Sect. 147 of the Act of 1864 provided that those railway companies, with their carriages, waggons, and servants, might use free of charge the railways, tramways, and other conveniences at the docks, so as to enable them to convey goods and other traffic to and from the shipping at the docks, and that the dock company should provide space at the Victoria Dock for the erection of offices by those railway companies for clerks, and for storage of sheets, ropes, and other necessary articles required by the railway companies for the conduct of their business.

The London and St. Katharine Docks Company owned a railway, in the ordinary sense of the term, in the London Docks, which had belonged to the London Dock Company; but that railway had no connection with the lines in respect of which the through rates were required.

The London and St. Katharine Docks Company Act 1875 (38 & 39 Vict. c. cliv.) authorised the London and St. Katharine Docks Company to construct a dock called the Royal Albert Dock, and in that Act were incorporated the Lands Clauses Consolidation Acts, the Harbours, Docks, and Piers Clauses Act, and sect. 13 of the Railways Clauses Consolidation Act 1863. Sect. 4 (5) of the Act of 1875 authorised the dock company to make and maintain, in connection with their works, all necessary or convenient locks . . . rails, trams, sidings, stations, platforms, . . . and other works and conveniences.

A part of the North Woolwich Branch of the Great Eastern Railway was included in the site of the works authorised by the Act of 1875, and that Act, by sect. 6, provided that the dock company should construct, in substitution for about half a mile of the North Woolwich Branch, a line passing through a tunnel under the new dock, the

tunnel to be repaired and maintained by the dock company; the new piece of line was to be vested in the Great Eastern Railway Company and to be deemed to form part of the North Woolwich Branch; but the soil over the tunnel was to remain vested in the dock company with the right to construct, maintain, and use over it such roads and other conveniences as from time to time they might require for the purposes of their undertaking; the part of the North Woolwich Branch for which the new piece of line was to be substituted was to vest in the dock company, and was called "the transferred portion of the North Woolwich Branch"; the transferred line was to be maintained by the dock company, to the reasonable satisfaction of the Great Eastern Railway Company, in good repair and working order so as to permit the user thereof, as therein provided, by the Great Eastern Railway Company and the other railway companies lawfully entitled to use the substituted line, and also at all times for the goods traffic to and from the docks; if any accident should prevent the use of the substituted line through the tunnel, the said railway companies were to be entitled free of charge to use for the purposes of their traffic the transferred line, until the tunnel was again ready for traffic, the right of the said railway companies to use the transferred line to continue only as long as might be reasonably required for the repair of the tunnel and substituted line.

The Act of 1875, by sect. 6 (k), provided that the dock company should either set apart, or should permit the Great Eastern Railway Company to lay down free of charge and to maintain, upon the Victoria Dock estate, such sidings as might be necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, waggons, and engines used for the purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension or to the North Woolwich Branch, so as to render unnecessary the shunting or stopping of such trains, carriages, waggons, or engines on the North Woolwich Branch, and that the dock company should permit any such sidings, whether set apart by them or laid down by the Great Eastern Railway Company, to be fully and freely worked and used by the railway company for dock traffic.

The London and St. Katharine Docks Act 1882 (47 & 48 Vict. c. ii.) authorised the London and St. Katharine Docks Company to maintain and use a railway, which they had constructed on their property, for the carriage of passengers from the North Woolwich Branch to Galleons Reach at the entrance of the Royal Albert Dock, and gave them power to take tolls for the carriage thereon of passengers and small parcels, but prohibited them from carrying thereon goods or merchandise other than parcels.

The Railways Clauses Consolidation Act 1845 and Parts 1 and 3 of the Railways Clauses Act 1863 were incorporated in the Act of 1882.

The Act of 1882, by sect. 26, authorised the dock company and the Great Eastern Railway Company to make agreements with respect to the use and management by the two companies of their respective railway works, the management, regulation, interchange, collection, transmission, and delivery of traffic upon, or coming from, or destined for the railways and works of the two

companies, and the fixing, collection, payment, appropriation, and distribution of the tolls, charges, and profits arising from the respective railways and works of the two companies.

This application for a through rate was not, however, made in respect of the railway for passengers and parcels authorised by the Act of 1882.

The London and St. Katharine Docks Company had constructed, under the Acts of 1864 and 1875, lines of rails in the Royal Victoria and Albert Docks forming a junction with the Great Eastern Railway and extending for about three miles on either side of the docks to the various quays and warehouses.

The dock company had also constructed, under sect. 6 (k) of the Act of 1875, a large group of sidings, known as the exchange sidings, commencing about twenty-six chains from the junction with the Great Eastern Railway.

The whole length of all the dock company's lines and sidings in the Royal Victoria and Albert Docks for the purpose of carrying goods to and from the Great Eastern Railway was about forty-five miles, and the application for a through rate was made in respect of those lines and sidings.

By arrangement between the dock company and the railway companies, the goods traffic was carried to and from the docks, quays, and warehouses from and to the Great Eastern Railway in waggons of the railway companies, and the dock company provided the engines for hauling the waggons in the docks. The dock company so hauled the waggons from all parts of the Victoria and Albert Docks to the exchange sidings, and there placed them in train order on lines appropriated for the time being to the traffic of the railway companies which respectively conveyed goods traffic from the docks.

Under the powers conferred by sect. 146 of the Act of 1864, an agreement was made between the dock company and the London and North-Western Railway Company, the Great Eastern Railway Company, and the Great Northern Railway Company, under which the dock company loaded the traffic and performed other services for the sum of 1s. 5d. a ton.

A large quantity of goods traffic was landed from vessels on to the quays of the Royal Victoria and Albert Docks, and was sent thence, either direct or after being warehoused in the warehouses of the dock company, to stations on the Midland Railway.

The dock company claimed to have a through rate for the above-mentioned goods traffic, but the defendant railway companies refused to quote a through rate.

The dock company alleged that they were a railway company, in respect of the lines and sidings on their docks, within the meaning of the Railway and Canal Traffic Act 1888, and therefore were entitled to a through rate.

The Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25) provides:

Sect. 25. Whereas by sect. 2 of the Railway and Canal Traffic Act 1854 it is enacted that every railway company and canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon or from the several railways and canals belonging to or worked by

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such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company, and railway and canal company, having or working railways or canals which form part of a continuous line of railway, or canal, or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf: And whereas it is expedient to explain and amend the said enactment:

Be it therefore enacted, that, subject as herein-after mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company, and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); and also the due and reasonable receiving, forwarding, and delivering by every railway company, and canal company, and railway and canal company, at the request of any person interested in through traffic, of such traffic at through rates: Provided that no application shall be made to the commissioners by such person until he has made a complaint to the Board of Trade under the provisions of this Act as to complaints to the Board of Trade of unreasonable charges, and the Board of Trade have heard the complaint in the manner herein provided.

The Railway and Canal Traffic Act 1873 (36 & 37 Vict. c. 48) provides:

Sect. 3. In this Act—The term "railway company" includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament. The term "railway" includes every station, siding, wharf, or dock, of or belonging to such railway and used for the purposes of public traffic.

The Railway and Canal Commissioners (Sir F. Peel dissenting) gave judgment in favour of the dock company.

The defendants appealed. By consent the appeal was heard before two judges only.

Moon (with him *Cripps*, K.C. and *Asquith*, K.C.) for the appellants.—The order of the Railway Commissioners was wrong, and there was no power to grant a through rate. The applicants are not a railway company, and are therefore not entitled to have a through rate; and, even if for some purposes the applicants are a railway company, yet the sidings on their docks do not belong to them as a railway company, and are not railways for which a through rate can be ordered. The application for this through rate was made under sect. 25 of the Railway and Canal Traffic

Act 1888. Under that section the application must be made by a railway company, and must be an application for a through rate from a railway of that railway company. By sect. 55 of the Act of 1888 the definition clause of the Railway and Canal Traffic Act 1873 is made applicable to the Act of 1888. Sect. 3 of the Act of 1873 provides that "the term 'railway company' includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament," and that "the term 'railway' includes every station, siding, wharf, or dock, of or belonging to such railway and used for the purposes of public traffic." There is not really any definition of a railway in the Act, but only a provision that, if there is a "railway," it shall include the stations, &c. What is meant by a "railway" in these Acts is a railway in the ordinary signification of the term—that is, a railway over which traffic passes and which is subject to the ordinary law applicable to railways in this country and to the provisions of the Railway Acts. These alleged railways of the applicants are not so subject; for instance, they have not submitted any classification of merchandise traffic or schedule of maximum rates and charges, under sect. 25 of the Act of 1888, and the public cannot insist upon the applicants carrying their goods for them. The sidings of the dock company are not a railway, because they do not form part of a railway. None of the tramways in respect of which this application was made are "railways," and do not belong to the dock company as a railway company; they are merely ancillary to the main business of the dock company as a dock company. In *Re East and West India Dock Company* (59 L. T. Rep. 237; 38 Ch. Div. 576) it was held that the East and West India Dock Company, which is now amalgamated with this company, were a railway company; but that was only for the purposes of the Railway Construction Act 1863, which is an entirely different point. Subsequently it was held, in *East and West India Dock Company v. Shaw, Savill, and Albion Company* (60 L. T. Rep. 142; 39 Ch. Div. 524), that the railway was not a railway for all purposes, and that the Railway and Canal Traffic Act of 1854 did not apply to the charges on that railway. In the case of *Manchester Ship Canal Company v. Midland Railway Company* (10 Rlwy. & Can. Cases, 54) it was held that the canal company, being authorised by Act of Parliament to construct railways and to charge tolls for its use, although under no obligation to carry for the public, were a railway company within sect. 25 of the Act of 1888. In that case the railways were constructed as ordinary railways under the powers which railway companies ordinarily possess and subject to the obligations applicable to ordinary railways in respect of maximum rates, and the decision was that the fact that the provisions of the Railways Clauses Act 1845, which enable the public generally to use the line, did not apply did not prevent that which was authorised, constructed, and used as a railway in the ordinary sense from being a railway within the Act of 1888. The case of *Williams v. London and North-Western Railway Company* (82 L. T. Rep. 287; (1900) 1 Q. B. 760), decided in this court, though upon a different question, throws some light upon the

question as to what is, and what is not, a railway. In that case it was held that land used for the lines, sidings, and platforms inside the railway company's goods station was not "land used as a railway made under the powers of an Act of Parliament for public conveyance," within the meaning of a local Act giving partial exemption from rating in respect of such land. A person or company by possessing a siding to a railway does not thereby become a railway company and entitled to demand through rates. The term "railway," in relation to through rates, means something which is part of the through route over which the through rate is asked. None of these lines of the dock company are any part of the through route for which these through rates are asked. These lines are ancillary to the docks; they were constructed as ancillary to the docks, and they were authorised as ancillary to the docks, and they are not railways in any sense, but are merely a part of the docks to which they are ancillary. The judgment of Sir Frederick Peel in the court below was right and ought to be adopted, and the judgment of Wright, J. ought to be reversed.

Balfour Browne, K.C., Freeman, K.C., and Waghorn for the respondents.—The last case cited by the appellants, *Williams v. London and North-Western Railway Company (ubi sup.)*, has no bearing whatever upon the question in this case. In that case the question was whether the station and rails were a railway constructed under the powers of an Act of Parliament for the conveyance of public traffic so as to enjoy partial exemption from rating. In this case the question is whether the lines in question, in respect of which the through rate is asked, are a railway constructed or carried on under the powers of an Act of Parliament. That is an entirely different question. These lines are a railway either constructed or carried on under the powers of an Act of Parliament, and the dock company are therefore a "railway company," within the definition in sect. 3 of the Railway and Canal Traffic Act 1873. These sidings are used for the purposes of public traffic, and are a "railway" within the definition in sect. 3 of the Act of 1873 because they belong to a railway constructed or carried on under the powers of an Act of Parliament. The dock company own and work the railway which they were authorised to work and maintain by the London and St. Katharine Docks Act 1882; and the Act of 1864 also authorises the dock company to carry on their lines as railways; and the Act of 1875 gave power to construct railways, and vested part of a statutory railway in the dock company. The power to make charges is in no way essential to constitute a railway company or a railway. The lines over the docks in the case of *Manchester Ship Canal Company v. Midland Railway Company (ubi sup.)* were in substance the same as the lines in this case, and they were held to be a "railway," and the canal company to be a "railway company." There is no real distinction between that case and the present case. The railways belonging to the dock company, and the sidings, are part of the through route, though only for a short distance, and therefore the dock company can require a through rate.

Moon in reply.

COLLINS, M.R.—This was an application by the London and India Docks Company, in its capacity as a railway company, for a through rate from its quays and warehouses on the Victoria and Albert Docks to different places named on the systems of the Great Eastern Railway and Midland Railway Companies. The application was made under sect. 25 of the Railway and Canal Traffic Act 1888, and, as I have said, it was made by the dock company in the capacity which they claim to have of a railway company, within the meaning of that section. [His Lordship stated its provisions, and continued:] So that the applicants are averring, for the purpose of this application, that they are a railway company—that is, a company at whose requisition this through rate is to be granted. The section and the later parts of the Act give jurisdiction to the commissioners, under certain conditions, to grant a through rate. It seems to me that, according to common sense and to the terms of the section, where a railway company is demanding a through rate, it must be a railway company owning a line which forms part of a continuous route. It presupposes that the demanding company has itself a line which is to form a part of that route, not a mere infinitesimal part, but a part which would be substantially treated as part of the *transitus* between two given places. Now, in this case, the applicants are a dock company; they exist for the purpose of making and working docks; for that object they came into existence under statutory powers, and they had to acquire powers to lay down rails or tramways and generally to bring into existence all those appliances which are ancillary to the working of a dock. I do not propose to go in detail through the numerous clauses of the Acts of Parliament which have been brought to our attention; but I think I am justified in saying this, that in these Acts there are not to be found those provisions treating them as railways which one would expect to find if the Legislature had intended to constitute those dock companies railway companies for all purposes. It is a very remarkable thing that in this series of Acts we do not find that the Railway Clauses Act is incorporated except for certain purposes that have no specific relation to the demand in question in this case; certain circumstances concerned with it and relating to its subject-matter are found, and I think that throws a very strong light on what was the real view of the Legislature in bringing these bodies into existence. They are regarded as dock companies, with the ordinary incidents of dock companies as such, but they are not treated as railways in the ordinary sense of the term. It is said that the dock company in this case comes within the statutory definition of a railway company which is to be found in sect. 3 of the Railway and Canal Traffic Act 1873. That definition is as follows: "The term 'railway company' includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament." So there must be a railway to begin with, and that railway must be constructed or carried on under the powers of an Act of Parliament. Further on sect. 3 says: "The term 'railway' includes every station, siding, wharf, or dock, of or belonging to such railway and used for the purpose of public traffic." It seems to

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me perfectly clear, and it was not contended to the contrary, that, though the term "railway" includes siding, wharf, &c., a siding or a wharf which is not otherwise a part of a railway does not of itself constitute a railway; and, therefore, if there is a siding which is used as a siding and is brought into existence under statutory powers, it is not a railway unless it belongs to a railway and is a siding of a railway. There must be a railway before it can be said that the siding itself is a part of the railway, or that it comes within the law dealing with railways. Now, in this case, the through route which is suggested and which the applicants set forth as the route in respect of which they desire a through rate is one from their warehouses on either of their two docks to what are called the exchange sidings, and thence on to the line either of the Great Eastern or the Midland Railway Company. As to these lines, which, as I have said, must be part of a continuous route, their share of the route is simply composed of these tram lines, or railways, if you like to call them so, round about and over the docks; and they in no sense, in my judgment, form a continuous route from anywhere to anywhere. They are the lines over which the dock traffic is managed, and I think it would be a departure from common sense and the ordinary meaning of terms if we were to hold that these lines, which constitute the ordinary means of dealing with dock traffic by moving it from warehouse to warehouse, and so on, are parts of a through route—parts of the *transitus* from one point to a point on another railway. They were certainly not brought into existence for that purpose, and it seems to me that it is impossible to infer here from the powers conferred upon the companies, the purpose for which they were conferred, and the way in which they are used, and the possibilities of getting from one part of the dock to another part of the dock through these trams and rails, that they are a part of a continuous route, which might be the subject-matter of a through rate. When one looks at the thing broadly, it seems to me that really the dock and the appliances about it are nothing more than a large station, and that all these appliances exist for the purpose of doing that which would be done at a station, for moving traffic about as is necessary at a station. They are not part of a line with a terminus *a quo* and a terminus *ad quem* at all, and, therefore, if the respondents had been driven to rely only on these lines, which in the argument were admitted to have been laid down for the purposes I have described, they would not, I think, have contended here that they had any *locus standi* as a railway company. The dock company as it now exists, having been made up by a series of amalgamations, has several docks, to some of which railways, in the full sense of the term, are annexed, and are in that sense owners of railways; and they contend that, in that capacity, they can claim the position of a railway company, and can say that, being a railway company, they are entitled to demand a through rate. They are able to point to two perfectly independent lines, one called the Royal Albert Dock Railway and the other the Blackwall Railway, both of which belong to this dock company as it is now constituted. With respect to the Royal Albert Dock Railway, it is not part of a route over which the through rate is

claimed, and for very good reasons, because it is a line that at the present time has no power to carry goods other than parcels. I do not know whether it carries passengers or not, but at all events it is not in respect of that line that the through rate is demanded. Neither can the dock company, for the same reason, ask for a through rate in respect of the Blackwall line, because that line does not form part of a through route; and, although it is true that the same persons who are now asking for the through rate are elsewhere owners of railways, that fact is not relevant to the claim for this through rate. Therefore the respondents were driven to fall back upon something else as constituting them a railway company, and that something else they found ultimately in what has been called the transferred line. The facts with respect to that line are these: When the Royal Albert Dock, I think, was being made, it was found that it would interfere with the already existing line of the Great Eastern Railway Company, which ran across the site of the proposed dock and on to the North Woolwich station, and, that being so, the inconvenience of the dock cutting alone would have made it very inconvenient for the traffic to be carried along that route, for it would have involved a drawbridge or something of that kind. Therefore the Great Eastern Railway Company, in order that its traffic might not be interrupted, carried its line under the proposed site of the dock by a tunnel, but they left the old line in its old position. That old line had to be interrupted by a drawbridge, and an arrangement was made whereby that part of the line, which was so interrupted and for which the tunnel was substituted, was handed over for certain purposes to the dock company, but the Great Eastern Railway Company still retained the right in special circumstances to pass trains over it, and they have occasionally done so. The dock company, on the other hand, acquired a right to pass trains over it just as it passes trains over its own lines and other appliances. It is said that this dock company, who are demanding this through rate, are a railway company because they own part of a fully constituted railway line in the full popular sense of the term, and that, being the owners of that bit of railway, they cannot be denied the position of the owners of a railway when they are asking for this through rate. To begin with, I do not think they are owners of this bit of the line in the full sense of being a railway company in the ordinary sense of the word. This railway has been denuded of its special characteristics as a railway in the process of transfer to the dock company, and the dock company even now do not possess in respect of it any powers of making charges such as one would expect to find, and such as the Great Eastern Railway Company did possess—and, for all that I know, does possess now—when they were the owners of it and had it as part of their ordinary railway system. It has been taken out of that category and put into a totally different position now, and the dock company simply find themselves with a piece of line, which was a part of a railway proper and was owned by a railway company, in their possession and have used it as they have used the rest of their tramways, simply for the purpose of their docks. It seems to me that they cannot be treated, with respect to their ownership of this line, as a railway company in the proper sense

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of the term, or as the owner of a railway in the proper sense of the term. Further, I do not think that, if they were a railway company, they could avail themselves of sect. 25 simply in respect of this particular piece of line and make that the ground of their demand for a through rate in this case, for, as I have said before, they had to propose their through route, and their proposed route is from the different warehouses along the dock, many of which—indeed, most of which are not apparently in connection with this particular piece of line at all. The traffic coming from the north of the Royal Albert Dock would never pass over it at all; the traffic coming from the south part would pass over a small part of it; and the traffic coming from the North Victoria Dock, somewhat west of the point of intersection, would never pass over it at all. But the respondents rely on it, not so much as in itself justifying the demand for a through rate, but because, inasmuch as they have a piece of real railway, they are a railway company in respect of it, and can bring in all these other lines that are connected with it and say that they are sidings and approaches to a railway, and that by or in virtue of the ownership of this small piece of line they have the right to regard all the other tramways, or whatever the proper name for them is, as part of a railway, and therefore are entitled to demand a through rate. I think it would be quite absurd to say that these sidings and the rest of these lines are ancillary in any sense to that piece of railway. On the other hand, it seems to me that this piece of railway is really merged into the category of what I call the tramways, and that these lines are used as simply ancillary to the dock system. The sidings themselves could not constitute a railway, and they can only be material in this case if there was a railway and these sidings could be said to be part of it. I think, therefore, that these lines cannot be called a railway in any sense within the meaning of this legislation. On these grounds it seems to me that the applicants must fail. They have failed to show anything in the nature of a through route, part of which passes over their own line, and they are not owners, in the proper sense of the word and within the meaning of this legislation, of a railway over which they are prepared to offer a through route. It is said that there is a decision of the Railway Commissioners which concludes this case against the railway companies—that is the decision in *Manchester Ship Canal Company v. Midland Railway Company* (10 Rlwy. & Can. Cases, 54). I was a party to that decision myself, as was also Sir Frederick Peel, and I think that, instead of being an authority for the applicants in this case, it is an authority against them. The decision was in favour of the applicants in that case simply and solely on grounds which do not exist here, and, in fact, it is a decision that, but for the existence of those very special circumstances, must have been the other way. There were there, what there is not here, special powers whereby the Ship Canal Company were able to charge tolls on railways, and they had actually an order made by statutory power regulating the tolls and charges which they were to make, and we thought, rightly or wrongly, that they were therefore in the position of persons who owned a real railway, in the proper sense of the term, over which

the public were entitled to travel at certain given rates; and we thought that that put them in the position of a railway company so as to give jurisdiction to the Railway Commissioners to grant them a through rate. I think that was an extreme case, which was decided on very special circumstances which do not exist here. Therefore, whether that case was rightly or wrongly decided, I think that Sir Frederick Peel, who was a party to it and was also a party to this case, has taken the right view in this case. He differed from my brother Wright, and I can say no more than that I prefer his reasoning, which commends itself to me, and with which I agree, to that of my brother Wright. I think, therefore, that this appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. I think it is clear that sect. 25 of the Act of 1888, explained as it is by the Act of 1873, contemplates a continuous line of railway communication, with different complete lines of railway, and that it must be a railway created by statutory authority. Has that section any application to the present case? Here it is said that there are tramways worked by steam which are called railways; that they are provided by the dock company for the accommodation of their goods; and that they are railways within the meaning of this Act. I should have thought it was perfectly clear that they are not. They are not part of a continuous line of communication from one terminus to another. They are provisions made by the dock company for carrying on its business in a convenient way. It is said that there was another ground on which these lines of communication and sidings could be treated as a railway. That was that the portion of the railway called the transferred line was a railway constituted by a proper authority and created in the ordinary way, and that this line of tramways and the sidings must be treated as belonging to that railway and forming part of a railway system. Now, I am unable to accept the contention that that transferred line retains its old character of a railway. It seems to me plain that it has been practically transferred into the group of tramways which were used by the dock company for the purpose of their business. Then it was argued that the sidings were of themselves a railway, and that the communication with them therefore belonged to the dock company as a railway company. But suppose the sidings had been placed at the boundary of the dock premises, and the goods had been there taken from the railway company by the dock company, could it be reasonably said that the sidings under those circumstances, because of their communication with the railway lines outside, had become a railway within the meaning of the Act? I am clearly of opinion that this last argument fails like the others, and I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the Midland Railway Company, *Beale and Co.*

Solicitor for the Great Eastern Railway Company, *E. Moore.*

Solicitors for the respondents, *Turner, Son, and Foley.*

CHAN. DIV.]

Re BARNETT'S TRUSTS.

[CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, March 18.

(Before KEKEWICH, J.)

Re BARNETT'S TRUSTS. (a)

Crown—Intestate—Bona vacantia—Domicil—Mobilier sequuntur personam—International law.

Petition by the Treasury Solicitor, as administrator of the personal estate of a domiciled Austrian who died intestate in 1883 without leaving a widow or next of kin, for payment out of court of a sum of Consols belonging to the intestate. The Crown claimed the property as bona vacantia. The Austrian Government claimed the property, relying on the maxim Mobilier sequuntur personam.

Held, that the Crown took the property as bona vacantia in exercise of its sovereign right; the maxim Mobilier sequuntur personam did not apply, as there was no persona.

PETITION by the Treasury Solicitor, as administrator of the personal estate of Aloysius (otherwise Louis) Heller, deceased, for payment out of court of a sum of Consols, representing the residuary personal estate in England of William Barnett, deceased.

William Barnett by his will gave the residue of his personal estate in England, subject to certain annuities which had ceased, to Aloysius Heller.

Aloysius Heller died on the 9th March 1883 in Vienna, intestate, without leaving a widow, and without kindred.

At the date of his death he was a domiciled Austrian.

The trustees of the will of William Barnett paid the money into court.

On the 27th April 1900, letters of administration were granted to the Treasury Solicitor of the personal estate in England of Aloysius Heller.

It appeared from an affidavit of an Austrian lawyer that the disposition of the movable property of Austrian citizens was regulated by the General Civil Code for all the German hereditary provinces of the Austrian Monarchy.

By that code the right of inheritance was limited to certain degrees of relationship; the right of succession to an illegitimate child belonged to the mother only; if no relations existed within the prescribed degrees, the whole inheritance fell to the spouse.

By art. 760, if the spouse was no longer alive, the succession was confiscated as heirless property, either by the *fiscus*, or by those persons who according to the political ordinances were justified in confiscating heirless estates.

In the course of the hearing of the petition the Attorney-General was added as respondent.

The Attorney-General (Sir R. B. Finlay, K.C.), the Solicitor-General (Sir E. Carson, K.C.), and R. J. Parker for the Crown.—The right to goods belonging to persons dying intestate, without leaving husband or widow, and without kindred, as *bona vacantia* is vested in the King in right of his Crown:

Dyke v. Walford, 5 Moo. P. C. 434;

Re Higginson and Dean; *Ex parte Attorney-General*, 79 L. T. Rep. 673; (1899) 1 Q. B. 325;

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Blackstone's Commentaries, 8th edit., vol. 1, p. 299; *Aspinwall v. Queen's Proctor*, 2 Curt. Ecol. Rep. 241;

In the Goods of Beggia, deceased, 1 Ad. Ecol. Rep. 340.

As to the law of foreign countries:

Austrian General Civil Code.

As to France:

Laurent's *International Law*, 3rd edit., vol. 6, pp. 435, 446;

Code Nap., art. 768a, 589;

Westlake on *Private International Law*, 3rd edit., p. 168;

Foelix on *Private International Law*, s. 62;

Wharton's *Conflict of International Laws*, 2nd edit., ss. 602, 603.

As to Germany:

Mackeldey's *Systema Juris Romani*, s. 630;

Bar's *Private International Law*, 2nd edit., p. 843, s. 387;

Vost on *Pandects*, book 38, p. 595, title 17 (29).

It is not a question of succession; the Government takes the property as *bona vacantia* by reason of its sovereignty. There is no reciprocity; if the goods were in Austria, the Austrian Government would not give them up.

Warrington, K.C. and A. Adams for the Finance Minister of the Imperial and Royal Austro-Hungarian Empire.—Our submission is that the property belongs to the Austrian Government. The question is governed by the general civil code for all the German hereditary provinces of the Austrian Monarchy, arts. 759, 760: (Westlake on *Private International Law*, 3rd edit., pp. 95, 99, 130, 168). The intestate was a domiciled Austrian at the time of his death, and the maxim *Mobilier sequuntur personam* applies:

Dicey's *Conflict of Laws*, r. 179, p. 677;

The Treasury Solicitor Act 1876 (39 & 40 Vict. c. 18);

Doe d. Birtwhistle v. Vardill, 5 Barn. & Cr. 438, 451;

Re Ewin, 1 Cro. & Jerv. Rep. 151, 156;

Bremer v. Freeman, 10 Moo. P. C. 306, 358;

Enoch v. Wylie, 10 H. L. C., 19;

Story's *Conflict of Laws*, 8th edit., 312;

Cooper v. Cooper, 59 L. T. Rep. 1; 13 App. Cas. 88;

Williams on *Executors*, 9th edit., 303.

T. T. Methold for the official solicitor.

Herbert Robertson for the legal personal representative of William Barnett.

KEKEWICH, J.—We have had a very interesting discussion, and reference has been made to many authorities, including some decided cases, and I think rather more text-writers. None of those are out of place as tending to throw considerable light on the discussion, which I agree has been of an interesting character; but, after all, it seems to me we are brought back to questions of English law, which must be decided in the absence of direct authority according to principle, and that principle which governs English law on this particular subject. Reference has been made to many writers, both English and foreign, on what is termed private international law. What those writers have said is apposite, because in dealing with a question of this kind one is thrown back on maxims and principles, and the exposition of them by text-writers is important, and is always accepted as a guide, but it is ad-

mitted on all hands that they fail to deal in an authoritative manner with the particular question which I am called upon to decide. There is no doubt the dicta go to this, that in a case where a man dies heirless (I naturally use the expression in the affidavit for the respondents) his personal property must go in the manner indicated by the law of the deceased's domicile. There are dicta, and sometimes dicta that are probably clear on that point, but those dicta do not profess to lay down general propositions. In each case that has been cited to me, I think it true to say it is given with a modification, and a possibility of an application of a different rule elsewhere. Now, the respondent's argument is that this case is governed by the old maxim which is embodied in our English law and which is to be found repeated in one form and another by all the text-writers, *Mobilia sequuntur personam*, and the respondents' point is that that maxim is applicable to the case of a man dying heirless and leaving personalty, or, strictly speaking, movable property, outside his domicile. That is the position. Now, *Mobilia sequuntur personam* is translated over and over again by text-writers, as well by foreign as English, and reduced to definition and rules, and they are all, more or less, in the same form and to the same extent. I do not know that one can find anything better than the rule from Mr. Dicey's book, which is cited on behalf of the respondents, rule 179, on p. 677. You cannot read that rule so as to understand it without reading the preceding rule, No. 178, which deals with the payment of debts, with which we are now concerned, it being admitted on all hands that the debts of the intestate would have to be paid according to the law of the country in which the property was found. The debts being out of the way, you have to deal with what Mr. Dicey calls the distributable residue, and there he lays down this rule: "The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death." On the next page he describes what he means by "the law of the deceased's domicile." I need not read the passage, because I think it may be taken we all mean the same thing by that term. That seems to me to exactly illustrate the meaning and extent of the rule. It is the distribution of the distributable residue. When you come to distribute the deceased's property then you must follow the law of the deceased's domicile; whether it is according to some statute, whether it is according to what the English call common law, whether it is among relations, because they claim in that character, or among persons who are entitled under the will—in whatever aspect you look at it, the distribution must follow the law of the domicile; but that is distributing it exactly as is meant, or rather part of what is meant, by *Mobilia sequuntur personam*. Now, we have to deal with a case here where there is no distribution at all—where there is really no *persona* to follow. Mr. Warrington argues that the Crown or any other person, his own client, for instance, coming in and obtaining administration to the deceased's estate is for all intents and purposes the deceased's personal representative. He says that he is so, and that we call him the "legal personal representative" of the deceased. But that is only the language of our law. He does not represent him at

all, except that by our law he is put in his place to defend actions brought by creditors, or it may be by persons who are claiming the estate against him. In no other sense does he claim any estate. He does not claim through the *persona*, through the deceased. He claims what in some old authorities is called the *glans caduca*—the acorn which has fallen from the tree, and not the acorn on the tree or connected with the tree. It is the acorn which has fallen on to the ground, from the tree. There is no possibility of getting at this property through the deceased. It is because there is nobody who can claim through the deceased, no one who can be entitled, that the Crown steps in and takes the property. In other words, the Crown takes it because it is, as described in the cases, *bona vacantia*—it is property which no one claims. It is property at large. There is no succession. The Crown does not claim it by succession at all. It claims it because there is no succession. All the learning on this subject of the *bona vacantia* is to be found in the case in the Privy Council which was cited in argument, and to which I need not refer. It was there, no doubt, a contest of a peculiar character, and the judgment delivered by Lord Kingsdown goes into the duties and the powers of the ordinary, and goes to get rid of any claim on the part of the Church, but the principle is that the Crown comes and claims it, as was put in the case cited by the Attorney-General as *jura regalia*, the right to take that which belonged to no one; and if that is really the sound view I cannot see how, according to English law, there can be a right in anyone else to say that this maxim applies, and there should be an administration and distribution and settlement of rights according to the domicile of the deceased person, who in effect by dying lost the claim not only for himself, but those left behind, to his domicile. If that is the sound view, it seems to me that concludes the question. I am not dealing here with any case in which another claimant may be desirous to enforce a different rule. It may be—I do not say it will be, but it may be—that hereafter, if a case arises where there is a conflict between the two countries respecting the law on the subject, a more difficult question may have to be decided, and decided on the ground of international comity, but with that I have not to deal at all, because it seems to me perfectly clear on the statement of law in this learned affidavit which states the code, that as between Austria and England there is no real difference on this subject. I have not forgotten the previous paragraphs, which have been referred to in argument, but it is really No. 760 which is directly applicable. The words with which it commences, "If the spouse is no longer alive," must be read in connection with the immediate preceding clause, which gives the whole inheritance to the spouse with certain conditions there mentioned. Reading article 760 alone, those words, "If the spouse is no longer alive," are equivalent to this, that if there be no person to claim as heir, then the succession is confiscated as heirless property. The great difficulty in the case, to my mind, is in dealing with the poverty of language, the poverty, at any rate, of the English language. The word "confiscated" is a word capable of being used in many senses. In the ordinary sense it is where the Crown intervenes, not to take up as belonging

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to it a thing because it is vacant, but to take up by way of penalty in exercise of sovereign rights different from those which are asserted in a case like this, and which must be the meaning, I think, of "confiscated" here. It does not mean "confiscated" in the sense of taking by way of penalty. It is taken to the Crown, assumed by the Crown, as its own property. What the code says is it is confiscated as heirless property—that is, as property which we call in England *bona vacantia*. That is the same thing—property to which there is no heir because neither country admits the right of the passing traveller, and therefore the property must fall to the Crown as a matter of right in the exercise of its sovereign power. The rest of it is really of no importance for this purpose. It only says: "Either by the *fiscus*, or those persons who, according to the political ordinances, are justified in confiscating heirless estates"—that is to say, by the person appointed for the purpose, whether it be the Minister of Finance in one country, or the Solicitor to the Treasury in another, is immaterial—it is as heirless property. That seems to me to be precisely on our lines—that when there is no heir, then some paramount authority steps in and claims it—not as against anyone else, because there is nobody to claim it at all. But then it is said, "You must remember the law is different as regards succession in Austria from what it is here, that there is a limit to the persons to take, and that makes a difference." I notice that argument because it was urged, but I confess I fail to see the force of it. What matters it, looking at it from an Austrian point of view, to them, that according to English law those related by half blood are allowed to come in? What would it matter if the relation of half blood was excluded? It must come back to this: Under what circumstances does the succession stop, or, rather, perhaps that is inaccurate, I should say under what circumstances does no succession arise; under what circumstances is the paramount authority entitled to come in and say, "I take because there is nobody else to take"? That seems to me to be the whole question, and it matters not in the least whether any description of person is allowed to come in or not, or whether there is a limit or no limit to those entitled to claim. It seems to me to be all upon the same lines, and that really when once you have got at the principle which I have endeavoured to express, if not all, by far the large majority of the passages which have been quoted of the dicta, can all be construed by reference to that principle, having regard to the unfortunate poverty of language, which makes you speak of "succession" when there is no succession, simply because there is no other expression which fits in so well with ordinary parlance. An excellent illustration was given of that by the Attorney-General in opening the case, and which is to be found in several of the books (I think in that case in the Privy Council more than once), which speaks of the Crown as *ultimus hæres*. It is not only not English, it is a Latin expression, but it is perfectly inaccurate—as inaccurate really as an expression could well be, and yet like many other inaccurate expressions, it is thoroughly well understood, and is very convenient. Only when you come to use convenient expressions which are inaccurate technically and deduced from principles, and thereon found a rule, you are likely to be led into

error, and, in fact, almost sure to be led into error. I think the principle is that which I have stated, and that it must govern this case. There must be a declaration of the Crown's rights. The costs of the Crown, the official solicitor, and the trustee must come out of the fund in court; but the costs of the Austrian Government, as an adverse claimant, cannot be allowed.

Solicitors: *The Treasury Solicitor; Tatham and Lousada; The Official Solicitor; Francis Fearon.*

March 14 and 24,
(Before BUCKLEY, J.)

Re SCOTT; SCOTT v. SCOTT. (a)

Infant—Contingent life interest—Maintenance—Accumulations of surplus income during minority—Right to accumulations—Remaindermen—Conveyancing Act 1881 (44 & 45 Vict. c. 41), s. 43, sub-s. 2.

On the true construction of sub-sect. 2 of sect. 43 of the Conveyancing Act 1881, the word "property" means "income," and accumulations of surplus income during the minority of a person entitled absolutely or contingently belong absolutely to whomsoever, in the events which happen, becomes entitled to the income.

THIS summons involved the determination of the true meaning of sub-sect. 2 of sect. 43 of the Conveyancing Act 1881.

By his will, dated the 9th July 1888, David Cooper Scott, after bequeathing certain legacies and annuities, devised and bequeathed all his real and residuary personal estate to his trustees upon trust for sale and conversion and to stand possessed of the residuary trust funds in trust

To pay the income and annual produce of one equal moiety of my said residuary trust funds to my said wife during her widowhood, and if she shall marry again then in trust to pay the income arising from one third part of my said residuary estate to my said wife for life, and, subject to the interest of my said wife during her widowhood or otherwise in the income and annual produce of the said moiety or one equal third part of my said residuary trust funds as the case may be and to the annuities hereinbefore granted and bequeathed and to the proviso hereinafter contained concerning the share or shares of my daughter or daughters, I direct my trustees shall hold my said residuary trust funds in trust for my children who being sons shall attain the age of twenty-five years . . . or being daughters shall attain the age of twenty-one years or shall marry under that age to be divided between them in equal shares . . . and I hereby declare that my trustees shall pay to my said wife during the infancy of any of my children a sum not exceeding one half of the income arising from the share of such child for his or her board and maintenance.

And the testator declared that his trustees should retain the share of each of his daughters upon trust "to pay the income thereof to my same daughter during her life," during coverture for her separate use without power of anticipation, with remainder to her children as she should by will appoint, and in default of appointment to her children equally, with remainders over.

The will also contained a power of advancement.

(a) Reported by A. L. MORRIS, Esq., Barrister-at-Law.

The testator died in June 1890, leaving one son and four daughters, two of whom were infants.

The trustees duly paid to the widow for board and maintenance one half of the income of the expectant share of each of the infant daughters; they also paid out certain sums for education under an order of the court, and accumulated the surplus income, with the result that when they came of age the accumulations amounted to 666l. 18s. 8d and 1163l. 16s. 9d. respectively.

The two youngest daughters having attained twenty-one took out an originating summons against the trustees asking for payment to them respectively of these two sums as being unapplied income of their respective settled shares.

The Conveyancing Act 1881, s. 43, provides that

(1) Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may at their sole discretion pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not. (2) The trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time on securities, on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold these accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise, but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

Buckmaster for the plaintiffs.—These accumulations have arisen from income to which the plaintiffs would have been entitled if of full age, and they therefore belong to them. The question turns upon the construction of sect. 43, sub-sect. 2, of the Conveyancing Act 1881. The plaintiffs have only a life interest, but the "property" from which the accumulations "arise" is the income, and not the corpus, and therefore they are entitled, and not the remaindermen. In *Re Buckley's Trusts* (48 L. T. Rep. 109; 22 Ch. Div. 583), which was decided upon a similar provision in Lord Cranworth's Act, Fry, J. held that in the case of an absolute legacy to an infant with a gift over if he should die under twenty-one, which happened, the accumulations of income belonged to the infant's representative; and for this purpose there is no difference between an absolute and a contingent gift. In *Re Wells; Wells v. Wells* (61 L. T. Rep. 806; 43 Ch. Div. 281) North, J. seems to have decided the point in favour of the infant's claim, but in *Re Humphreys; Humphreys v. Levett* (68 L. T. Rep. 729; (1893) 3 Ch. 1) the Court of Appeal found in the will a contrary intention within the meaning of sub-sect. 3, and expressly left this point open for further consideration.

Beddall for the trustees.—I have to represent the interests of the remaindermen, and I submit that "property" cannot mean "income," and that the true meaning of the section is that the accumulations are to be held for the persons entitled to the corpus of the share according to

their respective interests as tenant for life and remaindermen. In *Re Humphreys* the interests were vested, and not contingent as here.

Cur. adv. vult.

March 24.—BUCKLEY, J. stated the facts and read the section, and continued:—The determination of this question involves the consideration of the true construction of sect. 43 of the Conveyancing Act 1881. The gifts in favour of the daughters are gifts to them, as members of a contingent class, of shares of residue. The contingency is that of attaining the age of twenty-one years. Under such a gift the income is accessory to the capital and belongs contingently to the legatee in whose favour the contingent gift is made. The question is how the income which thus follows the capital is applicable in the case of a settled share, regard being had to the statutory provision contained in sect. 43 of the Conveyancing Act 1881. First, as matter of principle, the intention of sect. 43 was not to affect the construction of wills: (*Re Dickson; Hill v. Grant*, 52 L. T. Rep. 707; 29 Ch. Div. 331, 338). The object of the Act was to shorten and simplify conveyances and not to alter the devolution of property. *Prima facie*, therefore, when the daughter attained twenty-one, she, as tenant for life, would become entitled to receive payment of the income of the settled share accrued up to that date in respect of the contingent gift. For the respondents, however, who represent the possible unborn children of the daughters or other remaindermen, it is contended that under sub-sect. 2 of sect. 43 the accumulations are to be held for the benefit, not of the tenant for life absolutely in the events which have happened, but as corpus settled for all the persons entitled in succession under the settlement of the daughters' share—in other words, that the word "property" in sub-sect. 2 means the corpus from which the accumulated income has arisen. Another argument, but too extravagant to admit of serious consideration, would be that the accumulations are held, not for the persons thus entitled in succession, but for the person "who ultimately becomes entitled to the property"—that is to say, entitled to the corpus after the determination of the tenancy for life. In my judgment, neither of these contentions can be sustained. The fact is that if in sect. 43 the word "property," is read as equivalent exclusively to "corpus" or "capital" its use is far from exact. Thus the section opens with the words "Where any property is held by trustees in trust for an infant . . . for life." If "property" is equivalent to "corpus" or "capital," as contrasted with and to the exclusion of income, this language is not apt. If it is read to mean "corpus or its income, as the nature of the gift may require," the language becomes appropriate. Further, that the word "property" in sub-sect. 2 cannot mean "corpus" in every instance may be shown by taking a particular case. Thus, suppose that 1000l. is held by trustees for A., an infant, for life, and after his death for B., and suppose that A. survives the testator for ten years and then dies an infant—this is a case within sect. 43 (1). The income in such case during the ten years unquestionably belongs to A.—but B. is entitled to the corpus. If "property" in sub-sect. 2 means corpus, B. is the person entitled to that, and would on such a

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construction take the income which accrued during A.'s lifetime. Rejecting, therefore, a construction which would read "property" in sub-sect. 2 as always meaning corpus, I go on to consider whether it ever means corpus. I think not. The property spoken of is that from which "the same"—that is, the accumulations—arise. Income arises, no doubt, from corpus, but the accumulations arise from setting aside and investing income as it is earned. The words of sub-sect. 2 are not "the property from which the income arises," but "the property from which the same (i.e., the accumulations) arise." The property from which the accumulations arise is the income which is year by year set apart and forms the accumulated fund. The words of sub-sect. 2 are, I think, to be read thus—"entitled to the property (viz., the income) by the accumulation of which the accumulated fund or accumulations arise." If the words be thus read and for the word "ultimately" there be substituted "in the events which happen" all difficulty disappears. The words will then read thus, "and shall hold those accumulations for the benefit of the person who in the events which happen becomes entitled to the property (viz., the income) from the accumulation of which the accumulations arise." I think that is the meaning of the words. I do not find that any authority is inconsistent with this view. The decision of Fry, J. in *Re Buckley's Trusts* (48 L. T. Rep. 109; 22 Ch. Div. 583), decided upon sect. 26 of Lord Cranworth's Act, is only that that Act applied to gifts absolute or contingent and not to gifts vested but liable to be divested. The decision of North, J. in *Re Wells* (61 L. T. Rep. 806; 43 Ch. Div. 281) is that a person entitled to a vested interest for life is on attaining twenty-one the person ultimately entitled to the property within sub-sect. 2. North, J., I think, thought as I do, that "property" means the income the accumulations of which are being dealt with. The Court of Appeal in *Re Humphreys; Humphreys v. Levett* (68 L. T. Rep. 729; (1893) 3 Ch. 1) was again dealing with an immediate vested life interest. That decision approved *Re Wells*, and, while I have felt some difficulty by reason of the fact that the decision was rested upon finding in the will an expression of a contrary intention within sub-sect. 3 of sect. 43, I do not think there is anything in it to preclude me from coming to the conclusion that "property" in sub-sect. 2 means that property the accumulation of which has produced the fund. The court in *Re Humphreys* left open the point which I have here to decide. I therefore hold that the plaintiffs, who in the events which have happened are entitled to income, are entitled to the accumulated sums.

Solicitors for all parties, *Steven, Bawtree, and Stevens*.

Feb. 7 and 8.

(Before JOYCE, J.)

GROVE v. PORTAL. (a)

Lease—Construction—Exclusive right of fishing—Covenant not to assign demised premises—Breach.

By an indenture of lease the defendant demised to the plaintiff the exclusive right of fishing in a certain river. The plaintiff covenanted that he would not underlet, assign, transfer, or set over or otherwise procure the premises to be assigned, transferred, or set over unto any persons whomsoever without the consent in writing of the defendant. The plaintiff proposed to grant a licence and authority to B. to fish in that portion of the river comprised in the lease (but so that not more than two rods should be used at any time) for the unexpired residue of the term. On summons to determine whether the proposed licence was a breach of the covenant not to assign:

Held, that, as the plaintiff was not excluded from fishing himself and the covenant did not extend to "any part of" the premises, the proposed licence was not a breach of the covenant.

The dictum of Lord Eldon in Church v. Brown (15 Ves. 258, at p. 265), that a covenant not to part with the possession of the premises would not have restrained the tenant from parting with a part of the premises, approved and followed.

By an indenture of lease dated the 25th April 1894, and made between Melville Portal (thereinafter called the lessor) of the one part and Thomas Newcomen Archibald Grove (thereinafter called the lessee) of the other part, in consideration of the yearly rent thereafter reserved and of the covenants, provisions, and conditions thereafter contained and on the part of the lessee to be observed and performed, he (the lessor)

Doth by these presents limit and appoint by way of demise or lease unto the lessee all that the exclusive right of fishing in manner hereafter mentioned in and upon that portion of the river Test situate in the parishes of Freefolk, Laverstoke, and Overton, in the county of Southampton, commencing at Bere Mill and extending from thence (with the exception of the water within the premises of the Laverstoke Mills belonging to Mr. W. S. Portal) to Mr. Crimble's waters at Southington Mill, in the parish of Overton, together with full liberty of ingress, egress, and regress for the said lessee and his authorised friends at all times during the term intended to be hereby granted to fish in such above-described portions of the said river Test with rods and lines in a proper and sportsmanlike manner at right and reasonable periods of the year, and without using nets or other means than the artificial fly, and the fish which they shall then and there take to have and retain to his and their own use, to have and to hold the said right of fishing and premises hereinbefore expressed to be demised unto the said lessee from the 30th day of September 1893 for three, seven, fourteen, or twenty-one years, at the option of the said lessee, or until one year's notice is given by the said lessee to determine the said tenancy on the 30th day of September in any one of such years as aforesaid, yielding and paying therefor during the said term hereby granted the rent or sum of 300l.

And the lessee did thereby for himself, his heirs, executors, and administrators, covenant

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

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with the lessor and his heirs and assigns that he (the lessee), his executors and administrators (*inter alia*),

shall not nor will during the said term underlet, assign, transfer, or set over or otherwise by any act or deed procure the said premises to be assigned, transferred, or set over unto any person or persons whomsoever without the consent in writing of the said lessor, his heirs or assigns, being first obtained for that purpose, and that it shall be allowed to the said lessor, his heirs, executors, and administrators, and to any person staying in his house to whom he may give leave to fish with his rod in the said waters without let or hindrance.

The lease also contained a proviso for re-entry by the lessor if the rent thereby reserved should be unpaid for fifteen days, or in case of breach or non-performance of any of the covenants and agreements therein contained on the part of the lessee.

During the year 1901 the plaintiff had entered into negotiations with one George Roarke Bryant for the purchase by the latter of a certain freehold estate known as Berry Down, in the county of Southampton, and part of the terms on which the purchase was to be carried out was that the plaintiff should grant to Mr. Bryant a licence to fish in the river Test.

The licence proposed to be granted was a licence and authority to fish in that portion of the river Test comprised in the lease in the manner and for the like periods as in the lease was provided (but so that not more than two rods should be used at any time) for the whole residue then unexpired of the term granted by the lease.

The defendant objected to the granting of the proposed licence on the ground that it constituted a breach of the covenant by the plaintiff not to assign or underlet, and he also threatened that if the proposed licence was granted he would treat Mr. Bryant as a trespasser.

In consequence of the defendant's objection and threat Mr. Bryant refused to complete the purchase of Berry Down or to take up the licence for the fishing unless the question of the plaintiff's right to granting the licence should be decided.

The plaintiff accordingly on the 28th Oct. 1901 took out an originating summons asking for a declaration that upon the true construction of the lease the plaintiff was entitled to give licence and authority to such person or persons as he might think fit, and in particular to one George Roarke Bryant, his or their assigns, or any person or persons authorised by him or them, to fish in that portion of the river Test comprised in the lease in like manner and for the like periods as in the lease provided, but so that not more than two rods should be used at any time for the whole residue now unexpired of the term granted by the lease without any consent or licence from the defendant, and that the giving of any such licence or authority as aforesaid would not constitute any breach of any of the covenants contained in the lease.

Younger, K.C. and F. M. Cassel for the plaintiff.—The agreement between the plaintiff and Mr. Bryant to grant a licence is no breach of the covenant not to assign. The effect of the agreement is not to assign any estate, but to give a mere licence or privilege to fish :

Daly v. Edwards, 83 L. T. Rep. 548.

There is a distinction between an exclusive right of fishing and a right of fishing in common :

Malcomson v. O'Dea, 10 H. L. C. 593, at pp. 618, 619.

What is being licensed here is a right of fishing in common, which would give no right to bring an action of trespass :

Holford v. Bailey, 13 Q. B. 426 ;

Fitzgerald v. Firbank, 76 L. T. Rep. 584, at p. 587 ; (1897) 2 Ch. 96, at p. 101.

As to whether this is a breach of the covenant, it has always been held that a covenant of this kind must be strictly construed :

Church v. Brown, 15 Ves. 258, at p. 265.

The covenant only extends to "the demised premises," and not to any part thereof ; and Lord Eldon in *Church v. Brown*, at p. 265, says that a covenant not to part with the possession of the premises would not have restrained a tenant from parting with a part of the premises. They also referred to

Gentle v. Faulkner, 82 L. T. Rep. 708 ; (1900) 2 Q. B. 267 ;

Crusoe v. Bugby, 2 Wm. Bl. 766.

Hughes, K.C. and *Methold* for the defendant.—This is an attempt to make a commercial speculation out of the right of fishing. It is a lease masquerading as a licence. It is a right to fish and take away the fish and is an incorporeal hereditament. It is a demise of a *profit à prendre*, and is irrevocable. It is not a licence although called one. A grant to kill and take away game or to fish and take away the fish is a grant or demise of an incorporeal hereditament and not a mere licence :

Hooper v. Clark, L. Rep. 2 Q. B. 200, at p. 202 ;

Webber v. Lee, 47 L. T. Rep. 215 ; 9 Q. B. Div. 315, at p. 318 ;

Fitzgerald v. Firbank, 76 L. T. Rep. 584, at p. 587 ; (1897) 2 Ch. 96, at p. 101.

The right to fish may be a licence, but the right to carry away the fish is a grant :

Wood v. Leadbitter, 13 M. & W. 838, at p. 844.

The distinction between this case and *Daly v. Edwards* (*ubi sup.*) is that in that case it was not the right of a *profit à prendre*. The right of fishing is the same as that of free warren, which is a grant for a term :

Smith v. Kemp, 2 Salk. 636.

If it is a grant for a term, it is a letting.

Younger, K.C. in reply.—If the covenant not to assign had not been inserted, it is clear the plaintiff could have assigned. The covenant not to assign relates only to the demised premises, which infers a right of fishing with eight rods. This is only a licence for two rods and not a general licence ; and, as the words "any part thereof" are not inserted in the covenant, this licence does not come within the covenant :

Combridge v. Harrison, 72 L. T. Rep. 592.

This is not an exclusive licence to fish. There is no case where a non-exclusive right gives a right to an action of trespass.

JOYCE, J.—This is a question raised by originating summons for the determination really of a question of construction of a certain lease. The question I am asked to determine is whether "upon the true construction of the lease the

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PALMER v. GRAND JUNCTION WATERWORKS COMPANY.

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plaintiff is entitled to give licence and authority to such person or persons as he may think fit, and in particular to one George Roarke Bryant, his or their assigns, or any person or persons authorised by him or them, to fish in that portion of the river Test comprised in the said lease in like manner and for the like period as in the said lease provided, but so that not more than two rods shall be used at any time for the whole residue now unexpired of the term granted by the said lease without any consent or licence." Now, if the meaning of that had been (I am now speaking with reference to the two rods) that only two rods were to be used altogether, and that Mr. Grove was to be excluded from fishing at all so that Mr. Bryant would have a licence for two rods, and there would be no other rods on the stream, I think it would have been well arguable that the effect of that was to procure the premises to be transferred to Mr. Bryant. I think also that if this covenant against alienation—viz., "shall not nor will during the said term underlet, assign, transfer, or set over." &c.—had extended not merely to "the said premises," but also to "any part of the premises," this case might also have been arguable for the defendant. But Lord Eldon says distinctly in the case of *Church v. Brown* (15 Ves. at p. 265) that a covenant not to part with the possession of the premises "would not have restrained the tenant from parting with a part of the premises." The reason of that, no doubt, is that these covenants have always been construed with the utmost jealousy to prevent the restraint from going beyond the express stipulation. That is a dictum which, as far as I am aware, has never been disapproved of. It is copied in the text-books, and is considered by the text-writers to be law. Similarly, a covenant against assignment does not prevent the tenant from underletting, unless the words forbid an assignment for the whole or any part of the term, and there is the same reason for that construction. Also in the case of *Crusoe* (on the demise of Blencowe) v. *Bugby*, in 2 Wm. Bl. 766, the judgment is to this effect, at p. 767: "The courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them. The lessor, if he pleased, might certainly have provided against the change of occupancy as well as against an assignment, but he has not done so by words which admit of no other meaning." The words there were "assign, transfer, or set over or otherwise do or put away this present indenture of demise, or the premises hereby demised." Then he goes on to say: "'Assign, transfer, and set over' are mere words of assignment. 'Otherwise do or put away' signifies any other mode of getting rid of the premises entirely." That case is mentioned by Sir William Grant in the case of *Greenaway v. Adams* (12 Ves. 395), where he says at p. 400: "I have no doubt upon the construction of this covenant"—that is, the covenant he was considering in that particular case. "This case is not like the case of *Crusoe v. Bugby*" (the case I have just mentioned) "where all the words of the covenant could have distinct effect and operation, without referring at all to an underlease, and it did not necessarily follow that the lessor, as he did not choose that the tenant should assign, therefore intended to restrain under-

letting." I understand Sir William Grant to approve of *Crusoe v. Bugby* (*ubi sup.*). Further, I must say that, looking at the particular nature of the property demised in this case, the subject of the demise, I do doubt whether the granting of the licence to Mr. Bryant is a transfer of any part of the premises—those particular premises. But I am not going to decide the case upon that ground. I decide it upon the principle of the dictum of Lord Eldon that, by reason of the omission from the covenant of the words "any part of the premises," I think an assignment of a part of the premises was not forbidden. I am of opinion that this licence to George Bryant for two rods is perfectly good. That is really what the plaintiff wants, but the form of the question is too wide, and must be modified. Each party will pay their own costs.

The order as finally settled was as follows: A declaration that upon the true construction of the lease dated the 25th April 1894 the plaintiff is entitled to grant a licence to George Roarke Bryant, his assigns or any person or persons authorised by him or them, to fish in all that portion of the river Test comprised in the said lease in like manner and for the like periods as in the said lease provided for the whole residue now unexpired of the term granted by the said lease, provided that such licence shall not extend to or permit of fishing with more than two rods at one and the same time.

Solicitors for the plaintiff, *Lee and Pembertons*.
Solicitors for the defendant, *Winter, Bothamley, and Co.*

Wednesday, Feb. 26.

(Before EADY, J.)

PALMER v. GRAND JUNCTION WATERWORKS COMPANY. (a)

Settled land—Tenant for life—Sale of option—Unauthorised by Settled Land Acts 1882 to 1890.

In 1887 a water company entered into a contract with a tenant for life, acting under the powers conferred by the Settled Land Acts 1882 to 1890, for the purchase of a plot of settled land with the object of erecting thereon certain buildings for the purposes of their undertaking, and agreed to enter into a covenant not to build thereon or let it for building otherwise than for the purposes of their undertaking. They promoted a Bill in Parliament for power to erect the proposed buildings, which was thrown out before the conveyance was executed, and thereupon requested the vendor to agree to the omission from the conveyance of the covenant restrictive of building on the plot sold.

The vendor, however, insisted on a conveyance in accordance with the contract, but entered into an agreement with the company, to which the trustees of the settlement were parties, to the effect that if the company should not require the land for the purposes of their undertaking and should desire to erect other buildings thereon or to sell or let the same and thereof should give notice to the vendor, then the vendor would on payment of 10*l.* consent to the company building upon

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

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or selling the land without the restriction as to building contained in the conveyance, which agreement, although dated the day after the conveyance, was executed simultaneously and formed one transaction with it.

The vendor died, and was succeeded by his son as tenant in tail of the settled land, who possessed lands adjoining the plot sold.

The company then gave the notice and tendered to him 10l. in accordance with the agreement, but he declined to give his consent, alleging that he was not bound thereby.

On a special case stated by consent of the parties under Order XXXIV., r. 1:

Held, that the vendor as tenant for life of the settled land had no power under the Settled Land Acts 1882 to 1890 to enter into such an agreement with the company, which therefore was not binding on his successors in title.

THIS was a special case stated by consent of the parties in the above action under Order XXXIV., r. 1, of the Rules of the Supreme Court 1883, in which the following facts were set out:—

By an indenture of settlement dated the 26th Aug. 1856 certain freehold lands in the county of Bucks, including a piece of land called Bell's Field and the land adjoining the same, were settled to the use of Sir Charles James Palmer for life, and after his decease to the use of his first and every other son successively in remainder according to seniority in tail, with divers remainders over. The indenture contained no power for the trustees thereof to sell the property thereby settled.

By an order of court dated the 17th May 1886 Frederick George Hilton Price and Percy Dixwell Nowell Oxenden were appointed trustees of the settlement for the purposes of the Settled Land Acts 1882 and 1884.

By an indenture dated the 11th Dec. 1888, and expressed to be made between Sir Charles James Palmer (therein called "the vendor") of the first part, Frederick George Hilton Price and Percy Dixwell Nowell Oxenden (therein called "the trustees") of the second part, and the Grand Junction Waterworks Company of the third part, after reciting (*inter alia*) that the vendor as tenant for life in possession of the freehold hereditaments thereby conveyed had agreed to sell to the company at the price of 835l. the hereditaments called Bell's Field and the fee simple thereof in possession free from incumbrances, but subject to the covenants thereafter contained, it was witnessed that, in pursuance of the agreement and in consideration of the sum of 835l. by the direction of the vendor paid to the trustees by the company, the vendor, in exercise of the power for that purpose conferred on him by the Settled Land Acts and of every other power enabling him, and as beneficial owner, did thereby appoint and convey unto the company the land called Bell's Field, to hold the same unto and to the use of the company in fee simple discharged from all limitations, powers, and provisions in the indenture of settlement contained and from all estates, interests, and charges subsisting or to arise thereunder. And the indenture, after a grant to the company of a certain easement therein described and a restriction of the operation of the covenants implied by the conveyance as beneficial owner in the manner usual where a tenant for life so conveys, contained

a covenant on the part of the company in the following terms:

And the company for itself, its successors and assigns, hereby covenants with the vendor that it and they will not build on or let for building otherwise than for the purpose of their undertaking or works any part of the lands hereby conveyed, but the company, its successors or assigns, may build, any such buildings or erections as may be necessary for the purpose of their undertaking or works.

The company had in 1887 entered into the contract to purchase Bell's Field with a view to erecting thereon certain buildings and works in connection with their undertaking, for which purpose they promoted a Bill in Parliament in the session of 1888, and in the contract agreed to enter into the restrictive covenant set out above. Before the completion of the purchase, however, the Bill had been rejected by Parliament, and the company, not having obtained the powers requisite to enable them to erect on the land the contemplated buildings and works and realising that they might in consequence have to abandon their original scheme, approached Sir Charles James Palmer with the view to his agreeing to omit the covenant from the conveyance. Sir Charles James Palmer, however, insisted on the conveyance being executed according to the terms of the original contract, but at the same time agreed with the company to enter into the following agreement which, though dated the day after the conveyance, was in fact executed simultaneously with it.

By an agreement under seal dated the 13th Dec. 1888, made between Sir Charles James Palmer (therein called "the vendor") of the first part, Frederick George Hilton Price and Percy Dixwell Nowell Oxenden of the second part, and the company of the third part, and also expressed to be supplemental to the indenture of the 11th Dec. 1888 (therein called "the principal indenture"), it was agreed as follows:

If the company shall abandon their scheme for erecting works upon and shall not require the land called Bell's Field for the purposes of their undertaking and shall desire to erect other buildings thereon or to sell or let the same and thereof shall give notice to the vendor, then the vendor will on payment by the company of 10l. consent to the company building upon, letting, or selling the said field without the restriction as to building contained in the principal indenture.

On the 11th July 1895 Sir Charles James Palmer died.

The plaintiff, Sir Charles Henry Dayrell Palmer, was the eldest son of Sir Charles James Palmer, and is his successor in title within the meaning of the Settled Land Acts, in which capacity he also holds other lands adjoining Bell's Field and forming part of the settled hereditaments.

On the 10th Oct. 1895 he barred the entail of the settled hereditaments by a deed of that date duly enrolled on the 16th Oct. 1895.

On the 17th Aug. 1896 the company by their solicitors served the plaintiff and his then solicitors with a written notice (purporting to be given pursuant to the terms of the agreement of the 12th Dec. 1888) that, the company having abandoned their scheme for erecting works upon and not requiring Bell's Field for the purposes of their undertaking, proposed to sell the same.

without the restriction as to building contained in the indenture of the 11th Dec. 1888, and requested that on payment by them of 10l. his consent might be given to their so selling. With the notice they tendered the sum of 10l.

The request and tender were refused, the plaintiff, by his solicitors, denying that he was bound by the agreement of the 12th Dec. 1888.

Nothing further was done by either party in relation to the notice or the subject-matter thereof until the spring of 1900, when correspondence took place between the solicitors of the parties, in which the company claimed and the plaintiff denied that by virtue of the notice and tender the company had a right to sell or let the field free from the aforesaid restriction as to building. The company also before the commencement of this action erected a notice board upon the field advertising that the land was to be let or sold for building purposes.

On the 13th June 1900 the writ in this action was issued.

The only powers vested in Sir Charles James Palmer, deceased, in relation to selling or disposing of the settled land or any easement or right appertaining thereto or held therewith were those conferred upon him as tenant for life by the Settled Land Acts.

The questions submitted for the opinion of the court were: (1) Whether the said agreement of the 12th Dec. 1888 was binding upon or enforceable against the plaintiff or any future owner of the settled land or any part thereof. (2) Whether (in the event of the answer to the former question being in the negative) the plaintiff was entitled to the benefit of and to enforce the restrictive covenant contained in the conveyance of the 11th Dec. 1888.

The parties thereby authorised the court, in the event of the answer to the former question being in the negative and the answer to the latter being in the affirmative, to make the declaration and (if necessary) grant the injunction which were respectively claimed by the writ of summons, and in any event to make such order as to costs and generally to make such further or other order or orders as to the court might seem meet.

By the writ of summons in the action the plaintiff claimed (1) a declaration that, having regard to the covenant of the company contained in an indenture dated the 11th Dec. 1888 and made between the late Sir Charles James Palmer and others of the first and second parts and the company of the third part, the company are not entitled as against the plaintiff to build on (otherwise than for the purpose of their undertaking or works) or to let or sell for building the land called Bell's Field; (2) an injunction to restrain the company from letting or selling for building purposes or from building on (otherwise than for the purpose of their undertaking and works) the said land or otherwise committing any breach of the said covenant.

Theobald, K.C. and *G. F. Hart* for the plaintiff.—There was a binding contract made for the sale of the land subject to the restrictive covenant under sect. 4 (6) of the Settled Land Act 1882 before the agreement of the 12th Dec. 1888 was entered into. That agreement may have been binding on the vendor personally, but it is not binding on the plaintiff, who is the vendor's successor in title to the settled land, as it is the

sale of a privilege annexed to the settled land. The Settled Land Acts do not authorise a tenant for life to effect such a sale, and therefore the plaintiff cannot be bound thereby:

Settled Land Act 1882, ss. 4, 53, 54;
Oceanic Steam Navigation Company v. Sutherland,
43 L. T. Rep. 743; 16 Ch. Div. 236.

The plaintiff as the owner for the time being of the settled land is entitled to the benefit of the restrictive covenant.

Vernon Smith, K.C. and *W. R. Sheldon* for the defendants.—The other lands subject to the settlement of which the plaintiff is owner for the time being might have been situated in some distant county, and then in respect of what lands would the plaintiff be entitled to the benefit of the restrictive covenant? [EADY, J.—It appears from the special case that some of the settled lands adjoined the property sold.] The plaintiff is not entitled to the benefit of the restrictive covenant under the circumstances. The contract for sale and the agreement of the 12th Dec. 1888 formed one transaction and amounted to an agreement for the sale of the land for 845l., the payment of the 10l. being deferred until the company should desire to use the land otherwise than for the purposes of their undertaking. [EADY, J.—Would that be a valid sale under the Settled Land Acts?] We submit so:

London and South-Western Railway Company v. Gomm, 46 L. T. Rep. 449; 20 Ch. Div. 562.

The whole transaction was not concluded until the 12th Dec. 1888.

EADY, J.—By an indenture dated the 11th Dec. 1888 Sir Charles James Palmer, the plaintiff's predecessor in title, sold and conveyed certain freehold land called Bell's Field to the company for the sum of 835l., subject to a restrictive covenant. [His Lordship read the covenant set out above, and proceeded:] The question is whether the plaintiff is entitled to sue on that covenant, and whether the company can be restrained from selling Bell's Field, freed from the restriction imposed thereby. I will consider the matter first apart from the agreement of the 12th Dec. 1888. The company insist that the plaintiff is not entitled to sue upon the covenant. They contend that there is nothing to show what part of the adjoining lands belonging to him is entitled to the advantage of the covenant, and therefore he is not an assign of the benefit of it. It was a sale by the tenant for life in pursuance of his statutory power at a price fixed having regard to the intended user of the land. On such a sale there is a statutory power under sect. 4 (6) of the Settled Land Act 1882 to impose any restriction, with respect to building, on the tenant for life and the settled land or any part thereof, or on the other party and any land sold to him. Was this done? What is the true inference to be drawn from the transaction? It is that the covenant was made with the vendor as tenant for life and for the benefit of the settled land. The plaintiff takes in remainder under the same settlement by virtue of which the vendor was tenant for life, and is in possession of lands adjoining the land sold. He is entitled to the benefit of the restrictive covenant as owner for the time being of the settled land. Therefore he is entitled to enforce the covenant as owner for the time being of the land for the benefit of which it was entered into.

Then, what is the effect of the agreement of the 12th Dec. 1888, and how is it to be dealt with? It is argued on behalf of the company that it forms a contemporaneous transaction with the conveyance of the land. I assume that is so, but I must bear in mind the fact that there was an antecedent binding contract entered into in 1887, and that the vendor insisted on the conveyance being executed in accordance with the terms of the original agreement, which was accordingly carried out. It was argued on behalf of the plaintiff that the agreement was only intended to apply to the vendor personally; but I cannot accept that explanation, because the trustees for the purposes of the Settled Land Act were parties to the agreement. The difficulty is that it is not such an agreement as a tenant for life under the Settled Land Acts has power to enter into. It is an agreement conferring an option on the company at any future time, by paying 10*l.*, to obtain a release of the covenant. There is nothing in the Settled Land Acts empowering a tenant for life to sell on any such terms. It was contended on behalf of the company that in substance the transaction amounted to one agreement for the sale of the land for 845*l.* I cannot accept that view, because no certain price of 845*l.* was fixed. It was merely an option given to the company to obtain a release of the restrictive covenant by paying 10*l.* Whether it was one transaction or two, the result is the same—namely, that the agreement to release the covenant on payment of 10*l.* at any future time was quite beyond the power of the tenant for life under the Settled Land Acts. I must therefore make the declaration asked for by the plaintiff.

Solicitors: *Dimond and Son; Chappell and Co.*

KING'S BENCH DIVISION.

Feb. 26 and 27.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HOLLAND (app.) v. HALL (resp.). (a)

Hawker—Carrying to sell—Carrying goods to show on approval with a view to sell—Previous request to a canvasser to send goods on approval—Necessity of hawker's licence—Hawkers Act 1888 (51 & 52 Vict. c. 33), ss. 2, 6.

By sect. 2 of the *Hawkers Act 1888* "hawker" means "any person who travels with a horse . . . and goes from place to place or to other men's houses carrying to sell or exposing for sale any goods," &c.

The respondent was sent out by his employers, who were manufacturers of sewing machines, with a horse and van in which were some sewing machines, with instructions to call at certain specified houses in different places and show the machines on approval for the purpose of selling them, and he did so. None of the persons in the houses called at had bought or agreed to buy machines, but they had previously been visited by a canvasser to whom they had expressed a desire to see a machine to decide whether they would purchase it. The machines were shown at these houses on approval, and if approved of they would be sold there.

Held, that the respondent was going "from place to place carrying to sell" within the meaning of sect. 2, and was therefore a "hawker" and required a hawker's licence; and that he was none the less a hawker because he had offered the machines only to persons who had previously been visited by a canvasser.

CASE stated by justices of the peace for the West Riding of the County of York.

At a petty sessions held at Otley for the West Riding on the 16th Aug. 1901, an information was preferred by the appellant Joseph Holland, an officer of Inland Revenue, by order of the Commissioners of Inland Revenue, against the respondent William Hall and a certain Fred Poppleston, for the recovery of the penalty imposed by sect. 6 of the *Hawkers Act 1888* (51 & 52 Vict. c. 33).

The information stated that Fred Poppleston and William Hall on the 19th April 1901, at the parish of Ilkley, in the West Riding of the County of York, did trade as hawkers without having in force a proper licence as by the statute in that behalf was required, contrary to the form of the statutes in that case made and provided; whereby they had forfeited for such offence the sum of ten pounds.

The respondent (Hall) appeared before the justices to answer to the information, and, as it appeared that the summons issued had not been served upon Poppleston, the justices proceeded to hear and determine the information against the respondent alone.

The *Hawkers Act 1888* imposes, in sect. 3, a duty of two pounds upon an excise licence to be taken out by every hawker in the United Kingdom subject to certain exemptions, none of which apply to this case, and sect. 2 of the Act defines a hawker as follows:

"Hawker" means any person who travels with a horse or other beast bearing or drawing burden, and goes from place to place or to other men's houses carrying to sell or exposing for sale any goods, wares, or merchandise, or exposing samples or patterns of any goods, wares, or merchandise to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, wares, or merchandise in or at any house, shop, room, booth, stall or other place whatever hired or used by him for that purpose.

Sect. 5, sub-sect. 2, provides:

A hawker shall not let to hire or lend his licence to any person: Provided that a servant may travel with his master's licence and trade for his master's benefit.

Sect. 6 (1). If any person does any act for which a licence is required by this Act—(a) Without having a proper licence in force in that behalf . . . he shall for every such offence incur a fine of ten pounds over and above any other penalty to which he may be liable.

It was proved before the justices that on the 19th April 1901 the respondent and Poppleston were in the employment of the Singer Manufacturing Company, who were makers of sewing machines. The respondent and Poppleston started from Shipley in the morning of that day with a horse drawing a covered van, in which were five sewing machines. They were first seen at Ilkley and about an hour later at Ben Rhydding. Shipley, Ilkley, and Ben Rhydding are separate and distinct places. At Ben Rhydding they were seen to go with the van to two houses known respectively as Redgarth and Fieldhurst. At

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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Redgarth they saw a servant, and asked her if any order had been given at that house for a sewing machine. Upon receiving a reply in the negative, they asked her to buy a machine, and remained for two or three minutes trying to persuade her to do so, and offered to fetch a machine from the van, but she refused to buy one. At Fieldhurst they saw two servants. James Bailey, a canvasser employed by the Singer Manufacturing Company, had on the 17th April 1901 called at this house and had seen these two servants and asked them to buy a sewing machine. He had no machines with him on that day, and upon offering to send a machine on approval was told that he might do so. Bailey did not mention any particular kind of machine nor any price, and there was no agreement made by either of the two servants with him to purchase a machine. When the respondent and Poppleston went to Fieldhurst the two servants refused to buy a machine, and then Poppleston asked if he might leave one there till evening. He left one, and it was called for on the 22nd April by one of the company's agents.

It was also proved that when the respondent and Poppleston started on their rounds on the 19th April with the five machines they had instructions to call at eight different houses to show machines on approval. These houses included Fieldhurst, but did not include Redgarth. None of the persons in these eight houses had agreed to buy a machine, but they had previously expressed to a canvasser of the Singer Manufacturing Company a desire to see a machine in order to decide whether they would make a purchase. The five machines in the van were taken out to show to the people at these eight houses. Three of the machines were taken back in the van to Shipley at the close of the day, one had been left at Fieldhurst as above mentioned, but no evidence was given as to what had become of the fifth machine. It was stated by the respondent in giving evidence on his own behalf that the machines were shown on approval, and if satisfactory they would be sold.

On behalf of the appellant it was contended that the respondent travelled with a horse drawing a burden, that he went from place to place and to other men's houses, and that the machines were carried for sale. In support of this contention the case of *O'Dea v. Crowhurst* (80 L. T. Rep. 491) was cited to the justices.

On behalf of the respondent it was contended that the Act did not apply to a large firm paying rates and taxes, but was intended to be a protection to the public against dishonest persons; that the machines were merely sent out to be taken to houses at which a canvasser had previously called; that they had been previously ordered and were not carried for sale. The following cases were cited: *Rea v. Little* (1 Burr. 609); *Rea v. Buckle* (4 East, 346); and *Johnson v. Hudson* (11 East, 180).

The justices found as a fact that none of the five sewing machines had been sold when the respondent left Shipley with the van, but upon the evidence given they were of opinion that the machines were not carried for sale within the meaning of the Act inasmuch as it was intended to offer them only to persons already visited by a canvasser, and they accordingly dismissed the information.

The question for the opinion of the court was whether upon the facts above mentioned the justices were right in point of law in holding as aforesaid that the machines had not been carried for sale.

Rowlatt (Sir Edward Carson, S.G. with him) for the appellant.—The question is whether the respondent was carrying these goods for sale within the meaning of the section. Sect. 2 defines what a "hawker" is; then sect. 3 provides for the taking out of an annual excise licence by every hawker, with certain exceptions given in sub-sect. 3, and sect. 6 imposes a penalty for acting as a hawker without having the proper licence. It does not matter whether the horse and van belonged to the respondent or not; it is sufficient to bring the case within the section if he travelled with it, though the servant could use the master's licence. There are two grounds on which the decision of the justices is wrong. In the first place, it is clearly wrong so far as the house Redgarth is concerned, as no canvasser had called there previously, and it could not be denied that there at least the respondent did carry for sale; secondly, there was a carrying for sale at the other houses, although a canvasser had previously called at the houses. The fact of the canvasser having called makes no difference, though the former case is really an *à fortiori* case. If the machines were approved, they would be sold then and there. In *O'Dea v. Crowhurst* (80 L. T. Rep. 491) it was held that taking a cask of oil round in a cart to customers in pursuance of orders to call, when the quantity required was fixed by the customer at his house, was hawking within the meaning of this section. In that case the justices were of opinion that the Act did not apply to persons calling at the houses of regular customers in compliance with previous requests from such customers; but the court (Darling and Channell, JJ.) held that that was a wrong view of the Act. There is an exception (amongst others) in favour of persons selling fish, fruit, victuals, or coal; otherwise a milkman or baker taking round milk or bread would require a licence.

Rufus Isaacs, K.C. (*T. Bullen* with him) for the respondent.—The point raised in this case is one of very great importance, not so much to the present respondent as to manufacturers like the Singer Manufacturing Company, to whom it would mean a large yearly expenditure if this court were to decide that there ought to be a licence in this case, as the licence is not a licence merely for the firm, but is a personal licence, though a servant may travel with his master's licence: (see sect. 5, sub-sect. 2). The question really is this: Whether in carrying machines which were to be shown in pursuance of the canvasser having called and having received instructions from the persons visited to send a machine for the purpose of its being shown, the sending or taking of the machine to such person is a "carrying to sell" within the meaning of the Act; in other words, whether the person who does that is a "hawker" within the meaning of the Act. The only ground upon which it is contended he is a hawker is because it is said that he is a person who travels with a horse and cart and who is "carrying to sell." These men went to the house Redgarth by mistake, and that house must be left out of this case altogether, so that the

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substance of the matter is that they were to call at eight houses which the canvassers had previously visited. It is upon that that the case ought to be decided, as there is no finding with regard to Redgarth that they called there for the purpose of selling a machine, and that appears from the finding of the justices that they dismissed the information as the intention was to offer the machines only to persons already visited by a canvasser, and Redgarth had not been so visited. If the information had been with regard to Redgarth alone, there could not have been a conviction, as the authorities show that upon one sale alone a man cannot be convicted of being a hawker, as there would not be a carrying "from place to place," which is the essence of the offence. The gist of the matter is the habitual carrying from place to place:

O'Dea v. Crowhurst (ubi sup.).

Then, as to Fieldhurst, upon the statement in the case there is nothing except that the respondent called there and that the servants refused to buy a machine. If it stood upon that, there could be no conviction, because it would be merely one isolated instance. There was simply a carrying round of these machines to leave them on approval. In the ordinary course they would be left on approval, and there would be no sale until there was an approval. This appears quite clearly from the statement in the case that "none of the persons in these eight houses had agreed to buy a machine," &c. Persons carrying the machines in pursuance of these instructions were not carrying them for sale. He referred to

O'Dea v. Crowhurst (ubi sup.).

Rowlatt in reply.

Cur adv. vult.

Feb. 27.—Lord ALVERSTONE, C.J.—In this case I have felt very great difficulty, and I confess that my mind has fluctuated more than once in the course of the argument. If the finding of the magistrates had amounted to a finding that the machines were only taken to be offered for approval, or were only sent on approval in pursuance of a previous request made to the canvasser, I should have thought we could not interfere; but, after carefully considering this finding of the magistrates, it seems to me that they have not found that, or intended to find it. Their finding is expressed in these words: "We were of opinion that the machines were not carried for sale within the meaning of the Act inasmuch as it was intended to offer them only to persons already visited by a canvasser, and we accordingly dismissed the information." I understand that finding to be this, not that they find that they were not offered for sale, but that they were only offered for sale to persons who had been previously canvassed. Now, I think, if that is so, the magistrates were wrong in holding that this man was not going about travelling "with a horse or other beast bearing or drawing burden" and going "from place to place"—in fact, wrong in holding that he was not a hawker. I think the line of division may be clearly ascertained. If there is merely the sending of articles that people may inspect them and see them, that would not make a man who takes them a hawker, even although ultimately at some future time a sale might result. On the other hand, it does not seem to me to be less an offering for sale because the

persons who are likely to be purchasers have been ascertained before the hawker visits the house. Now, in this case I think there was abundant evidence on which the magistrates could find, and I think they ought to have found, that these machines were being taken about for sale, although they were *prima facie* intended only to be offered on this occasion to persons whose names had been sent in to the head place of business by the canvasser; and I think certainly with regard to what happened on this occasion that it is quite clear that there was evidence that they were offered for sale to persons whose names had not been sent in by the canvasser. Possibly that would not be a sufficient ground for conviction in one sense, because it was only what I may call an exception and was not the general case that it was supposed was being dealt with by the magistrates. I come to the conclusion that, on these facts, the magistrates must be taken to have found that the machines were being offered for sale, and that the only reason that they thought the man was not within the section was that they were offered for sale to persons whose names had been previously mentioned. I think that that distinction is not sufficient, and therefore the appeal ought to be allowed.

DARLING, J. read the following judgment:—In my view of this case the magistrates have definitely decided that a person who carries about from place to place, by means of a horse and cart, unsold goods, and then leaves them on approval—so that they are by that means sold—does not carry them to sell within the meaning of the Hawkers Act 1888, s. 2. As a reason for this opinion they rely entirely on the fact that the persons who purchased had previously expressed to a canvasser a desire to see the goods in order to decide whether to purchase them or not. I cannot see that it makes any difference whether this desire was expressed to the person who carried the goods or to another, his associate. If this did alter the case, then an ordinary pedlar would require no licence if he left his goods at an inn, himself went round and canvassed people, and then took his goods to those who had expressed a wish to see them. It appears to me that the fact on which the magistrates rely is really immaterial to the decision of the question. I think that the respondent is shown, on the evidence in this case, to have gone from place to place, from house to house, carrying goods to sell, and exposing them, showing them, for sale; and that the goods were shown only to those of whom it had been ascertained that they would like to see them does not, in my opinion, prevent the exhibitor from being a hawker within the meaning of the statute. Therefore I think the magistrates came to a wrong conclusion.

CHANNELL, J. read the following judgment:—I agree. I think there is abundant evidence stated in the case to justify a conviction of the respondent for trading as a hawker. The only difficulty arises as to the finding of the magistrates on that evidence. If the respondent, and the man with him, were taking the sewing machines in the van from place to place in order to sell the goods, they were hawking within the meaning of the statute. If they had been delivering goods in pursuance of previous contracts of sale, of course they would not have been hawking; an,

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equally if they were delivering goods on approval in pursuance of previous orders to send goods on approval they would not be hawking. But if they were taking goods about in order to find customers for them, they would not escape being hawkers by having sent a person beforehand, whether an hour or so before or a day or two before, to ascertain what persons would be likely to be customers, and be willing to look at their goods, and then only calling with the cart at places ascertained to be favourable for business. Now, we have to see whether the magistrates who have refused to convict have found facts which show that the respondent was not hawking. They have found that "it was intended to offer the machines only to persons already visited by the canvasser." If that means that the goods were only sent out for delivery on approval to particular persons who had requested goods to be delivered to them on approval, it would not be hawking; but that is not expressly found, and the facts as to the number of machines and the number of houses seem to negative that view of the case. It seems to me that the finding of the magistrates only comes to this, that the respondent was carrying the goods from place to place to sell them, but he was only intending to try to sell them at certain houses where it had been ascertained that there were likely customers. I think that is hawking within the statute, and, on that view of the facts, the case of *O'Dea v. Crowhurst* (*ubi sup.*) appears to cover this case. I think the appeal must be allowed.

Appeal allowed. Case remitted to the justices with a direction to convict.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitor for the respondent, *G. D. Wansbrough.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, Feb. 28.

(Before BARNES, J.)

THE AUGUSTE LEGEMBRE. (a)

Salvage—Lifeboat services—Services rendered by tug against wish of master of salvaged vessel—Award.

A French steamship having fouled her propeller and become disabled was towed nearly one hundred miles into port by the steam lifeboat H. P. and two tugs, the V. and the D.; and the lifeboat E. H., which was required by the rules of the National Lifeboat Institution to accompany the H. P., remained fast astern of the steamship during the towage, but otherwise rendered no service. The D. assisted in the towage at the request of the master of the V., but against the wish of the master of the steamship. The employment of a third tug was, in the circumstances, reasonable and prudent, but turned out to be unnecessary.

Held, that the lifeboatmen in the E. H. and the tug D. were entitled to salvage remuneration.

Where a salvor at the request of a co-salvor, but against the wish of the master of the salvaged vessel, renders salvage services in such circum-

stances that they ought to have been accepted, he is entitled to salvage remuneration.

THIS was an action to recover salvage remuneration for services rendered by the lifeboats *Helen Peels* and *Edmund Harvey*, and the steam-tugs *Victor* and *Dragon*, to the steamship *Auguste Legembre* in Dec. 1901.

The facts were as follows: On the 12th Dec. 1901 the *Auguste Legembre*, a French screw steamship of 2603 tons gross register, whilst bound from Barrow-in-Furness to Port Talbot in water ballast, got her propeller entangled in a manilla warp washed overboard in a gale of wind off Cardigan Bay, and could not work her engines. She then drifted before the gale, and touched on the Barrell's Rocks off the Pembroke coast, where she sustained some damage, so that No. 2 hold filled with water up to the level of the sea outside, and some water got into the engine-room; but, owing to the watertight doors being shut down and the bulkheads between No. 2 hold and the engine-room being watertight, the pumps were able to keep down the water in the engine-room. She then drifted across the mouth of the Bristol Channel, and eventually on the night of the 13th Dec. was brought up with both anchors in twenty-six fathoms of water about fifteen miles to the westward of Trevoas Head. There she lay until the morning of the 15th Dec., and, though the wind throughout continued to blow a strong gale from the N.E. with a very heavy sea, she held safely to her anchors. Signals of distress were not exhibited, but she was seen from the shore to be in difficulties, and shortly before midnight on the 14th Dec. the *Helen Peels*, a twin-screw steam lifeboat belonging to the National Lifeboat Institution and stationed at Padstow, manned by a crew of eleven hands, and of the value of 10,500*l.*, came out to the steamer with the Padstow lifeboat in tow, which was manned by a crew of fifteen men. The master of the steamer told them he did not want assistance, but asked them to wait until the morning to see about taking her in tow.

On the morning of the 15th Dec., the weather having greatly moderated, the steamer got up her anchors with the object of being taken in tow by the *Helen Peels*. The steam-tugs *Victor* and *Dragon*, which had heard of the steamer's position and come round from Falmouth in very bad weather, then came up and offered their assistance. The *Victor*, which was the leading tug, was at once asked to assist in the towage, and she accordingly made fast ahead and began towing alongside the *Helen Peels* towards Cardiff, and the lifeboat *Edmund Harvey* made fast astern of the steamer. The *Dragon* also offered her services, which the master of the steamer declined, as he considered he had enough assistance without her. The *Dragon*, however, kept alongside for about an hour, and from time to time offered her services, which were as often refused. The weather was moderate but threatening, and the sea, though high, was going down as the wind fell. The steamer was sheering and difficult to tow and was making some water, and, thinking it was important that she should be towed into a place of safety as quickly as possible, the master of the *Victor* shouted to the steamer through the megaphone that he would not continue to tow without a third tug, and, not getting any audible answer from

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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the steamer, he asked the *Dragon* to make fast ahead of the *Victor*. The *Dragon* accordingly made fast against the wish of the master of the steamer, and assisted to tow her until midnight.

On the morning of the 16th Dec. the steamer was safely brought to anchor in Cardiff Roads, having been towed a distance of nearly one hundred miles.

The value of the *Auguste Legembre* was 11,400*l*.

It appeared that by the rules of the National Lifeboat Institution the crews of the *Helen Peele* and *Edmund Harvey* were liable to make good any damage done to the lifeboats while rendering salvage services, and to pay for all stores consumed while employed for salvage purposes, and that the expenses to which they were liable amounted to about 60*l*.

Aspinall, K.C. and *Stokes* for the plaintiffs.

Laing, K.C. and *Miller* for the defendants.

BARNES, J. (after stating the facts, proceeded):—The real contest in this case is as to the amounts that ought to be awarded to the *Victor* and to the *Helen Peele*, and as to whether anything ought to be awarded to the men in the lifeboat *Edmund Harvey* and to the *Dragon*. The French steamer was undoubtedly placed in safety by the efforts of the salvors, and, though she had ridden out the severe weather and had never moved from her anchors, she could not get away from the place where she was at anchor without assistance, and it was absolutely necessary that she should be towed by someone. The tugs did it satisfactorily, and a reasonable and proper award must be given for that service. I need say nothing about the *Victor*, except to give later on the amount which I think the proper sum to award to her. With regard to the *Helen Peele*, I do not think the case can be treated exactly as if the eleven men in the *Helen Peele* owned her. We are told that these men are to be treated in the same way as an ordinary lifeboat service is treated—that is to say, they take the salvage, and run the risk of paying for any damage to the tug or the lifeboat. I can understand an ordinary lifeboat service being dealt with on that footing; but I confess that it seems to me hardly applicable to the case of a tug of this character, and that I must deal with this case on the footing of men who had rendered a service and were liable for any repairs that had to be done. In this case the liability was not very great, because, although they went out in very bad weather, the tug is built for the purpose, and after she got to the steamer there does not seem to have been any unusual risk in the towage, which did not commence until the weather had moderated. With regard to the lifeboat men, I think they are entitled to be considered in the salvage award because of the peculiar circumstances under which they had to render their services. We are told that the tug would not be allowed to go out without the lifeboat, as she is built expressly for that service, and the rule is that she has to tow out the lifeboat. Practically, therefore, the lifeboat men had to keep with her, and she had to keep with the lifeboat. It seems to me that this case ought to be treated as if the lifeboat men formed part of the crew of the tug, for, though not really part of the crew, their position is analogous to that. I cannot, therefore, come to the conclusion that they are not to be treated as in any sense

instrumental in saving the property. With regard to the *Dragon*, the question is one partly of law and partly of nautical skill. Although the tug's services were not directly accepted, but were in fact refused by the master of the steamer, the tug did at the request of the master of the *Victor* make fast ahead, not that it was in fact absolutely necessary at that time to have more than two tugs towing, but because he at least wished to have a third tug in case it was wanted afterwards, and the *Dragon* rendered a towage service of a valuable character. It is a legal question in this sense, that if those services were rendered in such circumstances that they ought to have been accepted, then, although the master of the steamship, according to his evidence, did not wish to have them, an award of some amount should, as a matter of law, be made. It is also a nautical question, therefore, whether, having regard to the circumstances of the case, and what kind of weather might be anticipated at that time of year and in that locality, it was reasonably prudent and necessary to have a third tug. The Elder Brethren think it was, because, although the weather had moderated, it was in the middle of December, when the wind seems to have been flying about from quarter to quarter, and no one could be certain as to what would take place before they got to Cardiff. That is the reason why the *Victor* took this third tug ahead, and, although I think in fact it did not turn out to be necessary, it was a reasonable thing to do. For these reasons the *Dragon* must not be excluded, although her award should be of a moderate character. The award which I make to the various salvors is the sum of 1000*l*., which I propose to divide in this way: To the owners, master, and crew of the *Victor*, 500*l*.; to the crew of the *Helen Peele*, 325*l*.; to the owners, master, and crew of the *Dragon*, 100*l*.; and to the lifeboat men, 75*l*.

Judgment accordingly.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*, agents for *William Jenkins*.

Solicitors for the defendants, *Botterill and Roche*.

Tuesday, March 4.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE MYSTERY. (a)

Collision in dock—Dock company—Foreman's orders—Negligence—Costs.

The owners of a vessel are not liable for a collision solely due to the improper orders of a dock foreman which those in charge of her are bound by statute to obey and did properly obey.

The owners of a steamship damaged by collision with a barge in dock instituted an action in the City of London Court against the owners of the barge, and afterwards joined as defendants the dock company to whose improper orders the owners of the barge alleged the collision was due. The dock company alleged the collision was due to the negligence of the barge. Judgment was given against both defendants, but, on appeal by both, the judgment against the owners of the barge was set aside. The court, following The River Lagan (58 L. T. Rep. 773), ordered the

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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dock company to pay the costs of the plaintiffs and of the successful defendants both in the court below and of the appeal.

THIS was an appeal from the judge of the City of London Court in an action which arose out of a collision between the plaintiffs' steamship *William Adamson* and the defendants' sailing barge *Mystery* at the entrance of the Victoria Docks, London, about 2 p.m. on the 28th Oct. 1901.

The facts of the case were shortly as follows: The *Mystery*, which was bound into the Victoria Docks and was waiting for the dock gates to be opened, had made fast, by orders of a dock official, with a rope forward and aft to the outermost barge of four which were moored in tiers close to the dock wall. When the dock gates were opened the stern rope was taken to the pierhead, and the *Mystery's* head was allowed to swing round with the flood tide to get her into position to enter the dock. The barge to which the head rope was fast was also allowed to swing, with the result that the rope ceased to act as a check rope, and the *Mystery*, while swinging round, struck with her bowsprit the stern of the *William Adamson*, which was entering the dock. No charge was made against the *William Adamson*, but the case for the *Mystery* was that she was swinging as directed by the dock foreman, and that the stern rope was let go and the barges were allowed to swing by his orders, and that the collision was solely due to the carrying out of these orders. The London and India Docks Company were then added as defendants in the action, and they, both in their answers to interrogatories and at the trial, alleged that the collision was solely due to the negligence of those in charge of the *Mystery*. The learned judge found as a fact that the collision was due to the improper orders of the dock foreman, which the *Mystery* properly carried out, but held that although those in charge of the *Mystery* had not been guilty of negligence, her owners were not relieved from liability for the consequences of obedience to the orders of the dock foreman, and accordingly gave judgment against both defendants, with costs.

Both defendants appealed.

The following are extracts from the bye-laws of the dock company, made under the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.), the dock company's private Act:—

Bye-law 2:

The order in which vessels are to enter any dock is in the absolute discretion of the dockmaster, his assistants or deputies; and all persons in charge of vessels must cause their vessels to pass into the dock as directed by the dockmaster, his assistants or deputies.

Bye-law 10:

All vessels must be transported to and from the river or any part of the dock premises by the persons in charge and their crews under the direction of the dockmaster, his assistants or deputies.

Bye-law 17:

The dockmaster, his assistants or deputies, may at any time give in such manner as he or they may think fit to the master or other person in charge of any vessel any other directions.

Bye-law 2 of the bye-laws of 1893:

The expression "dockmaster" shall include his duly authorised deputies and assistants.

The following sections of the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), which

is incorporated in the London and St. Katharine Docks Act, were referred to:

Sect. 51. The undertakers may appoint such harbour-masters as they think necessary (including in such expression dockmasters and piermasters), as hereinbefore defined.

Sect. 52. The harbour-master may give directions for (inter alia) regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier; and its position mooring or unmooring, placing and removing whilst therein.

Sect. 53. The master of every vessel within the harbour or dock or at or near the pier shall regulate such vessel according to the directions of the harbour-master, made in conformity with this and the special Act; and any master of a vessel, who after notice of any such direction by the harbour-master served upon him, shall not forthwith regulate such vessel according to such directions shall be liable to a penalty not exceeding twenty pounds.

Scrutton, K.C. (with him *Miller*) for the owners of the *Mystery*.—On the facts found by the learned judge, the *Mystery* was not guilty of any negligence, and the action against her ought to have been dismissed:

The Bilbao, Lush. 149.

Pickford, K.C. (with him *Bucknill*) for the dock company.—The order to pass the *Mystery's* stern rope ashore was in the circumstances a proper order. The alleged order to the barges to swing was not given by the dock foreman, but, even if it was given, the *Mystery* could have checked her swing and avoided the collision by dropping an anchor, and was negligent in not doing so. If the collision was due to the improper orders of the dock foreman, the dock company are not liable, as the dock foreman had no authority to give such orders. The dockmaster was the only person who had power to regulate how vessels should come into the dock, and he was present directing the movements of the *William Adamson*. The duty of the dock foreman was merely to assist vessels with their ropes, and he was not a person whose orders the *Mystery* was bound by law to obey.

Aspinall, K.C. and *Balloch* for the owners of the *William Adamson*.—The learned judge was right in finding that the orders were given by the dock foreman, and were in the circumstances improper; but the *Mystery* could have carried out his orders without accident if she had let go an anchor, as she ought to have done in the circumstances, on her own initiative.

Scrutton, K.C. in reply.—The dock foreman was an official of the dock company, and was in uniform. He was acting as assistant of the dockmaster, and as such was a person who was authorised by the dock company's bye-laws to give orders, and whose orders the *Mystery* was bound by the Harbours, Docks, and Piers Clauses Act 1847 under a penalty to obey.

The PRESIDENT.—I think that the findings of the learned judge in the court below cover the whole ground in this case, with the exception possibly of one point. With these findings I am not disposed to differ, and, after having heard the observations made in comment on the judgment of the learned judge, it appears to me his findings of fact are correct. On these facts it is quite clear that the dock company alone are liable, because he has found

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that the orders given by the dock foreman were wrong and mistaken, and that in carrying them out the *Mystery* did nothing wrong. If the *Mystery* only acted in obedience to the orders of the dockmaster or his assistant and obeyed them properly, then, assuming these orders were lawful, I am quite at a loss to see on what grounds the *Mystery* could be held to blame. The only point which has been raised and is not covered in terms by the judgment of the learned judge is the question of the authority of the dock foreman who actually gave the orders in question. On the evidence it appears to me that the learned judge must have held, and I think rightly, that the dock foreman was a person whose orders could bind the dock company. It is clear he was an official of the dock company and was there for the purpose of looking after the barges, and it appears to me to be quite clear that in the circumstances he was a person authorised to give the necessary orders to the barges going into the docks. By some mistake he gave a wrong order. It is impossible to say he was acting in these circumstances outside the scope of his authority. It is expressly provided by the dock company's bye-laws that not only are the regulations with regard to going into dock to be obeyed, but also any other order which is thought fit to be given by the dockmaster, or his assistants or deputies. In this case a deputy or assistant of the dockmaster gave such orders, and, that being so, it appears to me they were orders given by a person who was the assistant of the dockmaster within the meaning of the Harbours, Docks, and Piers Clauses Act 1847. For these reasons the judgment of the court below should stand as against the dock company, but ought to be reversed as regards the *Mystery*.

BARNES, J.—I have nothing to add so far as the judgment of the learned judge against the dock company is concerned. But with regard to the judgment which he has given against the *Mystery*, it seems to be founded on a misapprehension that her owners were responsible because there was no statutory enactment relieving them from liability, as there is in the case of the compulsory employment of pilots. The decision of Dr. Lushington in *The Bilbao* (Lush. 149) deals with this point, and lays down the principle that the shipowner is not to be held responsible for obeying under compulsion of a statute any order of a harbour-master who is a stranger to him. The statute in this case is the Harbours, Docks, and Piers Clauses Act 1847, incorporated in the defendant company's Act, which imposes the obligation of obeying the orders of the dockmaster or his assistant. The learned President has dealt with the question of the dock foreman's authority to give the orders he did. The dock officials were not in any sense the servants of the owners of the *Mystery*, and the owners cannot, according to the well-established principles of the common law, be held responsible for the acts of such persons. I think the principles upon which *The Halley* (18 T. L. Rep. 879) was decided are exactly analogous and applicable to the present case, and, according to these principles, the owners of the *Mystery* are not liable for the collision.

Aspinall, K.C., for the plaintiffs (respondents), asked on the authority of *The River Lagan* (58 L. T. Rep. 773) that the dock company should be

ordered to pay the whole of the costs both of the plaintiffs and of the owners of the *Mystery* in the court below and of the appeal.

Pickford, K.C. (*contrari*).—There is no hard-and-fast rule regarding costs in cases of this kind, and the question is always one for the discretion of the court in each case. The facts in *The River Lagan* are different from those in this case, as the plaintiffs in this case commenced their action against the successful defendants, got judgment against them in the court below, and sought to uphold that judgment here. In any case the dock company ought not to be made to bear the plaintiffs' costs of the appeal.

The PRESIDENT.—I think the plaintiffs acted reasonably in joining both parties as defendants, and, following the decision of Sir James Hannen in *The River Lagan*, the whole burden of costs should fall on the unsuccessful defendant. I do not see any reason for dividing the costs in the court below and the costs here, and I shall therefore order the dock company to pay both sets of costs, here and in the court below.

Judgment accordingly.

Solicitors: for the owners of the *Mystery* (appellants), *Clarkson, Greenwell, and Co.*; for the London and India Docks Company (appellants), *Turner, Son, and Foley*; for the owners of the *William Adamson* (respondents), *C. E. Harvey*.

House of Lords.

Feb. 10 and 14.

(Before the LORD CHANCELLOR (Halabury), Lords ASHBOURNE, MACNAGHTEN, SHAND, BRAMPTON, and LINDLEY.)

DOUGAN v. MACPHERSON. (a)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Trust—Fiduciary relation—Purchase by trustee of beneficiary's interest—Inadequate price—Concealment of valuation.

The appellant and his brother had vested interests in equal shares in property included in a settlement and a will, subject to their mother's life interest. The appellant was a trustee both under the settlement and the will. In the lifetime of their mother the brother offered to sell his interest to the appellant, but before the offer was accepted the mother died. The brother, who was in impecunious circumstances, again offered to sell his interest. At this time the appellant had before him a valuation of the trust estate which he did not disclose to his brother, and he agreed to purchase his share at a price considerably below the valuation. The brother afterwards became bankrupt.

Held (affirming the judgment of the court below), that the trustee in the bankruptcy was entitled to have the sale set aside on payment to the appellant of the price which he had paid.

THIS was an appeal from a judgment of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk (Macdonald), Lords Trayner and Moncreiff), Lord Young dissenting,

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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who had affirmed a judgment of the Lord Ordinary (Lord Stormonth-Darling).

The case is reported 3 F. 553; 38 Sc. L. Rep. 406.

The action was brought by the respondent, as trustee in the bankruptcy of James Dougan, to set aside a sale by him to his brother John Dougan, the appellant, of his share in certain trust funds.

The facts appear sufficiently in the headnote above.

The Lord Ordinary held that the sale must be set aside, and his judgment was affirmed by the Second Division.

J. Crabb Watt (of the Scotch Bar) and *J. George Joseph* appeared for the appellant.

The *Lord Advocate* (Graham Murray, K.C.) and *E. Munro* (both of the Scotch Bar), who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellant their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: I cannot help saying that I feel somewhat surprised at the persistent argument which has been placed before your Lordships in this case, in spite of the rule of equity, which is perfectly clear to my mind and cannot be departed from, upon which we are asked, for the first time I believe, to place a different construction. Arguments have been addressed to your Lordships as if this were a question between two persons perfectly independent of each other, each man having a right to make the best bargain he can for himself. Undoubtedly that was the view taken by the appellant here, for he frankly says so: "I do not see that fairness has anything to do with it; if a man sells at his own valuation and another buys, it has nothing to do with fairness." He had no conception of the duty which he himself owed as trustee to the person with whom he was dealing as beneficiary and *cestui que trust*. The result, to my mind, is manifest. The appellant acted in pursuance of what his own belief was, that he had no such duty at all, and that if he had secret information in his possession as to what the value was, he might by concealing that information obtain 300*l.* or 400*l.* more than he would have done if the person with whom he was dealing had been acquainted with the value which a skilled valuer had put upon this property. Certainly it is an absolute novelty, to my mind, to hear it gravely argued that such a transaction as that can stand. I think that every learned judge who has dealt with this question has said that a court will always regard with great suspicion such a transaction, and will call upon the trustee to show that he has given full information, that he has kept back nothing, and that he has given an adequate price. Both these things fail here. The trustee did not give an adequate price. We know now that the price was too little in any view of it. He certainly did not communicate the information which he possessed; and when I say that, it is not for those who are impeaching this transaction to prove the negative—it is for the trustee to prove affirmatively that the information was given. To my mind, it is perfectly manifest that the information was not given, and I say so for two reasons: In the first place, when the

appellant is challenged in cross-examination to show that he did give it, he never suggests that he did, or that he had taken any means to do it, or that he had taken any care that the information should reach his brother. On the contrary, he says if they wanted to find out let them go to their own agents and not come to him. That is the line which he takes. I assume, therefore, from his own statement, that he could not prove that the information was imparted to his brother. There is another reason, if one applies one's common sense to it. Seeing the view which he took of his rights and of his own position—namely, that he was perfectly independent, and that he was transacting business with a person to whom he owed no obligation at all—am I to suppose that he went out of his way to do what no ordinary person dealing with another would do—namely, show him something which would enhance the value of the property which he was buying? That is not the ordinary course of mankind. Although they were brothers they do not seem to have been on particularly good terms with each other, and he himself repudiates the idea that he was giving anything out of the way to his brother. He says: "If he does not know, let him ask his own agents." Under these circumstances it seems to me that it is burning daylight to say that this transaction cannot stand. It is perfectly obvious, to my mind, that it must be set aside. The only further observation that I wish to make is that I am a little surprised to find that Lord Young in his judgment uses two phrases, and never gives any exposition of the sense in which he uses them. He says: "There is no legal objection to a trustee under a settlement purchasing the interest of a beneficiary so long as he acts uprightly and fairly"; and later on he says: "The transaction will be held to be legal if it is proved that the trustee has acted fairly and honestly"; then the transaction will stand. That is quite true, but the whole question is, Upon what facts does his Lordship rely to justify the use of those adverbs "uprightly," "fairly," and "honestly"? To my mind, it was neither honestly, fairly, nor uprightly done, and the transaction must be set aside. I therefore move your Lordships to dismiss the appeal with costs.

LORD ASHBOURNE.—My Lords: I concur. I think it impossible to conceive a clearer case. It was the absolute and obvious duty of the appellant in this case, if he thought that he could maintain the transaction upon which he had entered, to have present to his mind the distinct duty which he owed to his brother. In his evidence he says: "I do not see that fairness has anything to do with it." I think that this governed his entire conduct. He was thinking of the best bargain that he might obtain for himself. In common with all your Lordships who have taken part in this hearing, I am of opinion that it was not dealing fairly; that keeping back and non-disclosure of the valuation is a circumstance that cannot be explained, and cannot be got over, and it makes the case an overwhelming one for affirming the decision of the court below.

LORD MACNAGHTEN.—My Lords: I entirely concur. I must say that I am surprised that this action was ever defended, and I am astonished that after two adverse decisions the appellant should have had the courage to come to this

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House. As far as I am aware, there is no difference whatever between the law of England and the law of Scotland in relation to the duties and obligations of trustees when they are dealing with their *cestui que trust*. I do not find that the law is stated anywhere more concisely and more clearly than it was in the judgment of Lord Cairns, L.C. in *Thomson v. Eastwood* (2 App. Cas. 215). Now, did the appellant in this case give full value? Clearly not. Did he give all the information which he possessed to his brother? Most certainly he did not. He had in his pocket a valuation showing exactly what, according to the opinion of a most experienced valuer, this property was worth. He had it in his room at the time when his brother called, and he did not show it to him. He did not even give it to the agent, the person to whom he says that his brother might have gone. That was keeping back information which it was his bounden duty to have conveyed to his *cestui que trust*. And it does not matter in the least how or under what circumstances the information was gained; if he had that information he was bound to place it at the disposal of his *cestui que trust* with whom he was dealing.

Lord SHAND.—My Lords: I am of the same opinion, and I would not add one word to what has been said by your Lordships if it were not that the case is one coming from Scotland. With regard to the law of Scotland, I have only to emphasise what has fallen from Lord Macnaghten. It has not been suggested that there is any distinction in the law of trusts applicable to such a case as this existing between the law of England and the law of Scotland. The fiduciary relation is the same; the duties and obligations of trustees in such cases are the same in Scotland as they would be in England. Here the trustee plainly did not realise or appreciate the duty which lay upon him to give the beneficiary full information as to his position in entering into this transaction. He makes this quite clear by his own evidence. He had in his possession—I do not care how he acquired it—the valuation which has been so much spoken of. That is a fact, and that fact he was bound to disclose when he came to transact with reference to a proposed acquisition of the share of a beneficiary. He failed to do so, and the failure is fatal in the question as to the validity of the transaction. With regard to what Lord Young said, and the expressions which have been referred to in the judgment of the Lord Chancellor, I will only say that it might have been possible to suggest that there was integrity, uprightness, and honesty on the part of the appellant if it had been a transaction between strangers, and if there had not been the relation of trustee and beneficiary subsisting between them. But the moment that you bring into the case that the appellant was a trustee, having the duties lying upon him as a trustee in dealing with a beneficiary, and transacting or negotiating for the purchase of that beneficiary's share of the estate, the question of integrity and honesty drops out of the case. I do not say that he was acting fraudulently, but certainly he was acting in violation of the duty which he owed to his brother in his character of a beneficiary under the trust. I have therefore no hesitation in saying that the case is an extremely clear one, and in concurring in the judgment proposed by your Lordships.

Lord BRAMPTON.—My Lords: I concur, and I cannot help saying that I think the appeal a frivolous and vexatious one.

Lord LINDLEY.—My Lords: I am of the same opinion. I will only add that no equity lawyer, being told that the valuation was not disclosed by the trustee to his *cestui que trust*, could uphold this transaction for a moment.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Ernest Salaman, Fort, and Co.*, for *Clark and Macdonald*, Edinburgh.

Solicitors for the respondent, *Almond and Co.*, for *St. Clair Swanson and Manson*, Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 13 and 31.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

HOPE v. HOPE. (a)

ORIGINAL MOTION.

Practice—Appeal—Security for costs—Form of order—Bond to be given “to the satisfaction of the judge in chambers.”

In orders for security for the costs of appeals in the Chancery Division, the practice, as in the King's Bench Division, is to require that the security be approved by the judge in chambers.

NOTICE of appeal having been given by the plaintiff in an action, an order was made on the 19th June 1901 by the Court of Appeal, on the application of the defendant, that the plaintiff should procure some sufficient person on his behalf to give security by bond to the defendant in the penalty of 100*l.* conditioned to answer any costs occasioned by the appeal in case any should be awarded to be paid by the plaintiff to the defendant, or that the plaintiff should pay 100*l.* into court to answer the costs of the appeal.

Thereupon the plaintiff tendered to the defendant a bond for 100*l.* executed by his wife.

The defendant refused to accept the bond, upon the ground that it was an insufficient security; and he gave notice of motion that the plaintiff might be ordered within fourteen days to procure some sufficient person on his behalf to give security by bond in 100*l.* to answer the costs, or that that amount might be paid into court, or that, in default of such security being given, the appeal might be dismissed with costs without further order.

On the 18th Dec. 1901 the Court of Appeal ordered the motion to stand over to give the plaintiff an opportunity of finding and completing his security.

The plaintiff then applied to Eady, J., sitting at chambers, for an order that the defendant should shew cause why he refused to accept the bond as security for the costs of the appeal.

On the 9th Jan. 1902 the master dismissed this application with costs.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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The plaintiff took out a summons asking that the matter might be heard by the judge in person.

The defendant's motion again came on for hearing, and he asked that the appeal might be dismissed as the plaintiff had failed to comply with the original order to give security for costs.

A. F. Peterson for the applicant.

The respondent in person.

The Court (Williams, Stirling, and Cozens-Hardy, L.J.J.) held that the practice with regard to orders for security for the costs of appeals from the King's Bench Division—as to directing that the security be approved—would in future be the practice with regard to appeals from the Chancery Division; and that the order of the 19th June 1901 would therefore be amended by inserting after the words "security by bond" the words "to the satisfaction of the judge in chambers"; and, the plaintiff being dissatisfied with the order of the 9th Jan. 1902 and withdrawing the summons which he had issued appealing therefrom and the defendant consenting, the matter was accordingly adjourned to the judge in person in chambers; and the defendant's application was ordered to stand over until the judge had disposed of the question of the security.

Solicitors for the applicant, *Hasties*.

Solicitors for the respondent, *Lumley and Lumley*.

Jan. 14, 22, Feb. 12, 13, and March 26.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.J.J.)

BIRCH v. BIRCH. (a)

APPEAL FROM THE PROBATE DIVISION.

Probate—Grant—Action for revocation on ground of fraud—Staying proceedings—Res judicata—Jurisdiction of court.

Although the court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the judgment which raise a reasonable probability of the action succeeding, yet it cannot be laid down as a hard and fast rule that the evidence thus produced must be of such a character that it would be evidence in the action itself. If the facts alleged to have been discovered are so evidenced and so material as to make it reasonably probable that the action will succeed, the action ought not to be stayed.

Where an action is an independent proceeding to set aside a judgment on the ground that it was obtained by fraud, it is maintainable when that judgment has been procured by the fraud of a party to the action. But a mere general allegation of fraud, without particulars, cannot avail.

The limitation that a judgment can only be set aside, if at all, against those who procured it by fraud, does not apply to a probate action, the will being either good or bad against all the world.

The plaintiff in an action against executors claimed, on the ground of fraud, to revoke the probate of a will which had been decreed to have been proved in solemn form of law.

The defendants moved to stay the proceedings and to dismiss the action.

Held, that the evidence of the alleged fraud was insufficient; and that, therefore, the action ought to be stayed as being frivolous and vexatious, and the statement of claim struck out as disclosing no cause of action.

Decision of Barnes, J. on a different state of evidence (86 L. T. Rep. 118) reversed.

THE facts of this case as stated in the written judgment of Cozens-Hardy, L.J. were as follows:—

Arthur Birch died in April 1899. No will being forthcoming, letters of administration were granted to Walter George Birch, Edwin Birch, and Jesse Joseph Birch.

In the month of Dec. 1899 two actions were brought, one by Mrs. Guise as plaintiff against the three administrators, and Charles Birch and Henry Birch as defendants, and the other by Edwin Birch, Jesse Joseph Birch, and Amy Birch as plaintiffs against Walter George Birch as defendant. These actions were consolidated.

Each action claimed revocation of the letters of administration, and probate was claimed of an alleged will of the 18th Dec. 1897, or, alternatively, of alleged instructions from a will dated the 8th Dec. 1897.

The document of the 18th Dec. was the first which was produced, it being forwarded from America by one Sanders, who, with one Ford, appeared to be the attesting witnesses.

The instructions, which were subsequently forwarded from America, purported to be attested by the same two witnesses, and also by Mr. Barnes.

Walter George Birch pleaded that both of these documents were not signed by the deceased, or by any one at his direction, and that they were not executed according to the provisions of the statute.

The consolidated action came on for trial before the President without a jury on the 22nd June 1900. Neither Sanders nor Ford was forthcoming. The existence of such a person as Ford was challenged. Expert evidence as to handwriting was given for and against the will. Barnes, however, was called as a witness, and severely cross-examined; and in the result the President pronounced for the force and validity of the will of the 18th Dec., and ordered the letters of administration to be revoked. So far as appears, all the next of kin were parties to the consolidated action.

The present action was commenced by Walter George Birch as plaintiff against Edwin Birch and Amy Birch, the executors of the will, and it asked that the probate of the pretended will of the 18th Dec. might be revoked.

The writ was subsequently amended by adding the next of kin, and also Henry Guise, the husband of Ada Rose Guise, as defendants.

The statement of claim contained the following allegations:

(3) The said judgment was obtained against the plaintiff by the fraud of Frederick Charles Barnes, Alfred Sanders, and a person passing by the name of W. G. Ford, and Henry Guise, the husband of Ada Rose Guise, one of the plaintiffs in the aforesaid consolidated action. (4) In July 1899 the said Alfred Sanders, at the instigation of and in conjunction with the said Henry Guise, drew up and forged the pretended will

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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dated December 18, 1897. The said Alfred Sanders, in pursuance of the said fraud and at the expense of the said Henry Guise, went to Baltimore, United States of America, and from there wrote a letter, dated August 28, 1899, falsely describing the circumstances under which the said pretended will was executed. (5) In September 1899, in further pursuance of the said fraud, the said Alfred Sanders drew up and forged a document purporting to be a will executed by the said deceased on December 8, 1897. The said Alfred Sanders was instigated to draw up and forge the said document, dated December 8, 1897, by the said W. G. Ford, acting on behalf of and as the agent of the said Henry Guise. The said Alfred Sanders, W. G. Ford, and Frederick Charles Barnes fraudulently signed the said document as attesting witnesses to the due execution thereof by the said deceased. (6) In pursuance of the said fraud the said Henry Guise and Frederick Charles Barnes falsely represented upon oath to the court that they were strangers to and unacquainted with each other prior to on or about July 29, 1899. (7) In further pursuance of the said fraud the said Henry Guise and Frederick Charles Barnes concealed from the court the fact that the said W. G. Ford had been in personal communication with the said Alfred Sanders between July 13, 1899, and November 15, 1899.

The defendants moved before Barnes, J. to stay proceedings in this action.

No evidence was filed in support of the motion, but the plaintiff filed an affidavit by himself stating that the will of the 18th Dec. was entirely in the handwriting of Sanders, and verifying a letter, dated the 10th Sept. 1900, from a Mrs. Smith, of San Francisco, addressed to the authorities of Scotland-yard, enclosing what purported to be a confession by Sanders that he had forged the will at the suggestion and with the help of the defendant Henry Guise, then Henry Bagley.

It was decided by Barnes, J. (86 L. T. Rep. 118) that the court had jurisdiction to set aside the judgment obtained by fraud, and that the action must be allowed to proceed. His Lordship abstained from expressing any opinion one way or the other upon the merits of the case. But, the plaintiff having sworn to the facts which he alleged, the motion was refused.

From that decision some of the defendants now appealed.

On the appeal an opportunity was afforded to the parties to adduce further evidence.

There was expert evidence as to the letter enclosing the confession and the confession itself being in the handwriting of Sanders, who also wrote the will. There was evidence intended to prove, or at least to suggest, that Barnes was well known to Henry Guise (formerly Bagley) before the so-called accidental meeting, and, indeed, that there had been previous monetary transactions between them. On the other hand, Barnes and Henry Guise made affidavits entirely denying this, reasserting the truth of the evidence which they gave at the trial before the President, and suggesting that a mistake had been made between Henry Bagley and his brother, James Bagley. The latter made an affidavit stating his own connection with Barnes, and thus confirming to some extent the evidence of Barnes and Henry Guise.

C. A. Russell, K.C. and Whitmore L. Richards for the appellants.—Even with the additional affidavits that have been filed there is no evidence which can be used at the trial in support of the allegations in the statement of claim. The onus

is upon the plaintiff to show a reasonable probability of being in a position to prove fraud at the trial. The appellants require no evidence to prove that the judgment of the President in upholding the will was right. The action should therefore be stayed as vexatious.

Inderwick, K.C. and Willock for the respondent, the plaintiff, read and commented upon the affidavits.

Chaytor for another respondent.

Whitmore L. Richards in reply.—The action seeks to reopen matters in issue in the probate proceedings, and concluded by the solemn judgment of the court. We do not deny that the court has jurisdiction to impeach a decree obtained by the fraud of parties to it:

Flower v. Lloyd, 37 L. T. Rep. 419; 6 Ch. Div.

297; 39 L. T. Rep. 613; 10 Ch. Div. 327;

Wyatt v. Palmer, 80 L. T. Rep. 639; (1899) 2 Q. B. 106.

But it is admitted here that the parties to the former suit—Henry Guise not being a party—were innocent of the fraud alleged, and there is no authority to show that a fresh action will lie in such a case. The fraud alleged was not committed in obtaining the decree, but in procuring the will, and it was directly involved in the issue raised and determined in the former suit. The matter is therefore *res judicata*, and the plaintiff is estopped by the judgment already pronounced:

Priestman v. Thomas, 51 L. T. Rep. 843; 9 P. Div. 70, 210.

The statement of claim and the evidence show that the plaintiff relies upon new facts which have come to his knowledge since the decree. Forgery or no forgery was the issue in the first action, and the alleged new facts only go to show who were the persons who forged the will and procured the forgery, and that two of the witnesses committed perjury. In so far as forgery is alleged, the issue in the present action is identical with the first suit. In so far as new facts are alleged to exist, the procedure is analogous to a motion for a new trial under Order XXXIX., and the action ought to be stayed:

Young v. Kershaw; *Burton v. Kershaw*, 81 L. T. Rep. 531.

The evidence necessary to sustain an application for leave to file a bill of review under the old Chancery practice in such a case is still necessary when the defendants (as in the present case) challenge the plaintiff to show a case which will induce the court to allow the action to proceed:

Young v. Keighley, 16 Ves. 348;

Flower v. Lloyd, 37 L. T. Rep. 419; 6 Ch. Div. 297, at p. 300.

[COZENS-HARDY, L.J.—There was a recent case in the House of Lords which dealt with the question now before the court.] That was the case of *Boswell v. Coaks*. (a) It

(a) HOUSE OF LORDS.

April 30, 1894.

BOSWELL v. COAKS (No. 2)

AN action was brought to have it declared that the judgment given by the House of Lords in *Boswell v. Coaks* (No. 1) (55 L. T. Rep. 32; 11 App. Cas. 232) on the 22nd Feb 1886 was obtained by the fraud of the respondent and was not binding upon the appellant.

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shows that, although leave is no longer a necessary preliminary, the court has the same jurisdiction, which it will exercise with even greater

North, J. dismissed this action as against all the parties but one, on the ground that it was frivolous and vexatious, and an abuse of the process of the court.

On appeal to the Court of Appeal the decision of North, J. was affirmed.

On appeal to the House of Lords the following written judgment was delivered, affirming the decision of the Court of Appeal :

EARL OF SELBORNE.—My Lords : Although the matter does not seem to me to be one of difficulty, yet I regard it as one involving principles of infinite importance. The object of this action is to set aside a solemn judgment of this House affirming a judgment of the High Court, and reversing that of the Court of Appeal, by which the judgment of the High Court was reversed. The learned counsel of course have felt—and all your Lordships must feel—that it is not for us, at anybody's invitation, to review upon the merits which were before the House the decision then arrived at. The judgment is binding: it is a final and conclusive protection against further litigation to the party in whose favour it is passed, unless some adequate ground can be shown in support of a proceeding to set it aside in due course of law. I am not at all prepared to say that such a proceeding would be impossible. There are two classes of cases, perhaps, which ought to be distinguished for this purpose. One is that of which the celebrated case of the *Duchess of Kingston* (2 Sm. L. C., 9th edit., 812) is an example, in which by the collusion of the parties the process of the courts has been abused and the whole proceeding may be described as it was described in language used in that case as *fabula non judicium*. This, at all events, is not a case of that kind. The present case falls within the second class—namely whether it is not sought to treat as a nullity what has passed, but to undo it judicially upon judicial grounds, treating it as in itself, and until judicially rescinded, valid and final. Now, it is not denied that, under the new practice of the High Court, a motion may be made to stay an action before it is brought to the hearing, on grounds which satisfy the court that it is of such a kind, or brought under such circumstances, that it ought not to be permitted to proceed to a hearing in the ordinary course. An application for that purpose must, of course, be made; but when the application is made, it is, as I conceive, the bounden duty of the court to take into consideration the nature and the circumstances of the case, as well as any other circumstances which may be thought to bear upon the question, whether it should go to a hearing or not. And if it be possible to present to the mind a kind of case in which the exercise of such a jurisdiction is most necessary—provided that grounds do not appear to the court sufficient to justify the further prosecution of the action—it must, I conceive, be a case like this, in which a solemn judgment of two courts, the last being the House of Lords, is sought to be rescinded and set aside. The old practice of the Court of Chancery applicable to bills of review may not be, and I assume for the present purpose that it is not, now in use. A simpler and less formal and technical code of procedure generally has been adopted, which does not expressly require a preliminary application to the court when a proceeding in the nature of a bill of review to set aside a formal judgment otherwise final is taken. The same new code of procedure, while omitting to repeat the whole rule of the court requiring leave to be given for the commencement of such an action, contains this other power of an equally summary nature, that the defendant who is harassed by the action can apply to the court, if the case be a proper one, to stay its further prosecution. That is what has been done in this case. I conceive

caution than before the Judicature Acts. A plaintiff must still show that the new matter could not with reasonable diligence have been

that the principles applicable to an old bill of review ought to be kept in mind and ought to be applied in their full force, and even with greater freedom than before, when an application of this kind is made to stay the prosecution of an action to get rid of a former judgment. I will not lay stress upon its being a judgment of this House in the present case, because I think it right to assume that, if a judgment of the Court of Chancery, or of the High Court, is in a proper way proved at the hearing of the cause to have been obtained by fraud, it is one which the court can remedy. I say that, not by any means dissenting from the spirit of the observations made in *Flower v. Lloyd* (37 L. T. Rep. 419; 6 Ch. Div. 297; 39 L. T. Rep. 618; 10 Ch. Div. 327) by that great judge James, L.J. and concurred in by Thesiger, L.J. that the court ought to be even more than usually cautious how it attends to all sorts of reasons which may be brought forward, plausible upon the face of them, for disturbing such a solemn judgment, having regard to the enormous mischief of unsettling the principle on which the doctrine of *res judicata* is established. Upon that point I will only add this, that it seems to me that in every case of this kind, if a motion to stay an action is so made, the court ought to receive such evidence *pro* and *con*. as is material to the question whether there has really been, since the former judgment, a new discovery of something material in this sense, that *prima facie* it would be a reason for setting the judgment aside if it were established by proof. Now in this case I do not think that the allegations in the statement of claim are adequate. It is not necessary to determine that point, because it is admitted that an order such as that now under appeal may properly be made (in some cases at all events) not merely when a demurrer would have lain under the old practice, but when some facts are added by affidavit besides what appears in the statement of claim. But I must say that the statement here is singularly meagre, to say the least, and indirect, and I cannot but think it is so not accidentally—not through any slip on the part of the learned counsel who may have prepared the pleading—but designedly, and because the facts, so far as known, would not have justified a more positive and direct statement of that which is sought to be inferred. The case depends upon this, that it is proposed to offer in evidence of fraud and misrepresentation testimony which would go to prove that a shorthand writer's abstract was made, under the instructions of Coaks, I suppose, of a letter written to Bunyon on the 15th July 1872, and that that shorthand note contained a paragraph which was omitted from the press copy of the letter, or that which purported to be a correct transcript of the press copy produced and used upon the former trial. It is said that the existence of this shorthand note has been discovered since the judgment of this House in the former action. I am not disposed to call into question the sufficiency of Emerson's evidence to prove the new discovery of the matter of which he speaks. Supposing the letter to have been written in the same terms, which may or may not have been the case, and which might be controverted if this cause went to a hearing, it would not have affected the matter; but for the present purpose I will assume this to represent exactly the terms of the letter actually written, and of the part not produced before. I will now read the manner in which it is pleaded as material for the disturbance of the former judgment. Nothing whatever is alleged upon the matter of fact except in par. 51 of the statement of claim. It is said that this sheet was "abstracted from his press copy letter-book in order to avoid discovery of its contents," and that the contents were "deliberately concealed," although there was in the

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discovered earlier, and that it is so material that had it been adduced at the trial it would have probably affected the result:

Hungate v. Gascayne, 2 Ph. 25;

Thomas v. Rawlings (No. 3) 34 Beav. 50.

possession of Coaks "secondary evidence of them, well knowing that they were of vital importance to the questions at issue in the action." Now, I stop there, and I have no hesitation in saying that, although it would have been an extremely improper thing for Coaks deliberately to abstract anything whatever from the documents produced, material or immaterial, if he did so under the idea that it was material, yet, when it comes to be a question whether a solemn judgment is to be undone by a proceeding of this kind, the animus of Coaks is not enough for the purpose. It must appear to the court that that which was abstracted was material. Coaks denies in his affidavit this improper purpose imputed to him; but even if it had existed, if the document is not shown to be material, then the conditions are not fulfilled upon which a *res judicata* of this kind can be undone. But the paragraph does not stop there. This document "showed that the defendants Coaks and Bunyon both knew before the contract was approved, and whilst the skeleton case was still before Lord Romilly, that the London and Provincial Law Life Office were willing to insure the defendant Harvey's life at a premium of 8l. or 10l. per cent., whereas the said defendants represented to Lord Romilly that 12 per cent. was the lowest premium at which the life could be insured, and that the London and Provincial Law Life Office would not insure the life at all." I cannot help thinking that that is not the form in which the case ought to have been stated, if the defendant had discovered not only that there was such a letter, but that the representation to Lord Romilly was not true in point of fact. The letter does not appear to me to show any such thing. The most that can be said of the letter is that, at the time when it was written Coaks seems to have been under the impression that the London and Provincial Law Life Office might be willing, or were willing, to insure at 8 or 10 per cent. for ten years, and that he would like to get an insurance with them. If we are to take the document as expressing the terms of what was actually written, judging by what appears upon the face of the document, the impression upon Coaks's mind seems to have been produced by some inference drawn by him from a letter which he had then recently received from Bunyon; and the letters which are referred to, the only letters which are referred to which ever were or are now in evidence (and it is not alleged that any others have been discovered), appear to me, and I think to all your Lordships, not to warrant any such inference. Coaks suggests, speaking twenty-two years after the letter was written, that it was probably written by him under a confusion arising from a mistake in his mind as to the office for which the particular medical gentleman was acting; and I cannot help saying that unless to the other suggestions which have been made this is to be added, that other letters have been suppressed, that appears to me to be a much more probable explanation than any which can be found by comparing that letter with the letters actually written by Bunyon and in evidence. But the letter, at all events, does not show that Coaks (I will say nothing about Bunyon, for it clearly does not show it as to him) stated anything which was not actually the fact; and the statement of claim ought to have alleged, if the truth had been so, that the fact was that the London and Provincial Law Life Office were willing to insure upon those terms, and that the plaintiff had recently discovered that they were so willing. In point of fact, if Hardy's evidence is not to be rejected as improper to be considered at this time, it seems to me to prove at this

[COZENS-HARDY, L.J.—The case of *Thomas v. Rawlings* (*ubi sup.*) is reported on appeal in 11 L. T. Rep. 721; 13 W. R. 248.] The evidence here does not satisfy the conditions referred to in those cases. The alleged confession cannot

distance of time, conclusively and incontrovertibly, that the London and Provincial Law Life Office had done nothing whatever, had taken no step whatever, had given no ground whatever for any such belief as that they were willing to insure upon those terms; and the statement made to Lord Romilly three days before appears to me upon the affidavits now before the House, taken in connection with this letter, to be absolutely and unquestionably true—true in a sense which could not to a reasonable mind have been affected in the slightest degree by the knowledge, if the knowledge had been communicated, that Coaks had been three days afterwards under the erroneous impression that the London and Provincial Law Life Office would do that which they never expressed any idea of doing and which your Lordships must infer they were never asked to do. My Lords, nothing was done upon the footing of this letter. It is not alleged that anything of the kind has happened. The whole case therefore seems to me to be this: that a solemn judgment of your Lordships' House is to be brought under review, and that the parties are to go to a trial of it, because in this, I will not say equivocal manner, but indirect manner, it is rather implied than asserted that a statement was in substance false, which upon the evidence offered in support of this motion appears to have been in substance true. Well, there was an opportunity of cross-examining Hardy and Coaks. The appellant, in his affidavit, tells us that he deliberately determined not to use that opportunity; he chose to take his stand upon his supposed right, on putting before the court such a statement of claim as that which is before your Lordships, to go to a hearing. The affidavits sworn by the appellant and Emerson show, I think, that the appellant's object is not so much to substantiate this allegation or anything connected with it, but to establish this and other things besides, which are now abandoned at the bar, and that really he thinks by alleging this he has a right to go on and conduct in a finishing manner, with the hope and with the expectation of discovering new things in addition to this, a suit the object of which is to destroy a judgment of this House. In my judgment he was mistaken in the idea that it was not the proper time to lay a foundation for his suit by evidence then; and I most strongly suspect that he never would have acted upon any such idea had he been in a position to meet the case at all, by any evidence. There is no possible ground for surmising that Hardy either does not speak the truth or gives such imperfect evidence that upon that material matter anything which could effect the judgment of any court of justice could ever be added to it because, in the first place, the suggestion that, though no application was ever made to the London and Provincial Law Life Office, or considered by them, there may have been private conversations with individual directors of that company, is one of so perfectly arbitrary a kind, that in my judgment your Lordships ought not for a moment to entertain it unless there be positive proof of it given; and there is not so much as an allegation, for there is no allegation at all as to the London and Provincial Law Life Office; the only allegation is as to what is supposed to be proved by Coaks' letter. But, in my judgment, to make Coaks' letter material, it was absolutely necessary to go on and show that the London and Provincial Law Life Office was prepared to insure, and in the absence of that, the letter is perfectly worthless for any purpose bearing upon the decision of the case. Was or was not this a matter proper to be gone into upon the present motion? That seems to me to be the only question which ultimately arises; and in my judgment it was most material to that ques-

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possibly be made evidence in the absence of Sanders. It is not suggested that the plaintiff can produce him. The other allegations are simply based upon "information and belief" without disclosing the source of knowledge, and this is clearly insufficient, and renders the evidence inadmissible:

Re J. L. Young Manufacturing Company Limited.
83 L. T. 418; (1900) 2 Ch. 753.

Moreover, the witnesses Barnes and Guise have both made affidavits confirming the evidence given in the previous case, upon which it is acknowledged that the President relied, and the mere allegation of perjury by them is not alone sufficient to support this action:

Flower v. Lloyd, 39 L. T. Rep. 613; 10 Ch. Div. 327.

We also rely on the decisions as to the evidence required upon motions for new trial on discovery of new facts. The Court of Appeal has jurisdiction to enlarge the time for appealing in a proper case, and will also grant a new trial if some new evidence has been discovered. But such evidence must be so definite and conclusive in character as to materially affect the result previously arrived at, and not merely oath against oath:

Anderson v. Titmas, 36 L. T. Rep. 711.

Furthermore, if the plaintiff's case is a substantial one it discloses a criminal offence, and these proceedings should be stayed until the defendant Henry Guise is prosecuted to conviction:

Appleby v. Franklin, 54 L. T. Rep. 135; 17 Q. B. Div. 93.

If the action is allowed to proceed there can never be finality in litigation. A defeated litigant would be in a position to bring an action to set aside any adverse decision, file a statement of claim alleging fraud, and support it by an affidavit based on information and belief, while the alleged fraudulent party is not proceeded against criminally. In actions where the issue in the first instance is "fraud or no fraud," and fraud is not sustained, the defeated litigant ought not to be permitted on the subsequent discovery of some new element of fraud to raise the same issue in a second action. They referred also to

Thurtell v. Beaumont, 1 Bing. 339;

Baker v. Wadsworth, 67 L. J. 301, Q. B.

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tion, which beyond all doubt ought to have been gone into upon this motion—namely, whether anything material to disturb (if proved) the judgment of this House had been newly discovered by the plaintiff. That involves a double proposition; first, that something has been newly discovered, which is all they have attempted to prove, and then that that something is material. And there is a total defect both of allegation and of evidence of that which alone could make it material. That seems to me to be a matter most proper, I will say more, for the purposes of justice, most necessary to be gone into upon the motion which was actually made; and I have no hesitation in saying that in my opinion it has been dealt with most properly by the courts below, and that your Lordships ought now to dismiss this appeal with costs.

Lords WATSON, MACNAGHTEN, MORRIS, and SHAND concurred.

Appeal dismissed with costs.

March 26.—The following written judgments were delivered:

WILLIAMS, L.J.—We think that the judgment must be reversed, but it is right to state that the evidence before us is very different from that before Barnes, J. The question, which in form has to be decided in the present case, is whether or not the action ought to be stayed as frivolous and vexatious, and whether the statement of claim ought to be struck out as disclosing no cause of action. Now, as to the former part of the question—that is, whether the action is frivolous and vexatious—one is bound to include as an element to be considered the fact that there has already been a judgment binding the plaintiff, affirming the signature of the will of the 18th Dec. 1897 to be the signature of the testator Arthur Birch, and by necessary implication the attestation by the witnesses of the will, and by the terms of the judgment as delivered the attestation of the instructions for the 8th Dec. for the will. And I think that the court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the judgment which raise a reasonable probability of the action succeeding. But I do not think that it can be laid down as a hard and fast rule that the evidence thus produced must be of such a character that it would be evidence in the action itself. I can quite conceive of a case in which there was evidence of a fact which would not be evidence in the action itself, which evidence would nevertheless make it impossible to say that there was not a reasonable prospect of the action to set aside the judgment being successful. Suppose a case of a judgment based on the validity of a document vouched by one witness alone; suppose that that witness had sent to the police authorities a confession that the document was forged by him, and that that witness had written to say that he desired to return from abroad to give himself up for trial for the offence of forgery; suppose that the witness had actually taken ship for the purpose of coming to England and surrendering for his trial; and suppose that he was accompanied by an English police officer sent to meet him; suppose then that the ship is reported as lost; none of the matters included in this hypothetical case could be had as evidence on the trial of the action. But I do not think that it would be possible to describe the action as frivolous and vexatious, nor do I think that in such a case the weight to be given to the principle *interest reipublice ut sit finis litium* is such as to compel the court to stay as frivolous and vexatious an action brought to set aside a judgment. I should think that in such a case the action ought to go on, so as to give the plaintiff the opportunity of discovery in the action. Nor do I think that in such a case the discovery could properly be described as "fishing." But in each case it is a question of degree. Is the fact alleged to have been discovered so evidenced and so material as to make it reasonably probable that the action will succeed? If it is, I think the action ought not to be stayed. In the present case my brethren do not think that the evidence of the handwriting of Sanders and the contents of the letter forwarded to the police are sufficient, even in a case in which the evidence which led to the judgment raised in the mind of the judge

who tried the case considerable doubt, if not suspicion, and I do not think I ought to differ from them on such a question.

STIRLING, L.J.—I have had an opportunity of reading the judgment of Cozens-Hardy, L.J., and I entirely agree with it.

COZENS-HARDY, L.J.—This is an appeal from an order of Barnes, J., who refused an application by the defendants to stay all the proceedings in the action, and to strike out the statement of claim on the ground that the question raised has already been heard and adjudicated upon, and that the action is frivolous and vexatious. The facts, so far as admitted or proved beyond question, may be shortly stated. [His Lordship stated the facts of the case as above set forth, and continued:] Now, it is plain that in the action tried before the President the distinct issue was raised whether the alleged will was signed by Birch. The judgment in that action is binding upon the plaintiff unless and until set aside. This is not an appeal by the plaintiff from that judgment, or an application for a new trial. The present action is an independent proceeding to set aside that judgment on the ground that it was obtained by fraud. I do not doubt that such an action may be maintained, at least when the judgment has been procured by the fraud of a party to the action. Here Henry Guise, against whom fraud is alleged, was acting for and as the agent of his wife, who was a party, and she must be affected by his fraud. In *Boswell v. Coaks* (No. 2), Smith, L.J., who delivered the judgment of the Court of Appeal, after dealing with the case against the defendant Coaks, who was alone charged with the fraud, proceeded as follows: "As regards the point taken by the Solicitor-General for the other defendants—viz., that the judgment can only be set aside, if at all, against those who procured it by fraud, and it is not suggested that the other defendants had anything to do with the fraud alleged, this point appears to us to be fatal as regards all the defendants except Coaks, and we think it would be fatal to any further action to set aside the sale of the whole." But I do not think this limitation can apply to a probate action. The will is either good or bad against all the world. The defendants other than Mrs. Guise cannot, therefore, rely upon their not having had anything to do with the fraud of Mrs. Guise's agent. The judgments of the Court of Appeal and of the House of Lords in *Boswell v. Coaks* (No. 2) contain some important observations as to the mode in which a motion such as that which is now before us ought to be dealt with. Lord Selborne points out that it is not sufficient for the plaintiff to allege fraud. It is the duty of the court to receive such evidence *pro* and *con.* as is material to the question whether there really has been, since the former judgment, a new discovery of something material to disturb the former judgment; and Smith, L.J. states that the plaintiff must show a reasonable possibility of the alleged fraud being established. It is plain that par. 3 of the claim is of no importance. A mere general allegation of fraud, without particulars, cannot avail. As to para. 4 and 5, they are based solely on the alleged "confession." But, assuming that document to be written by Sanders, there is no possible mode of making it evidence

in the present action. It is not known whether Sanders is alive, and there is no reasonable possibility of the alleged forgery being established. As to par. 6, this allegation does not seem to me to be directly material to the judgment. It only goes to the credit of two of the witnesses who were examined and cross-examined on this very point. It would be highly dangerous to allow a solemn judgment to be set aside on the ground of alleged perjury by witnesses dealing with a collateral point, more especially when the alleged perjury is absolutely, and with considerable appearance of probability, denied. Upon the whole I have come to the conclusion that upon the materials before us, which are different from those before Barnes, J., this motion ought to succeed. It is not for us to say whether the President arrived at a right decision upon the evidence before him. That must be assumed in the absence of an appeal. If the present plaintiff were appealing, and all questions of time were got rid of, he might apply for leave to adduce further evidence on the appeal. But I think such an application must have failed. Such a document as the alleged confession, which cannot be adduced in evidence, must be wholly disregarded. No documentary evidence recently discovered is suggested. A mere suspicion is not sufficient. The supposition which I have made of an appeal, coupled with an application to adduce fresh evidence, is probably too favourable to the present plaintiff. Certainly the plaintiff cannot be in a better position when he seeks to set aside a solemn judgment. The importance of finality in litigation is very great, and I think it would be wrong to allow the issue to be again tried between these parties as to the validity of the will, which has been admitted to probate. In my opinion the order of Barnes, J. should be discharged, and an order made in the terms of the notice of motion, and the plaintiff must pay the costs here and below.

The Court directed that the plaintiff should pay the costs of the executors in the court below.

Appeal allowed.

Solicitor for the appellants, J. W. Reid.
Solicitor for the respondent, E. W. Reeves.

Monday, Feb. 3.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

KEATES v. WOODWARD. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Costs—Action founded on tort—Action which could have been commenced in a County Court—Recovery of injunction and nominal damages—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 116, sub-s. 2.

Sect. 116, sub-sect. 2, of the County Courts Act 1888 provides that, with respect to any action founded on tort brought in the High Court which could have been commenced in a County Court, if the plaintiff shall "recover a sum less than 10l.," he shall not be entitled to any costs of the action. An action for trespass to land was commenced in the High Court, in which the plaintiff claimed

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an injunction and damages. The real dispute in the action was as to the existence of an alleged right of way. The plaintiff obtained an injunction and nominal damages.

Held, that as the plaintiff had recovered substantial relief besides the amount of the nominal damages, the action was not within sect. 116, sub-sect. 2, and he was entitled to his costs of the action.

St. John's College, Cambridge v. Pierrepont (66 L. T. Rep. 88) overruled.

THIS was an appeal by the plaintiff from a judgment of the King's Bench Division (Wills and Channell, JJ.) holding that the plaintiff was not entitled to his costs of the action.

The action was commenced in the Chancery Division for an injunction and damages in respect of trespass to the plaintiff's land.

Upon the defendant's application under sect. 69 of the County Courts Act 1888, the action was transferred to the Birkenhead County Court.

The defendant contended that the acts alleged to be trespasses were lawfully done in the exercise of a right of way, and the real dispute in the action was as to the existence of this alleged right of way.

At the trial the jury found in favour of the existence of the right of way, and judgment was given for the defendant.

Upon the plaintiff's appeal, the Divisional Court reversed the decision of the County Court and gave judgment for the plaintiff with nominal damages. The court gave him the costs of the appeal, but refused his application for the costs of the action on the ground that they were bound by the case of *St. John's College, Cambridge, v. Pierrepont* (66 L. T. Rep. 88) to hold that under sect. 116 of the County Courts Act 1888 they had no jurisdiction to allow the plaintiff the costs of the action.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides as follows:

Sect. 116. With respect to any action brought in the High Court which could have been commenced in a County Court, the following provision shall apply: . . . (2) If in an action founded on tort the plaintiff shall recover a sum less than 10*l.*, he shall not be entitled to any costs of the action, . . . unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court, or a judge thereof at chambers, shall by order allow costs.

From this refusal to allow him his costs of the action the plaintiff appealed.

F. E. Smith for the plaintiff.—This case is not within sect. 116, sub-sect. 2, and there is no other reason why the plaintiff should be deprived of his costs. The action is not "founded on tort" within that sub-section, because it was brought to obtain a declaration of right:

Chapman v. Midland Railway Company, 42 L. T. Rep. 612.

Neither is it an action in which the plaintiff has recovered a less sum than 10*l.*, within the meaning of sub-sect. 2. The sub-section only applies to a case where pecuniary damages are the gist of the action. Here the substantial relief sought and obtained was an injunction. The damages were a minor matter. This interpretation of the

statute is in accordance with the former state of the law:

Danby v. Lamb, 11 C. B. N. S. 423; 5 L. T. Rep. 353.

That decision has been followed with approval in Ireland:

Bradley v. Archibald, (1899) 2 Ir. Rep. 108.

I submit that the decision in *St. John's College, Cambridge v. Pierrepont* (*ubi sup.*) cannot be reconciled with those cases and ought to be overruled.

Montague Shearman for the defendant.—I agree that unless this case comes within sect. 116, sub-sect. 2, there is nothing to prevent the court from granting the plaintiff his costs of the action. But the case comes directly within the section. A claim for an injunction is not a cause of action. It is only a remedy. It is an additional relief which may be given if damages are not a sufficient remedy:

Martin v. Bannister, 4 Q. B. Div. 491.

The action could not have been brought in the County Court for an injunction alone. It was the claim for damages that gave that court jurisdiction. The damages awarded being less than 10*l.*, the case comes directly within the words of sub-sect. 2 of sect. 116. That sub-section refers only to the amount of money recovered; nothing is there said as to any further relief that may be granted. The sub-section provides that a judge of the High Court can, under certain circumstances, give a certificate that the action was rightly brought in the High Court, and so allow the plaintiff his costs of the action; but no such power is given to a County Court judge, and the Divisional Court in this case had no greater power than the County Court judge.

F. E. Smith replied.

COLLINS, M.R.—This is an appeal from a decision of the Divisional Court in an action which was originally brought in the Chancery Division of the High Court. The claim was for an injunction and for damages in respect of trespass committed on the plaintiff's land. The action was transferred to the County Court under sect. 69 of the County Courts Act 1888, and the trial there resulted in the injunction being refused, the defendant having satisfied the jury that he had a right of way over the plaintiff's land. Upon the plaintiff's appeal, the Divisional Court reversed the decision of the County Court, and ordered judgment to be entered for the plaintiff for an injunction and nominal damages. We must, therefore, now deal with the case upon the footing that the plaintiff was entitled to an injunction and nominal damages. Now, it was contended in the Divisional Court that the plaintiff was entitled to the costs of the action, but the judges considered themselves bound by the case of *St. John's College, Cambridge v. Pierrepont* (*ubi sup.*) to hold that they had no jurisdiction to give costs. That case was an action of trespass. The main issue to be determined was one of title to land, and the plaintiffs claimed an injunction and damages. The action was tried before a judge with a jury. The jury found a verdict for the plaintiffs with 40*l.* damages. The judge gave judgment for the plaintiffs and granted an injunction, but made no order as to costs. The Divisional Court (Day and

Grantham, J.J.) held the plaintiffs were not entitled to costs. Day, J. said: "I am clearly of opinion that in the absence of any certificate or order of the court or judge at chambers expressly giving the plaintiffs their costs, they are not entitled by law to recover any upon this judgment. The action was an action for trespass. It was therefore an action founded on tort. It was one which might have been brought in the County Court, and in which the plaintiffs might have recovered damages in the County Court. It is, therefore, clearly within the terms of the County Courts Act 1888, s. 116. In such a case, if brought in the High Court, if less than 10*l.* is recovered, the successful party is by law not entitled to any costs. The mere claim for the injunction does not take it out of the County Courts Act 1888; otherwise parties might be tempted to tack on a claim for an injunction in every case where it was possible." That case therefore deals with the very point raised here, because it has been argued before us that sect. 116, sub-sect. 2, has the effect which the Divisional Court there held it to have. No doubt this action could have been commenced in the County Court, and it is contended on behalf of the defendant that the action being founded on tort, and the plaintiff having recovered less than 10*l.* as damages, the plaintiff is not entitled to costs. If the construction thus put upon the Act of Parliament by the defendant were right, those facts would be conclusive against the plaintiff, because in this action, which was transferred to the County Court under sect. 69 of the County Courts Act 1888, the plaintiff could not apply to a judge of the High Court for a certificate under the latter part of sect. 116, sub-sect. 2. The real point, therefore, is whether this action is one to which sect. 116, sub-sect. 2, applies. Is it an action founded on tort in which the plaintiff has recovered a sum less than 10*l.*? The question in dispute in the action was as to a right of way, and the plaintiff claimed, and succeeded in getting, nominal damages for the trespass and an injunction. The injunction was the gist of the action. It seems to me that it was not the intention of the Legislature that an action such as this, in which the principal claim was for an injunction, the damages being only subsidiary, should be considered as coming within the class of actions to which sub-sect. 2 of sect. 116 applies. The older authorities give support to this view. *Danby v. Lamb* (11 C. B. N. S. 423; 5 L. T. Rep. 353) which was decided in 1861 was a decision on sect. 34 of the Common Law Procedure Act 1860. That section provided that "when the plaintiff in any action for an alleged wrong in any of the superior courts recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful or malicious, and that the action was not fit to be brought." The action was for detinue, and the

question arose whether it was in substance for an alleged wrong in respect of which less than 5*l.* had been recovered. Erle, C.J., before whom the action was tried, gave a certificate depriving the plaintiff of costs under sect. 34, and the matter afterwards came before the Court of Common Pleas, consisting of the Chief Justice and Williams and Byles, J.J. Erle, C.J. after referring to the words of sect. 34, said: "I must confess I was inclined to put a wide construction upon the words 'alleged wrong.' A party who wilfully detains the goods of another, in some sense commits a wrong, and although the action of detinue has always been classed among actions *ex contractu*, I should have thought the power to certify was extended to that form of action, were it not that the whole provision of the section seems to be directed to the case where damages alone are sought to be recovered by way of compensation for a wrong. . . . It seems to me therefore that the Legislature did not intend to comprise within this enactment the case of a party seeking to recover something besides damages. Here by the Common Law Procedure Act 1854, s. 78, the plaintiff may have judgment to recover the chattel itself. I cannot therefore say that this is an action brought merely to recover damages for the wrong. Consequently I had no authority to give the certificate I did." Williams, J. was of the same opinion. He said, "The Legislature in sect. 34 of 23 & 24 Vict. c. 126 speaks of actions which are the subject of the enactment as actions wherein the exclusive object of the plaintiff is the recovery of damages. That section therefore can have no application to an action of detinue, the object of which is to recover the chattel detained as well as damages for the wrongful detention." Byles, J. also agreed that the rule for a review of taxation should be made absolute. There seems to have been some doubt as to whether an action of detinue, which was in form an action *ex contractu*, could be considered as covered by the words "alleged wrong" in sect. 34, but in 1878 that question was settled by the Court of Appeal in *Bryant v. Herbert* (39 L. T. Rep. 17; 3 O. P. Div. 389), when it was held that detinue was an action founded on tort. No doubt there are special words in sect. 34 of the Common Law Procedure Act 1860, which do not appear in sect. 116 of the County Courts Act 1888, but both sections are obviously aimed at actions in which small damages and nothing more are recovered. *Danby v. Lamb* (*ubi sup.*) has been followed by the Queen's Bench Division in Ireland. In *Bradley v. Archibald* (*ubi sup.*), Palles, C.B. said: "The words of the rules that correspond to sect. 243 of the Common Law Procedure Act 1853, and sect. 97 of the Common Law Procedure Act 1856, are very peculiar. They say that where the plaintiff shall recover a sum less than 20*l.* in contract, or a sum not exceeding 5*l.* in tort, he shall, under certain circumstances, be deprived of costs or be entitled to half costs only. Thus the subject matter of these rules, and of the sections of the Acts of 1853 and 1856, plainly is a judgment that deals with a sum of money, and a sum of money only. In my opinion these provisions have no application to a case in which the proper relief would be relief by way of injunction. The question came some little time ago before us in the Exchequer, and, on an appeal

being taken, the Court of Appeal agreed that, if the case was one in which an injunction could be granted, these provisions would not apply." Opposed to the view thus expressed in these cases there is no doubt the case which has been referred to of *St. John's College, Cambridge, v. Pierrepont* (*ubi sup.*). But it is to be remarked that *Danby v. Long* (*ubi sup.*) was not cited in that case, and I cannot help thinking that, if it had been cited, the opinion of the court might have been different. It seems to me that the weight of authority is in favour of the view we are now taking. On the one hand, we have the case in the Court of Common Pleas, a decision upon words essentially the same as those we have now to deal with, and the opinion expressed by the Court of Appeal, and by the Queen's Bench Division in Ireland which, though not binding upon us here, is to be treated with great respect. On the other hand, we have the decision of the Divisional Court in *St. John's College, Cambridge v. Pierrepont* (*ubi sup.*). In the result my opinion is that the fair meaning of the words "action founded on tort" in sect. 116 is an action in which a tort is the gist of the action, and that sub-sect. 2 does not apply to an action in which, though nominal damages are claimed, the main relief granted is an injunction. The question in this case was one of right, and the plaintiff's real claim in the action was for an injunction. The case is therefore in my opinion outside the provisions of sub-sect. 2 of sect. 116 of the County Courts Act 1888, and the plaintiff is entitled to his costs. The appeal must be allowed.

ROMER, L.J.—I am of the same opinion. Sub-sect. 2 of sect. 116 is primarily directed to actions founded on tort in which pecuniary damages only are sought. I do not mean to say that a plaintiff who is in substance seeking only to recover pecuniary damages can, by colourably adding a claim for an injunction, withdraw his action from the effect of sect. 116. But when the action is substantially brought to obtain some relief other than pecuniary damages, and judgment is given for such relief, then I think sect. 116 is not applicable to it. To hold otherwise would, in my opinion, lead to extraordinary results. For example, suppose a case in which there is a contract to pay a sum of 15*l.* in cash and also to hand over certain chattels of the value of 20*l.* An action is brought to enforce that contract, and the plaintiff obtains judgment for the payment of the 15*l.* and the delivery up of the chattels. Could it be said that the plaintiff has lost his claim to costs because in his action founded on contract he has recovered a less sum than 20*l.*? Surely that can not have been the intention of the Legislature. Again, take the case of a breach of contract for the sale of a piece of land worth 500*l.* An action is then brought for specific performance, a claim being also made for damages for the delay in performing the contract, and the plaintiff obtains an order for specific performance and 5*l.* damages for the delay. Could it be said in such an action that the plaintiff is not entitled to costs because he has recovered less than 20*l.* in an action founded on contract? Take another case where the plaintiff sues for conversion of his chattels of the value of 8*l.*, and for the delivery over of certain other chattels belonging to him, and of

great value in the hands of the defendant. If the plaintiff were entirely successful in his action, could it be said that he has recovered less than 10*l.* in an action founded on tort, and must therefore be deprived of his costs? It appears to me that the view taken by the judges in Ireland, as appearing in the case of *Bradley v. Archibald* (*ubi sup.*) was right, and that *St. John's College, Cambridge v. Pierrepont* (*ubi sup.*) was wrongly decided. The plaintiff in the present case was not prevented by the order transferring the action to the County Court from insisting that his claim was for substantial relief in addition to his claim for damages, and the Divisional Court has decided that he is entitled to an injunction besides damages. As he has obtained that substantial relief in addition to damages, his action is not within sect. 116, sub-sect. 2, and he is entitled to judgment for his costs.

MATHEW, L.J.—This action, which was commenced in the Chancery Division, was transferred to the County Court by order under sect. 69 of the County Courts Act 1888. The plaintiff's claim was for an injunction against a repetition of trespasses to his land, and he also claimed that upon his right to relief being established he would be entitled to damages for trespasses that had been in fact committed. That the County Court had power to grant the injunction claimed is clear from sect. 89 of the Judicature Act 1873, and Order XXII, r. 12 of the County Court Rules 1889. This claim to an injunction, which was the substantial and principal relief asked for, the claim for damages being only an incidental matter, was allowed by the Divisional Court, so that it is clear that the plaintiff would be entitled to his costs of the action unless there is anything to deprive him of that right. The defendant relies on sect. 116, sub-sect. 2, of the County Courts Act 1888, and contends that the plaintiff is not entitled to his costs because he has recovered less than 10*l.* within the meaning of that sub-section. It seems to me that the words of that sub-section apply only to a case where damages alone are sought to be recovered by way of compensation for a wrong. This is in accordance with the law as laid down by Erle, C.J. in *Danby v. Lamb* (*ubi sup.*) a case on a similar enactment in sect. 34 of the Common Law Procedure Act 1860. That statement of the law by Erle, C.J. has been followed by the courts in Ireland. An action is not within the sub-section where the substantial relief claimed is an injunction. I agree, therefore, that the plaintiff is entitled to his costs of the action in the County Court. *Appeal allowed.*

Solicitors for the plaintiff, *Pritchard, Englefield, and Co.*, for *Simpson, North, Harley, and Birkett*, Liverpool.

Solicitors for the defendant, *Cunliffe and Davenport*, for *W. H. Churton and Son*, Chester.

[OT. OF APP.]

BROWN v. BROOK—WRIGHT v. GLYN.

[OT. OF APP.]

Monday, March 3.

(Before COLLINS, M.R. AND ROMER, L.J.)

BROWN v. BROOK. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Stay of execution pending appeal—Jurisdiction of Court of Appeal—Order LVIII., rr. 16, 17.*The Court of Appeal has jurisdiction to hear an application for a stay of execution in a cause in which an appeal has been entered in that court, although no application for a stay has previously been made to the judge who tried the cause.*

THIS was an application by the plaintiff for a stay of execution in an action which had been tried by Ridley, J. at Leeds Assizes.

At the trial judgment had been ordered to be entered for the defendant, and the plaintiff gave notice of appeal and entered the appeal in the list of final appeals. No application for a stay had been made by the plaintiff to Ridley, J., who was away on circuit on the day when this application was made to the Court of Appeal.

Order LVIII. provides as follows :

Rule 16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the court appealed from may direct.

Rule 17. Wherever under these rules an application may be made either to the court below or to the Court of Appeal, or to a judge of the court below, or of the Court of Appeal, it shall be made in the first instance to the court or judge below.

Montague Lush, for the plaintiff, asked for a stay of execution.*H. T. Kemp*, for the defendant, raised a preliminary objection that the court had no jurisdiction to grant a stay because no application had been made in the first instance to Ridley, J., in accordance with the provisions of rule 17.*Montague Lush*.—This court has concurrent jurisdiction with the court below to hear this application :*Cropper v. Smith*, 49 L. T. Rep. 548; 24 Ch. Div. 305.

The court (Collins, M.R. and Romer, L.J.) said that they had jurisdiction to hear the plaintiff's application. The application was then heard and refused.

*Preliminary objection overruled.*Solicitors for the plaintiff, *McDiarmid and Hill*, for *F. C. Manley*, Hull.Solicitors for the defendant, *Burn and Berridge*, for *Barker and Mayfield*, Hull.

March 5 and 10.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

WRIGHT v. GLYN. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Master and servant—*Servant's authority to contract*—*Implied authority*—*Evidence of holding out as agent.**The defendant made an arrangement with his coachman whereby he undertook to pay the*

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

*coachman a certain sum per week per horse, and the coachman undertook to provide the forage and shoeing of the defendant's horses. The coachman then went to the plaintiff, a corn merchant, and saying he was in the defendant's service, ordered forage for the defendant's horses. The plaintiff knew that some of his customers made arrangements with their coachmen similar to that made by the defendant, but he did not inquire of the defendant whether his coachman had authority from him to buy forage on his behalf. The defendant paid the coachman the sum per horse which he had agreed to pay. In an action to recover from the coachman's master the price of forage supplied :**Held*, that there was no evidence of any holding out by the defendant of his coachman as having authority to pledge his credit, nor of any knowledge or ratification by the defendant, and that therefore he was not liable to pay for the forage supplied.

THIS was an appeal by the defendant from the judgment of Grantham, J. at the trial of the action without a jury.

The action was brought by the executor of J. F. Trigg, a corn merchant, for the price of forage supplied for the use of the defendant's horses in London between April and Oct. 1898.

The facts are set out in the judgment of the Master of the Rolls.

At the trial of the action the cases of *Rimell v. Sampayo* (1 O. & P. 254) and *Precious v. Abel* (1 Esp. 350) were cited on behalf of the plaintiff, and Grantham, J., considering that he was bound by those cases, gave judgment for the plaintiff.

The defendant appealed.

Danckwerts, K.C. and *Loehnis*, for the defendant, cited*Rusby v. Scarlett*, 5 Esp. 76;*Stubbing v. Heintz*, Peake, 66;*Hiscox v. Greenwood*, 4 Esp. 174;*Payne v. Lord Leconfield*, 51 L. J. 642, Q. B.and referred to the general principles of the law of agency, as laid down by Lord Cranworth in *Pole v. Leask* (8 L. T. Rep. 645).*T. Mathew* for the plaintiff, in addition to *Rimell v. Sampayo* (*ubi sup.*) and *Precious v. Abel* (*ubi sup.*), referred also to*Alexander v. Gibson*, 2 Camp. 555;*Rich v. Cos*, Cowp. 636;*Brady v. Todd*, 4 L. T. Rep. 212; 9 C. B. N. S. 592;*Farguharson v. King*, 85 L. T. Rep. 264; (1901) 2 K. B. 697.*Danckwerts*, K.C. replied.*Cur. adv. vult.*

March 10.—COLLINS, M.R. read the following judgment: This is an action brought by the plaintiff, as representative of one Trigg, deceased, a corn merchant, for 95l. 2s. 6d., being the price of forage supplied by the deceased on the order of the defendant's coachman and consumed by the defendant's horses. The defence is that the coachman had no authority to pledge his master's credit for the forage. Grantham, J. has given judgment for the plaintiff, and the defendant now appeals. The facts lie in a very short compass, and the evidence consists of certain affidavits made under Order XIV., supplemented by the evidence at the trial of Bates, the manager of the deceased, and that of Mr. Glyn, the defendant. The coachman was not called. It appears that

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one Dimont, the coachman or groom—he is called sometimes one and sometimes the other in the evidence, and it does not seem to be material which was his true capacity—was employed by the defendant under an arrangement that the defendant should pay him a certain sum per week per horse, and that he should for such payment supply forage and shoeing. It appeared from Bates's evidence that Dimont had called and said he wanted to open an account for forage for Mr. Glyn; that he thereupon took the order and made the usual inquiries about Mr. Glyn, and then delivered the goods, and continued to supply them till the defendant's horses left town in the following November; and he swore that he gave credit to the defendant, to whom in November he forwarded a statement of account at his address in London. The defendant had then left England for South Africa and had never had any dealings whatever with the plaintiff, nor was he aware till his return from South Africa from whom Dimont had ordered forage, or that it had not been paid for. The agreed payments to Dimont had been regularly made. Bates admitted that he was aware that some of his customers—perhaps 10 per cent.—had arrangements with their coachmen similar to that made by the defendant, but, he added, "the coachmen then say so." The question therefore is, on these facts: Has the plaintiff proved his claim against the defendant? I am of opinion that he has not. There can be no question as to the law in the matter. In order to fix the principal for an order given by a person purporting to be his agent, it is quite clear that either actual or ostensible authority to contract for the principal, or ratification, must be proved. Here express authority is distinctly negatived, and the case for the plaintiff must rest on ostensible authority alone. It certainly cannot be said, as a matter of law, that a coachman or groom has ostensible authority to pledge his master's credit for forage for his horses. The mere relation of master and coachman does not of itself involve as a matter of law such authority. If that be so, it becomes a pure question of fact—Was there evidence of a holding out by the defendant of Dimont as having his authority to pledge his credit? It seems to me there was none. The defendant is never introduced into the discussion at all by any act done by him except that of taking Dimont into his service. Bates acted on the representations made to him by Dimont, and on nothing else. He took the risk of those statements being true or false; and though he learnt that Dimont was the defendant's coachman, and was aware that arrangements, such as that here proved, sometimes existed between coachmen and their masters, he took no trouble to ascertain from the defendant whether any such arrangement existed between him and Dimont. Unless, therefore, the fact that Dimont stated with truth that he was the defendant's coachman amounts to a holding out by the defendant of Dimont as having authority to pledge the defendant's credit for forage, there is literally no evidence to fix the defendant in this case. We are not at liberty to try this case upon any facts except those which appear in evidence; and we certainly cannot assume, as we were invited to do by plaintiff's counsel, that it must be taken as common knowledge that coachmen have *prima*

facie authority to pledge their masters' credit for forage, and that the onus is thrown on the defendant of making the fact of any limitation of any such authority known to persons who supply forage. Could it be said that where the master himself makes a contract with a corn merchant for the foraging of his horses the coachman has, nevertheless, ostensible authority to bind the master by other contracts made with other persons to supply it, or that, where the master supplies his own forage, the coachman, by virtue of his position as such, has ostensible authority to order it elsewhere? Suppose the contract with the coachman were that he should supply horses, carriage, and forage for a lump sum, could he, nevertheless, make the master liable to the corn merchant on the footing of ostensible authority? Suppose all are hired from a livery man, who himself acts as coachman, is the master liable to the person who supplies the forage? A contractor to supply is not an agent to procure. The learned judge seems to have considered himself bound by the two *Nisi Prius* decisions, which were cited before us, in *Carrington and Paine* and *Espinasse* respectively; but, as I have already pointed out, there can be no dispute here as to the law, and those cases must be taken to have been decided on special facts; and it is enough to say that in the present case actual authority is negatived, and that there is no evidence whatever either of ostensible authority acted upon by the plaintiff or of knowledge or ratification by the defendant. For the same reason I abstain from discussing the other cases cited in argument. I think this appeal must be allowed.

ROMER, L.J. concurred.

MATHEW, L.J. concurred.

*Appeal allowed.*Solicitors for the plaintiff, *Charles Russell and Co.*Solicitors for the defendant, *Waterhouse and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 17 and 22.

(Before BYRNE, J.)

Re W. KEY AND SON LIMITED. (a)

Company—Register of shareholders—Trustees in bankruptcy of member—Form of share certificate—Memorandum of claim to lien—Right of trustee to registration and certificate—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 25, 30, 35; sched. 1, table A, clauses 2, 13.

P., the trustee in bankruptcy of N., applied to be placed on the register of members of W. K. & Son Limited, in respect of 4000 ordinary shares of that company numbered 1 to 4000 inclusive, in the place of N., in whose name the shares were standing.

The company did not decline to register him, but claimed the right to enter upon the register in respect of the 4000 shares a memorandum, similar to a memorandum which they proposed to insert in the new certificate to be granted, to the following effect: "The shares comprised in

(a) Reported by H. M. CHARTERS MACPHERSON, Esq.
Barrister-at-Law

this certificate are a portion of 10,000 shares numbered 1 to 10,000 inclusive, on all of which the company claim a lien under the company's articles of association for the debts, liabilities, and engagements of the said "P." to the company." The certificate they proposed to give was in the ordinary form; it certified that P. was the registered holder of the shares in question, "in the above-named company subject to the memorandum and articles of association thereof, and that for each of the said shares the full amount of 1l. has been paid up." Then followed a memorandum that "no transfer of any portion of the shares comprised in this certificate will be registered until the certificate has been delivered at the company's office," and then to the effect above set out.

P. contended that he was entitled to be entered on the register and to have a certificate, without the addition of the special memorandum proposed by the company.

Held, that it being in no way necessary for the protection of the company that this special memorandum should be put upon the register of shareholders, or that a certificate should be issued in this special form, the register ought to be rectified as proposed by striking out any reference to the specific claim on the register, and that the certificate ought to follow the form of the register.

MOTION for the rectification of the register of members of W. Key and Son Limited. The notice of this application by A. E. Preston, as trustee in bankruptcy of T. H. Norris, is sufficiently stated in the headnote; and all the material articles of association and sections of the Companies Act 1862 are set out in the judgment of Byrne, J.

Levett, K.C. and F. Evans for the motion.—The applicant is entitled under clause 13 of table A to have his name substituted in the register of members in the place of the bankrupt's, *Re Bentham Spinning Mills Company* (41 L. T. Rep. 10; 11 Ch. Div. 900), and the company cannot place any memorandum on the register or on the certificate as to the alleged lien on the shares: sects. 25 and 30 of the Companies Act 1862, and clause 2 of Table A.

Norton, K.C. and Muir Mackenzie for the company.—The trustee in bankruptcy can only take these shares subject to the lien:

Ex parte Harrison; Re Cannock and Rugeley Colliery Company, 53 L. T. Rep. 189; 28 Ch. Div. 363.

The company has a lien on these shares and is entitled and bound for its own protection to record it on the register of members:

Bradford Banking Company v. Briggs and Co, 56 L. T. Rep. 62; 12 App. Cas.

Levett, K.C. replied.

Cur. adv. vult.

Jan. 22.—BYRNE, J., after stating the terms of the motion and the position taken up by the company, proceeded as follows: The application is made with reference to the register, but, in point of fact, if the company are entitled to register as they propose, I do not think it would be disputed that the certificate ought to be in accordance with the register, so that the form of certificate is involved in the question

as to what is to be put on the register; and a good deal of argument has been addressed to me with reference to what the effect of giving a certificate in the proposed form would be. Mr. Norris was a shareholder of the company in respect of 10,000 shares. In respect of 6,000 of them there is no question; there is only a question with reference to 4000 of these shares. The company is governed by articles of association which provide as follows: "1. Subject as hereinafter provided, the regulations contained in the table marked A in the first schedule to the Companies Act 1862 (hereinafter called table A), shall apply to this company"; and art. 7 provides that "the company shall have a first and paramount lien upon all the shares registered in the name of each member (whether solely or jointly with others) for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends from time to time declared in respect of such shares." Art. 5 provides that "the directors may decline to register any transfer of shares upon which the company has a lien, and, in case of shares not fully paid up, may refuse to register a transfer to a transferee of whom they do not approve." Arts. 8 and 9 are auxiliary to art. 7. Art. 8 is "For the purpose of enforcing such lien the directors may sell the shares subject thereto in such manner as they think fit"; and art. 9 is "The net proceeds of any such sale shall be applied in or towards satisfaction of such debts, liabilities, or engagements, and the residue (if any) paid to such member or his executors, administrators, or assigns." There is no special article with reference to the transmission of interest otherwise than by transfer, so all that is thrown upon table A, clause 13 of which provides that "any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company." Mr. Norris was registered, and held a certificate in respect of these 4000 shares in the usual and ordinary form; that is to say that they were held as "fully-paid ordinary shares of 1l. each," "subject to the memorandum and articles of association and the rules and regulations of the said company." The applicant, who is his trustee in bankruptcy, now comes and says, "There has been a transmission of interest, and by virtue of that transmission I am now entitled to be registered as a member. I produce the ordinary evidence; here is the certificate"; and with the company, so far as that is concerned, there is no difficulty in any way. The applicant's counsel has, with reference to the entries to be made in the register referred to the provisions of the Companies Act 1862, sect. 25 of which provides that "Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:—(1) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each

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member, distinguishing each share by its number, and the amount paid or agreed to be considered as paid on the shares of each member; (2) the date at which the name of any person was entered in the register as a member; (3) the date at which any person ceased to be a member." Then there is a provision for a penalty for not keeping the register properly. And sect. 30 provides that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England or Ireland." Now the right to a certificate depends on clause 2 of table A: "Every member shall, on payment of one shilling, or such less sum as the company in general meeting may prescribe, be entitled to a certificate under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon." I think that, *prima facie*, the right of a person taking by transmission is to be entered upon the register in the same way as his predecessor in title was entered, and to have the certificate in the same form as that of his predecessor in title. The question is whether the company are entitled to say, "We will put upon the register a memorandum to the effect that we now claim a sum as being due under the clause of the articles giving us a lien." At present the company claim that a lien has accrued in respect of certain moneys, and have brought an action for the purpose of establishing and enforcing that lien. The claim to a lien is altogether repudiated, and the action is being resisted. The company now say, "We are entitled to put on this register a notice that we have this specific claim." Why? Is it required for the protection of the company? First of all, standing upon the register alone, the only suggestion made to me with reference to that substantially came to this—that the company may put anything on the register of shareholders which is not in terms forbidden by the Act and is not absolutely mischievous to the shareholder, and which is put on by them in good faith. Now there is nothing in the Act which prohibits the company from using the register of shareholders for making convenient memoranda; but in this particular case, if they are entitled to put on this special memorandum which they propose to put on, I do not see how the right of the company to give the certificate in the form they propose to give it could be resisted, because the certificate ought to correspond with the register as showing what the interest recognised by the company is. *Prima facie*, the applicant is entitled to a "clean" certificate, like that possessed by the person from whom he derives his title. Why should the company be entitled to put such a memorandum on the register at all in the first instance? It was suggested that there might be new directors of the company or a new secretary, and that they might forget that there was an accrued right, or a claim to an accrued right, to a lien. Well, I confess that that argument does not appeal to me, standing on the register alone. The same argument applied during the time that the bankrupt was upon the register. The new directors, or the new secretary, might have been so foolish as to forget they had a claim, but I do not think that would have justified any alteration in the register making it inconsistent with the

certificate that they had given to him; and it does not seem to me that it is necessary for the protection of the company in any way that they should enter upon the register the memorandum which they propose. But it is said that it was essential to grant the certificate in this special form for the protection of the company. Counsel for the company have failed to show me that it is necessary. The company claim to have a lien, and are entitled to that lien, if at all, by virtue of the memorandum and articles, and the certificate is only granted in form "subject to the memorandum and articles of association." The only ground which could be suggested as a reason for the certificate being granted in the form proposed is that, there now being a claim to a specific lien, the company might be held estopped hereafter if they granted a certificate without mentioning on it that there was such a claim, and that the lien under the articles had now ripened into an immediate charge for a sum of money—it does not say what sum. I should be sorry to say anything to suggest that they could be under any such liability. They have power under their articles to decline to register any transfer of shares upon which the company has a lien, and it appears to me that such an entry on the certificate is not necessary for the protection of the company, and that it would be detrimental to the trustee in bankruptcy, who is now asking for registration. Why should he be put in a worse position than the bankrupt was in reference to this matter? The certificate is evidence of the legal title; the trustee is entitled to be put on as the legal owner of these shares, and it seems to me that he is entitled to what was called in the evidence and in the course of the argument a "clean certificate." If there were any probability or prospect of a fraudulent or wrongful dealing on the part of the applicant with the shares, so soon as he came into possession of the certificate, the true remedy of the company would be, as it seems to me to apply for an injunction in the pending action to restrain him from dealing in any way with the certificate, but I do not think they have any right at all to put in such a statement as they propose, which might lead to very serious inconvenience. Suppose the action goes on, and it turns out that there is no lien on these shares at all, why is this gentleman to have a certificate in his hands saying it is subject to the claim of the company? Suppose he wanted to deal with the certificate; he might be absolutely free from the claim and yet would only have a certificate stating that the shares were subject to it. But then it is said that he could apply for a new certificate. Supposing he applies for a new one and the company say, "We will not give you a new one; you are only entitled if your old certificate is worn out or lost." There might be very considerable difficulty, and he might have to bring an action to get an amendment of the certificate in some way or to obtain a new one. It seems to me that the company have no right to do as they propose—viz., to put a memorandum on the certificate granted which will make out the shares referred to in it as being subject to some special right which interferes with the legal title; for that is really what the meaning of it would appear to be. I think the register ought to be rectified as proposed—that is by striking out any reference to the specific claim on the register. That is all

I have to do now, but I intimate that it seems to me that the form of the certificate must follow the form of the register. The respondents must pay the costs.

Solicitors: *Ward, Perks, and McKay*; *W. H. Court*, for *Albin, Hunt, and Fourmy*, Chesham.

Feb. 28, March 4, 5, and 15.

(Before JOYCE, J.)

GODWIN v. SCHWEPPE'S LIMITED. (a)

Light—Building agreement—Owner of two tenements—Conveyance of one tenement—General words—Implied grant—Derogation from grant—Obstruction—Injunction—Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), s. 6, sub-ss. 2, 4.

In 1884 O., the owner of a building estate, entered into a building agreement with a builder S. Upon part of the land comprised in the agreement S., with the concurrence of O., built a block of mansions (which was not in accordance with the scheme of the agreement) with windows facing west.

To the west of the site of the mansions were certain plots, referred to as the "adjoining ground," on which, by the agreement, there were to be built "a coach-house or stable premises, dwelling-house, or cottage," as might be agreed upon. When the building of the mansions was commenced, S. contemplated the erection of a corresponding block of mansions on the "adjoining ground," and laid foundations therefor, and constructed part of the western wall of the mansions as a party-wall with chimney breasts. S. exercised his option under the agreement to take the plots upon which the mansions were erected, and by a conveyance in 1886 O., as "beneficial owner," conveyed the mansions without any express general words to S. S. subsequently mortgaged the mansions, the mortgage being afterwards transferred. The transferees eventually sold under their power of sale, O. himself being the purchaser.

The plaintiffs were the trustees of a settlement made by O. of the mansions.

The defendants, who were the successors in title of O. of the adjoining land under conveyances neither of which contained any express reservation of a right to light over the adjoining ground, had commenced to build on the adjoining ground stables, &c., which obstructed the light to the windows in the west side of the mansions, but to an admittedly less degree than would have been caused by a corresponding block of mansions if erected as originally contemplated.

Held, that notwithstanding by virtue of sect. 6, sub-sect. 2, of the Conveyancing Act 1881 the parcels in the conveyance in 1886 included and operated as conveying all lights appertaining or reputed to appertain thereto or at the time of conveyance enjoyed therewith, yet having regard to the circumstances existing at the time of the grant, which were to be looked for in the building agreement, the conveyance did not as against O. pass to S. any right to have the access of light to

the windows of the mansions looking west over the adjoining ground unobstructed by any building on the adjoining ground.

Birmingham, &c., Banking Company v. Ross (59 L. T. Rep. 609; 38 Ch. Div. 295) followed.

HERBERT OXLEY, who was the owner of a building estate at Hammersmith, on the 19th Jan. 1884 entered into a building agreement with a builder named Edgar Sage, to which there was annexed a plan showing the whole of the estate divided into plots numbered from 1 to 44 inclusive. It was the usual kind of building agreement, and, subject to its provisions, Sage was to build and completely finish, within a certain time, on the plots numbered 10 to 19 exclusive, and on some other plots, a good and substantial dwelling-house or shop of a certain value, and also within twenty-seven calendar months from the date of the agreement erect on each of the parcels or plots of ground numbered 20 to 44 inclusive a coach-house and stable premises, dwelling-house, or cottage, conformably to plans and elevations to be approved by the surveyor to Oxley, the owner. The agreement also contained other provisions as to the building line. Then it provided that Sage was to execute the whole of the buildings and works in conformity with the plans approved, and to the reasonable satisfaction of Oxley or his surveyor. Then clause 10 provided:

As to each of the said parcels of ground, when the carcass of the dwelling-house and buildings or stables to be erected thereon shall have been built, &c.,

the landlord (that is, Oxley) was to grant to Sage or his nominees "a lease of the parcel of ground with the dwelling-house or buildings or stables thereon" in the usual way, with provisions as to the rent and what was to be contained in each of the leases.

By clause 14 the tenant was "forthwith to apply to the Metropolitan Board of Works for, and use his best endeavours to obtain, their sanction to the erection of buildings on the land Nos. 6 to 44 inclusive on the said plan, and the formation of a new roadway in accordance with the provisions hereinbefore contained." If such sanction could not be obtained, a fresh scheme was to be agreed upon between the parties, or, in default of agreement, settled by arbitration, such new scheme to provide for the erection on the land Nos. 6 to 44 inclusive of private houses or shops facing Blythe-lane, with a mews or workmen's residences or private houses in the rear. Then there were provisions for the case of Sage becoming bankrupt, &c., and, in case of such default, neglect, or refusal, it "shall not prevent this agreement from remaining in force as to any of the said parcels of ground and premises in relation to which or to the lease whereof no such default, neglect, or refusal shall have occurred."

Clause 16 was to the effect that in case the landlord (that is, Oxley), in certain events, be able to determine the agreement entered into with Sage, in such case he "may thereupon remove the tenant—i.e., Sage—from the further erection of or interference with all or any of the dwelling-houses, stables, and buildings then remaining incomplete, notwithstanding that a lease or leases thereof may have been actually granted, and may employ any builder or builders to finish the same" pursuant to the agreement.

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

Then clause 17 gave Sage an option to purchase the fee simple if he thought fit instead of taking a lease. There was also a clause for reference to arbitration.

The plots numbered 1 to 8 were built upon and purchased by Sage pursuant to the option in clause 17. Sage then proposed to Oxley to erect upon plots 10, 11, 12, and part of 30 a block of mansions sometimes referred to in the papers as block No. 1, and ultimately and now known as Addison-mansions. This was assented to, and these mansions were erected by Sage with the concurrence of Oxley. It was in respect of certain windows in the western side of these mansions that the present action was brought.

To the west of the site of the mansions were the rest of plot 30, plot 29, and plots 28, 27, and 26, which are hereafter referred to collectively as the "adjoining ground." They formed the site of the buildings (stables and a carriage or van house) complained of as obstructing the access of light to the windows of the mansions which were in question in the action.

According to the building agreement these several plots (that is, "the adjoining ground") were to have built upon them a "coach house and stable premises, dwelling house, or cottage," as might be agreed, and, in default of agreement, as might be settled by arbitration, in which last event the buildings were to be a "mews or coachman's residence or private houses."

When the building of Addison-mansions was commenced, Sage contemplated the erection of another and corresponding block of mansions upon the adjoining ground, and he at the same time laid the foundations therefor in such ground with the concurrence of or without objection from Oxley. Addison-mansions were built with about half of the western wall from its northern end to the middle of the western side of the mansions constructed as a party-wall having chimney breasts and apertures for fireplaces on the outside. There was also a return wall of about 4ft. in length at right angles to this party-wall, then a wall parallel to the party-wall and with the return wall forming the two sides or one end and one side of an area or open space intended to be built upon. The southern end of this area abutted upon the road in the building agreement designated private road, and the western side was open to the adjoining ground.

These foundations on the adjoining ground were obviously and admittedly laid so as to leave or provide a similar and equal area on the adjoining ground in such a manner that the two areas together would make a space or court in the shape of a parallelogram with no buildings thereon.

The mansions having been built, Sage exercised his option to take a conveyance in fee instead of a lease. That conveyance was by an indenture dated the 5th May 1886, made between Oxley of the one part and Sage of the other part, to which there was a plan annexed, on which the two areas were plainly shown, as also was the party-wall, which was there so described; and the operative part provided that in pursuance of the agreement, and in consideration of the sum of 1620*l.* paid by Sage to Oxley, Oxley as beneficial owner conveyed to Sage

All that plot of land situate in Blythe-lane, and delineated in the plan drawn in these presents and

therein coloured pink, together with the block of residential flats or chambers and buildings thereon erected and known or intended to be known as Addison-mansions and the area in the centre of the same and together also with the right to use the said ornamental garden ground in common with the owners and occupiers for the time being of the land coloured yellow in the said plan.

This last-mentioned area had nothing to do with either of the areas before referred to.

On the next day—viz., the 6th May 1886—a mortgage was made by Sage to Malcolm Ovans and others, the same solicitor acting for Sage and the mortgagees. The description of the parcels in this mortgage was the same as in the conveyance. There was a covenant to complete the mansions; and the plans on the conveyance and mortgage were identical.

These mortgagees thoroughly investigated the title and had full notice of the building agreement, and of the condition of matters generally on the western side of the mansions, where they were entitled to only a moiety of the party-wall.

Subsequently, on the 20th Sept. 1886, this mortgage was transferred to other mortgagees, who at the same time made a further advance to Sage, he being a conveying party in the deed of transfer. There was a plan on this deed identical with that upon the conveyance of the 6th May 1886.

By an indenture dated the 11th Aug. 1891 the mortgaged premises were sold under the power of sale in the mortgage, Oxley himself being the purchaser; and the present owners, the plaintiffs in the action, were the trustees of a settlement, dated the 19th April 1893, made by Oxley of the property, and under which he was interested.

The defendants were the present owners of the "adjoining ground." They derived their title under a conveyance by Oxley to Sage in 1887, and a subsequent conveyance by Sage, neither of these containing or purporting to contain any reservation of any right to light over the "adjoining ground" for the windows of the mansions which were then vested in the mortgagees.

The defendants had erected on the "adjoining ground" stables and a carriage or van house, these buildings being further away from the mansions and of smaller height than the corresponding block of mansions originally contemplated as before mentioned would have been if erected.

The effect of the evidence as given at the trial appears sufficiently from the judgment.

Younger, K.C. and *Bolt* for the plaintiffs.—There was an express grant of the easement of light by virtue of the Conveyancing Act 1881, s. 6 (2), by Oxley to Sage under the conveyance of the 5th May 1886. It is a question of evidence as to what was the amount of light at the time Oxley granted to Sage. At the date Oxley executed the conveyance he was aware of the difficulties as to the right to light if he sought to develop the building land. Knowing the circumstances, he made what amounts to an express grant by the conveyance of the 5th May 1886, and he cannot derogate from such a grant:

Birmingham, &c., Banking Company v. Ross, 59 L. T. Rep. 609; 38 Ch. Div. 295.

There is no reservation to Oxley, the vendor, of

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the right to light although there was a reservation of other rights. As against an express grant you cannot have an implied reservation:

Wheeldon v. Burrows, 41 L. T. Rep. 327; 12 Ch. Div. 31, at pp. 45 and 49.

By sect. 6, sub-sect. 2, of the Conveyancing Act 1881, all lights enjoyed with the house are included, and there is nothing here in the conveyance or the building agreement sufficient to show a "contrary intention" within the meaning of sub-sect. 4. The case we most rely on is:

Broomfield v. Williams, 76 L. T. Rep. 243; (1897) 1 Ch. 602.

Beddington v. Atlee (56 L. T. Rep. 514; 35 Ch. Div. 317) is distinguishable because there the land over which the right was claimed was contracted to be sold before the date of the conveyance to the plaintiff of the house in respect of which he claimed the right. *Broomfield v. Williams* (*ubi sup.*) was applied in *Pollard v. Gare* (84 L. T. Rep. 352; (1901) 1 Ch. 834). Our submissions are, first, that we are entitled by express grant from Oxley under the conveyance of the 5th May 1886; or, secondly, that if Sage had any interest in the land coloured yellow in the plan, we are entitled under Sage's mortgage of the 6th May 1886. We submit we are entitled to a mandatory injunction as the buildings erected by the defendants were not completed until the day the writ was issued. The circumstances under which the court will grant a mandatory injunction were considered in

Lawrence v. Horton, 62 L. T. Rep. 749.

Hughes, K.C. and *Harman* for the defendants.—This is an attempt to extend the doctrine that a man cannot derogate from his own grant to an extravagant extent. This is a stronger case than

Birmingham, &c., Banking Company v. Ross (*ubi sup.*).

There is the building agreement and Sage built under it, although he did not build the same sort of building as contemplated by it, but his right to build was under the agreement. He had intended building on the land west of the mansions a block of flats similar to the mansions. [JOYCE, J.—At the date of the conveyance of the 5th May 1886 Sage might have blocked the lights, but whether Oxley could have done so is a different matter.] At the time of the conveyance both (what may be called) the dominant and servient tenements were included in the same building agreement. The right to light is limited by the circumstances existing at the date of the grant. The test is that Sage could not have built on the adjoining ground without obstructing the mansions. The grant has therefore to be construed in the light of these circumstances. This is the principle of the case of *Birmingham, &c., Banking Company v. Ross* (*ubi sup.*), as explained by *Broomfield v. Williams* (*ubi sup.*). The point is also dealt with in *Beddington v. Atlee* (*ubi sup.*) and *Burrows v. Lang* (84 L. T. Rep. 623; (1901) 2 Ch. 502, at p. 506). The building plan was not in any sense abandoned at the date of the conveyance, because Sage went on building on the other side of the road, and he had not the means of doing both at the same time. On the documents themselves it

is impossible to say that Sage had abandoned his intention to build. They also referred to

Conveyancing Act 1881, s. 6 (2);
Myers v. Catterson, 62 L. T. Rep. 205; 43 Ch. Div. 470.

Bolt in reply.

Cur. adv. vult.

March 15.—JOYCE, J.—This action is instituted in respect of the obstruction of the access of light to certain windows which are not ancient lights. The right to have the access of light thereto unobstructed must therefore, if it existed, have been acquired by contract or by the operation of the rule that a grantor shall not derogate from his own grant. The facts are as follows: [His Lordship stated the facts as above set out, and continued:] There are no express general words in the conveyance of the 6th May 1886, but by virtue of sect. 6, sub-sect. 2, of the Conveyancing Act 1881 the parcels included and operated as conveying with the mansions all lights appertaining or reputed to appertain thereto or at the time of the conveyance enjoyed therewith. It is contended on behalf of the plaintiffs—and it is to Oxley's interest at the present time to support this contention—that the grant of light by him under the general words imported by the Conveyancing Act 1881 into the conveyance of the 5th May 1886 operated against himself as an absolute and unlimited grant of light to the windows in the western side of Addison-mansions, and conferred the right to the access of light to the windows of the mansions looking into the area or open space without any obstruction from any building to be erected at any time thereafter upon the adjoining ground, or in other words, that by such conveyance he was, and the persons who derive title from him to the adjoining ground now are, precluded from erecting on this adjoining ground either the corresponding block of mansions of which the foundations were laid as I have mentioned, or any building against their moiety of the party-wall, or any such stables or building as contemplated by the building agreement, or, indeed, any building that would in any manner whatsoever obstruct or interfere with the access of light over the adjoining ground to the windows of the mansions looking into the area or open space shown upon the plans on the conveyance and mortgage of 1886 respectively. What was the legal effect of the conveyance and mortgage of the 5th and 6th May 1886 in reference to any right of light for the windows of the mansions looking into the area or over the adjoining ground? There are no express general words in any of the deeds, but by sect. 6 (2) of the Conveyancing Act 1881 there are imported the words as to lights which I have already mentioned. Easements and privileges legally appendant or appurtenant to property pass by a conveyance of the property simply without any additional words, but before the Conveyancing Act of 1881 easements and privileges which were used and enjoyed with or reputed to appertain to the property without being legally appendant or appurtenant did not pass by a conveyance of the property without being expressly mentioned. It was decided in *Booth v. Alcock* (29 L. T. Rep. 231; L. Rep. 8 Ch. 665) that a lease or grant of a house together with all lights thereto belonging or therewith used or enjoyed is not

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a lease or grant of all light then actually falling upon the windows of the house, but only of such right to light as the lessor or grantor then had. That is to say, general words in a grant are to be restricted in equity as well as at law to such rights as the grantor had then power to grant. As far back as the case of *Swansborough v. Coventry* (9 Bing. 305; 2 Moore & Scott, 362) the law is laid down by Tindal, C.J. thus: "It is well established by the decided cases that when the same person possesses a house having the actual use and enjoyment of certain lights and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights." But in the very important case of *Birmingham, &c., Banking Company v. Ross* (59 L. T. Rep. 609; 38 Ch. Div. 295) it was determined that although a grantor shall not derogate from his own grant, this rule does not entitle the grantee of a house with the lights, under the words imported into the grant by the Conveyancing Act 1881, to any easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee. The expression "lights enjoyed" in the statute is confined to the light enjoyed under such circumstances as would reasonably and properly lead to an expectation that the enjoyment of that light would be continued. In truth, there is not in the conveyance of the 5th May 1886 any express grant of the right to light now claimed. It is only a question of how far under the circumstances the maxim that the grantor cannot derogate from his own grant applies and operates. And upon consideration I think that the present case is governed by the decision in *Birmingham, &c., Banking Company v. Ross* (*ubi sup.*). The adjoining ground as well as the site of the mansions was the subject of the pre-existing building agreement between the grantor and grantee in the conveyance. The mansions had been built by the grantee, and their respective rights were to be looked for in the building agreement: (see judgment of Rigby, L.J. in *Broomfield v. Williams*, 76 L. T. Rep. 243, at p. 250; (1897) 1 Ch. 602, at p. 616). Under the circumstances, and having regard in particular to the provisions of the building agreement, comprising and affecting as it does the plots which form the adjoining ground, the existence of the foundations laid in such adjoining ground, the obvious existence and the condition of the party-wall, and the areas shown in the plan on the conveyance of the 6th May 1886, I have come to the conclusion that the conveyance of the 5th May 1886 did not as against Oxley pass to Sage any right to have the access of light to the windows of the mansions looking into the area over the adjoining ground unobstructed by any future building on the adjoining ground and not within the area contemplated as to be left thereon. I am confident that no such result was intended, nor do I think that the possibility of such a result could have entered into the contemplation of either of the parties. Suppose that immediately after the conveyance the event had happened upon which Oxley would have become entitled to enter upon the adjoining ground

under clause 16 of the building agreement, he would have been entitled, in my opinion, notwithstanding the general words supplied by statute in the conveyance, to have erected upon the adjoining ground at least such buildings as were particularly contemplated by the building agreement, and possibly even a block of mansions corresponding to block No. 1—that is to say, Addison-mansions. Sage has been called as a witness on behalf of the plaintiffs, and obviously desires to support their contention, although the defendants derive their title under him. He deposes that in his own mind he had prior to the conveyance of the 5th May 1886 abandoned all idea of erecting any block of mansions on the adjoining ground upon the foundations which he had laid as I have mentioned. I must say, however, that, if it be really material, I very much doubt the correctness of this statement of his. I mistrust his recollections with respect to the precise date of such abandonment, seeing as I do that the plan on the conveyance, which, it is admitted, he himself prepared, shows what it does show in reference to the party-wall and the two areas—at all events that is the plan by reference to which the conveyance must be construed and its effect determined. If I am right in my view of the effect of the conveyance of the 5th May 1886, it follows that the mortgage of the 6th May 1886 did not pass to the mortgagees as against Oxley and persons claiming through him any greater right or easement than was granted or created against him by the conveyance, and I am of opinion that under the circumstances, and especially having regard to the plan upon the mortgage and the obvious condition of the premises, the mortgagees could not, if so minded, have prevented Oxley and Sage or their assigns from erecting upon the foundations in the adjoining ground the contemplated block of mansions corresponding to the block first erected. In other words, there did not, in my opinion, result from such mortgage any implied obligation on Sage not to interfere with the lights of the mansions to the extent required for building upon the adjoining ground pursuant to the building agreement, or even of building the corresponding block of mansions, and I cannot see why the transferees of the mortgage or any purchaser from them should be in a better position than the original mortgagees. Whatever rights Oxley and Sage together had, after the date of the mortgage, to build upon the adjoining ground is now vested in the defendants. It is plain that the present stables and buildings of the defendants on the adjoining ground do not form nearly so serious an obstruction to the access of light to the windows in question as the corresponding block of mansions would have done if erected on the same site. Consequently, in my opinion, this action by the persons deriving title under the mortgagees against the assigns of Oxley and Sage through the deed of 1887 fails, and must be dismissed with costs.

Solicitors for the plaintiffs, *Morgan, Upjohn, and Leech*.

Solicitors for the defendants, *Leonard and Pilditch*.

Friday, April 11.

(Before JOYCE, J.)

EVANS v. CHAPMAN. (a)

Company—Articles of association—Capital—Minimum subscription—Mistake—Rectification by court—Jurisdiction—Companies Act 1862 (25 & 26 Vict. c. 89), s. 50—Companies Act 1900 (63 & 64 Vict. c. 48), ss. 4, 6.

Under its ordinary jurisdiction to rectify written instruments the court has no power to rectify a mistake in the articles of association of a company which have been executed by the seven signatories to the memorandum, although no one else has come in under the articles and no shares have been allotted.

The proper mode of rectifying a mistake is by sect. 50 of the Companies Act 1862, which has only a statutory effect.

SPECIAL resolutions to wind-up voluntarily a company called the Sulphides Reduction (New Process) Limited, for the purposes of reconstruction under sect. 161 of the Companies Act 1862, and to appoint liquidators, who were thereby authorised to consent to the registration of a new company of the same name with a memorandum and articles of association which had already been prepared with the privity and approval of the directors, were passed and confirmed on the 18th Feb. and the 7th March 1902 respectively. The capital of the old company was 100,000l. The proposed capital of the new company was 112,500l., divided into shares of 1l. each. On the 3rd April 1902 a prospectus inviting subscriptions for shares was issued to the public by the new company, and stated that the new company had been formed for the purpose of acquiring and taking over the assets of the old company.

On the front page of the prospectus were the following statements made in accordance with sect. 4 of the Companies Act 1900:

Seven shares of 1l. each (being the amount of the minimum subscription upon which the directors under the articles of association can proceed to allotment) are now offered for subscription at par, payable 1s. per share on application and 16s. 6d. per share on allotment.

Seven shares have been subscribed by the signatories of the memorandum.

In the body of the prospectus it was also stated that the minimum subscription on which the directors might proceed to allotment was seven shares of 1l. each. Clause 7 of the articles of association of the new company as registered was as follows:

7. If the company shall offer any of its shares to the public for subscription: (a) The directors shall not make any allotment thereof unless and until at least 7 per cent. of the shares so offered shall have been subscribed, and the sums payable on application shall have been paid to and received by the company . . .

The articles had been prepared from a print of the articles of another company in which the words "per cent." occurred in clause 7. The draftsman struck out the words "per cent." in preparing the draft, but the printers reproduced them in the proof. The words were again struck out when the proof was revised, and the proof as corrected was produced at the meetings of the old company at which the special resolutions were

passed and confirmed. By mistake the wrong proof, in which the words "per cent." had by inadvertence been allowed to remain, was sent to the printers instead of the proof as revised, and the articles were printed and eventually signed by the seven signatories to the memorandum of association without it being observed that the words "per cent." were still retained in clause 7. Several applications for shares by the public had been received, but no shares had been allotted.

The mistake was not discovered until the 7th April 1902, when the necessary application for leave to commence business was made to the Registrar of Joint Stock Companies. He then pointed out the discrepancy between the prospectus and the articles, and refused to certify that the company was entitled to commence business as required by sect. 6 of the Companies Act 1900.

In order to have the mistake rectified at once an application by motion in an action by one of the signatories to the memorandum against the other signatories and the new company was made, asking that the articles of association might be rectified by striking out the words "per cent." in art. 7, and by the consent of all the defendants treating the motion as the trial of the action.

The material sections of the Companies Acts are as follows:

Sect. 50 of the Companies Act 1862:

Subject to the provisions of this Act and to the conditions contained in the memorandum of association, any company formed under this Act may, in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association . . . or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

Sects. 4 and 6 of the Companies Act 1900:

Sect. 4. No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely—(a) The amount (if any) fixed by the memorandum or articles of association and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment . . . has been subscribed, and the sum payable on application for the amount so fixed and named . . . has been paid to and received by the company.

Sect. 6 (1). A company shall not commence any business or exercise any borrowing powers unless—(a) Shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and . . . (c) There has been filed with the registrar a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with. (2) The registrar shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled. . . . (5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

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(7) This section shall not apply to any company where there is no invitation to the public to subscribe for its shares.

Hughes, K.C. and Mark Romer, for the plaintiff, stated the facts and submitted that the court had power to make the order asked for. [JOYCE, J.—What jurisdiction has the court to rectify articles? The court has power to rectify any deed and the articles have the same effect as a deed: (see sects. 14, 15, and 16 of the Companies Act 1862). The articles are an agreement between the seven signatories to the memorandum of association until someone else comes in and shares are allotted. No shares have yet been allotted. If the articles here are no more than an agreement between the seven signatories, the court clearly has jurisdiction to rectify them. [JOYCE, J. referred to *Hall-Dare v. Hall-Dare* (54 L. T. Rep. 120; 31 Ch. Div. 251).]

Cassel, for all the defendants, supported the application and submitted that the jurisdiction of the court was not limited to agreements in writing *inter partes*, but extended also to a deed poll and a bill of exchange:

Druif v. Lord Parker, 18 L. T. Rep. 46; L. Rep. 5 Eq. 131.

The question of the jurisdiction to rectify the register of shares of a company was discussed in

Ashworth v. Bristol and North Somerset Railway Company, 15 L. T. Rep. 561.

JOYCE, J.—I do not see my way to make the order asked for. No doubt a blunder was made in drafting the articles, but that can be rectified under the provisions of sect. 50 of the Companies Act 1862 and is the proper way of doing it. With reference to the jurisdiction to rectify such a document, counsel have not had much time or opportunity to look into the authorities on the subject; but on the materials before me and as at present advised, I am of opinion that the general jurisdiction of the court to rectify instruments has no application to a document of this kind, which has only a statutory effect, and can only be rectified by statutory authority. I therefore refuse the motion.

Solicitors for all parties, *Cheston and Sons*.

Jan. 15, 16, and 17.

(Before JOYCE, J.)

HOUNSELL v. DUNNING. (a)

Statute of Limitations—Copyholds—Devise—Possession—Disability—Coverture—Elapse of thirty years—Will—Construction—Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), s. 5.

On the 26th Dec. 1869 *H. H. B.* died intestate leaving a widow, *J. B.*; two daughters, *M. B.* (now *M. H.*) and *Henrietta H. B.*; and a son, *P. H. B.*

At the time of his death *H. H. B.* was possessed of certain copyhold tenements held of the manor of *T. D.*

On the 7th Jan. 1870 *J. B.* died, having made a will on the 6th Jan. 1870 whereby she gave to her daughters *M. B.* (now *M. H.*) and *Henrietta H. B.* "all and singular the share and proportion of my late husband's estate that I take or to which

I am entitled on his decease to be equally divided between them share and share alike; and I also give and bequeath to my two said daughters the sum of 500l. . . . to be divided between them share and share alike, and I make this provision for them in lieu of the various freehold and copyhold lands of my late husband which descend to my son on the intestacy of my late husband."

At the time of the death of *H. H. B.* it was erroneously supposed that the copyholds in question devolved upon *P. H. B.* as the customary heir, whereas, in fact, they devolved upon *J. B.* as the customary heiress.

Acting upon this assumption, the administrator of *H. H. B.*, one *G. C. H.* (husband of *M. H.*), entered into possession of the copyholds and expended the rents—certainly from the time of the death of *J. B.*, if not before—in the maintenance and education of *P. H. B.* until he became of age in 1877; and in 1878 handed to him the title deeds with an account.

In 1871 a deed of enfranchisement had been executed in favour of *P. H. B.* by the lords of the manor in consideration of a sum of 138l., expressed to be paid by him.

On the 27th Nov. 1890 *P. H. B.* died, having remained in possession of the copyholds until his death. By his will *P. H. B.* appointed the defendants to be his executors and trustees, and gave all his real estate to them upon trust for sale and to stand possessed of the residue for the benefit of his nephew and niece *L. S. H.* and *M. I. H.*

On the 25th Sept. 1900 the plaintiffs *G. C. H.* and *M. H.*, having discovered that the copyholds did in fact devolve upon *J. B.*, and not upon *P. H. B.*, brought this action against the defendants for a declaration that *M. H.* was entitled under the will of *J. B.* to a moiety of the copyholds.

Held, that the plaintiffs were barred by sect. 5 of the Real Property Limitation Act 1874, more than thirty years having elapsed between the death of *J. B.* and the commencement of this action.

Semle, also, that upon the true construction of the will the copyholds did not pass to *M. H.* and *Henrietta H. B.*, but devolved upon *P. H. B.*

ON the 26th Dec. 1869 *Henry Hine Ball* died intestate, and left him surviving his widow *Jemima Ball* and three children—the plaintiff *Mary Hounsell*, born the 12th Jan. 1850; *Henrietta Hine Ball*, born the 8th Jan. 1855; and *Philip Henry Ball*, born the 23rd Feb. 1856.

Henry Hine Ball was at the date of his death possessed of certain copyhold tenements held of the manor of *Taunton Dene*, in the county of *Somerset*, for an estate of inheritance in customary fee simple; and, according to the custom of the manor, these copyholds devolved upon *Jemima Ball* as his customary heiress-at-law.

On the 7th Jan. 1870 *Jemima Ball* died.

By her will dated the 6th Jan. 1870 *Jemima Ball* gave to the plaintiff *Mary Hounsell* and to *Henrietta Hine Ball*

All and singular the share and proportion of my late husband's estate that I take or to which I am entitled on his decease to be equally divided between them share and share alike; and I also give and bequeath to my two said daughters the sum of 500l. . . . to be divided

(a) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

between them share and share alike, and I make this provision for them in lieu of the various freehold and copyhold lands of my late husband which descend to my son on the intestacy of my late husband.

James Slee Bult and the plaintiff George Collins Hounsell (husband of the plaintiff Mary Hounsell) were appointed executors, probate being granted to George Collins Hounsell.

At the time of the death of Henry Hine Ball all the persons interested in the matter believed that the copyholds in question devolved upon Philip Henry Ball, as his customary heir. And, accordingly, George Collins Hounsell, who was also administrator of the will of Henry Hine Ball, entered into possession of the copyholds and expended the rents—which he had collected through his solicitor and agent certainly from the time of the death of Jemima Ball, if not before—in the maintenance and education of Philip Henry Ball until he came of age in 1877; and in the following year accounted to Philip Henry Ball for the rents so received and handed over the title deeds.

On the 15th May 1871 a deed of enfranchisement had been executed, in favour of Philip Henry Ball by the lords of the manor in consideration of the sum of 138*l.*, expressed to be paid by him. The deed stated that Philip Henry Ball inherited the property “under the custom of the said manor as heir-at-law of his father Henry Hine Ball, who died intestate, and of his mother Jemima Ball, also deceased, who also died intestate as to the customary or copyhold estates she inherited from her husband Henry Hine Ball.”

On the 27th Nov. 1890 Philip Henry Ball died, having remained in possession of the copyholds until his death.

By his will, dated the 6th Feb. 1890, Philip Henry Ball appointed the defendants to be his executors and trustees, and gave all his real estate to them upon trust for sale, and to stand possessed of the residue for the benefit of his nephew and niece Ludlow Strangways Hounsell and Mabel Inman Hounsell, the son and daughter of the plaintiffs, in equal shares.

On the 25th Sept. 1900 the plaintiffs, having discovered that the copyhold estates did in fact devolve upon Jemima Ball, the widow of Henry Hine Ball, and not upon his son Philip Henry Ball, instituted the present action.

The plaintiffs claimed (1) a declaration that the copyhold properties in question, on the death of Henry Hine Ball, descended to Jemima Ball as his customary heir; (2) a declaration that according to the true construction of the will of Jemima Ball an equal undivided moiety of the property in question was devised to the plaintiff Mary Hounsell for a customary estate in fee simple; (3) a declaration that Mary Hounsell, or alternatively the plaintiffs, or alternatively George Collins Hounsell in her right, was or were entitled to the undivided moiety for a customary estate in fee simple, or, in the alternative, a declaration that Mary Hounsell was entitled, subject to any rights therein of George Collins Hounsell or any person claiming through or under him during his life, to the undivided moiety, for a customary estate in fee simple in remainder expectant upon his decease.

The defendants denied that the copyholds were subject to the will of Jemima Ball, and also relied upon the Statutes of Limitations.

Younger, K.C. and Beddall for the plaintiffs.—The copyholds in question pass under the words “all and singular the share and proportion of my late husband’s estate that I take or to which I am entitled on his decease to be equally divided between them share and share alike”; and this notwithstanding the subsequent provision. They referred to the cases of:

O’Toole v. Browns, 3 E. & B. 572;

Sanderson v. Dobson, 1 Ex. 141;

Dobson v. Bowness, L. Rep. 5 Eq. 404.

[JOYCE, J. referred to *Re Bagot*; *Paton v. Ormerod* (69 L. T. Rep. 399; (1893) 3 Ch. 348.)] Again, G. C. Hounsell was in possession of the copyholds from 1870 to 1877 in right of his wife. G. C. Hounsell is himself barred; but not so his wife, who, being under disability, had thirty years from 1877 in which to bring an action:

Real Property Limitation Act 1874, s. 5.

Adams (*Hughes*, K.C. with him) for the defendants.—The copyholds do not pass under the will. Although the word “estate” may include real estate, it does not necessarily; and, here, the erroneous belief of the testatrix that the copyholds went to the son is sufficient to show that the word “estate” is not to include realty. It is more incumbent to show that particular property passes in the case of a specific devise than in the case of a residuary gift. He referred to

Doe v. Hurrell, 5 B. & Ald. 18;

Re Bagot; *Paton v. Ormerod* (*ubi sup.*);

Coard v. Holderness, 20 Beav. 147;

O’Toole v. Browns (*ubi sup.*);

Sanderson v. Dobson (*ubi sup.*);

Green v. Pertwee, 5 Hare, 249.

But, apart from the construction of the will, the plaintiffs are barred by the Statute of Limitations; for the statute began to run from the date of the death of H. H. Ball. The husband never took possession on his own account, but acted merely as the bailiff of the infant P. H. Ball:

Morgan v. Morgan, 1 Atk. 488;

Wall v. Stanwick, 56 L. T. Rep. 309; 34 Ch. Div. 763;

Thomas v. Thomas, 2 K. & J. 79;

Re Hobbs; *Hobbs v. Wade*, 58 L. T. Rep. 9; 36 Ch. Div. 553.

The husband acted as the agent of P. H. Ball, and the possession of the agent is that of the principal, even though the agent be the true owner:

Williams v. Pitt, L. Rep. 12 Eq. 149.

He also referred to

Collard v. Hare, 2 Russ. & My. 675;

Doe v. Bramston, 3 Ad. & E. 63;

Jumpson v. Pitchers, 13 Sim. 327.

Younger, K.C. in reply.

JOYCE, J.—In this case Henry Hine Ball died intestate on the 26th Dec. 1869, being at the time of his death entitled to certain copyhold hereditaments held of the manor of Taunton Dene, in the county of Somerset. He left a widow, Mrs. Jemima Ball, and, among other children, an eldest son, Philip Henry Ball. Now, at that time, all persons concerned or interested in the matter supposed and considered that upon the death of Henry Hine Ball these copyhold hereditaments devolved upon Philip as his customary heir, and that Jemima Ball, the widow of H. H. Ball, was entitled to a distributive

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share in the personal estate of H. H. Ball, and possibly also to dower, or something in the nature of dower, in the real estate to which he died entitled. The widow lived for a short time after her husband, and died on the 7th Jan. 1870. Upon her death, if not before, the present plaintiff, Mr. Hounsell, appears through his solicitor and agent, Mr. Maynard (who, I suppose, collected the rents before), to have collected the rents of the property certainly from the time of the death of Mrs. Jemima Ball, and I rather think before that time—namely, from the death of Henry Hine Ball himself. Mr. Hounsell expended the rents which he received in respect of these properties in the maintenance and education of Philip Henry Ball, and when P. H. Ball came of age in 1877 he accounted to him and handed over the title deeds, as was quite natural, no one having supposed or thought for a moment that anyone was entitled to this property except P. H. Ball. Further than that, in 1871 there was an enfranchisement of all these copyholds by a deed of the 15th May 1871, which was procured by Mr. Hounsell himself in the name and on behalf of P. H. Ball, the expenses of the enfranchisement being paid out of the rents of this property, or otherwise out of income which belonged to P. H. Ball. Some time afterwards P. H. Ball contemplated a sale of the property, and, on the title to the property being looked into, it was then suggested by some of the solicitors concerned, as was the fact, that the customary heir of Henry Hine Ball was not his eldest son, Philip Henry Ball, but was the widow, Mrs. Jemima Ball. Ultimately, on the 25th Sept. 1901 this action was brought, being a claim by Mr. Hounsell and his wife (he bringing the action in right of his wife, as a devisee under the will of Jemima Ball) to this property against the trustees of the will of P. H. Ball, who are at present in possession. It is in reality a claim by the plaintiffs against their own children, who are the devisees or beneficiaries under the will of P. H. Ball. In my opinion, after some hesitation, it is not material at all whether, on the death of Jemima Ball, Philip Henry Ball was of age, and Hounsell received and accounted to him for the rents, or whether, as was the fact, Philip Henry Ball was an infant, and Hounsell collected the rents on his behalf and accounted for them as the bailiff of an infant. He did, in fact, account to P. H. Ball for all the rents; he admitted him to be entitled, and procured the enfranchisement in his favour, and no one supposed that anybody else was entitled. The result of this, to my mind, is that P. H. Ball was in possession or receipt of the rents of this property at least from the death of Jemima Ball, if not from the death of Henry Hine Ball. This would clearly have been so if Mr. Hounsell were the real owner, and I think it is equally so although he was only entitled to the rents in the right of his wife, there being no fraud or collusion in the case. If I am right in this, both plaintiffs are, as I hold them to be, barred by the Real Property Limitation Act 1874, more than thirty years having elapsed between the death of Jemima Ball on the 7th Jan. 1870 and the commencement of this action on the 25th Sept. 1900. Now, it has been said that this might have been so if Mr. Hounsell had not been the husband of Mrs. Hounsell, one of the real owners; but it is contended that P. H. Ball was in under Mr. Hounsell, so to speak,

and that P. H. Ball cannot be in a better position than he would have been if Mr. Hounsell had assigned or conveyed his life interest in these copyholds to him. To my mind, if that were so, then this action equally fails, because these plaintiffs have no right which I can recognise or deal with until the termination of the coverture. It then might be a question of a different party altogether—the heir. But I am of opinion, and I hold, that both the plaintiffs are barred altogether from any claim against this property. Then, even if they were not barred by the statute, in order to succeed it would be necessary for them to make out that they have a good title under a very peculiar devise or gift in the will of Mrs. Jemima Ball, as the claim of Mr. Hounsell is in the right of the wife as devisee under that will. That is a gift by Mrs. Jemima Ball of “all and singular the share and proportion of my late husband’s estate that I take or to which I am entitled on his decease.” Now, on the facts, as to which there is really no dispute, I am satisfied that this testatrix had not the slightest idea that she had any interest in the real estate in question, and that she never contemplated for one moment or thought of this gift passing any interest whatever in this copyhold estate. In my opinion, then, this gift is an ambiguous gift, and it may or may not be construed to pass the interest of the testatrix in the real estate in question. When the context of this will is looked at, it is found that the testatrix gives a reason for the mode in which she disposes of this share and proportion of her late husband’s estate to her daughters in the way she does—namely, the fact that the copyhold estates of the husband devolved upon the eldest son, Philip; so that, to my mind, there are, upon the face of the will, reasons that might induce the court to infer that the testatrix had no intention that this real estate, if it was hers, should pass by this gift. I am, then, inclined to say that there is sufficient to induce the court to hold that the testatrix, if she had known that there was a possibility of this property passing by the gift, would have made a different disposition. Therefore, although it is not necessary for me to decide that, I am inclined to think that this lady’s interest in this property did not pass by this gift, but devolved upon her customary heir, P. H. Ball; and I think that the view which was taken of the law by the solicitor at the time of the enfranchisement was right—namely, that P. H. Ball was entitled to the property he had inherited as heir-at-law of his father and of his mother Jemima Ball. In any view of the case, if I am right, this action fails, and must be dismissed with costs.

Solicitors for the plaintiffs, *Pakeman and Read*.
Solicitors for the defendants, *Surr, Gribble, and Oliver*, for *Easton and Channer*, Taunton.

Jan. 13, 14, 15, 16, and 20.

(Before JOYCE, J.)

IRELAND v. HART. (a)

Company—Shares—Blank transfer—Registration—Articles of association—Prior equitable title.

H. C. I. held certain shares in a company in trust for his wife, L. E. I., and, without her consent or knowledge, executed a blank transfer of the shares, and gave the same to G. J. H. as security for a loan. On the 23rd Nov. 1901 G. J. H. sent the transfer, which he had filled in with his own name, and the certificate of the shares, to the offices of the company for registration. On the 26th Nov. the managing director of the company saw H. C. I., who said that G. J. H. had no right to transfer the shares, and asked for postponement of the registration. On the 27th Nov. a meeting of the directors was held, and these circumstances mentioned to the directors; but the transfer was not registered. On the same day L. E. I. commenced an action for an injunction to restrain the registration.

The articles of association of the company provided that every instrument of transfer should be left at the office for registration accompanied by the certificate of the shares to be transferred, and such other evidence as the company might require to prove the title of the transferor to his right to transfer the shares.

Held, that G. J. H. had not on the 27th Nov. a "present, absolute, and unconditional" right to the registration of the transfer, and that therefore the prior equitable title of L. E. I. must prevail.

THE plaintiff Lucy Eveline Ireland was the wife of the defendant Henry Cubitt Ireland, to whom in Feb. 1901 she had transferred certain shares—which she had previously held in her own right—in order that he might attend and vote at meetings of the company in her behalf.

H. C. Ireland was duly registered as holder of the shares, which consisted of 180 fully paid-up shares of 5l. each in the defendant company, Samuel Kidd and Co. Limited.

In the early part of 1901 the defendant George John Hart, who was a chartered accountant and had audited the accounts of the defendant Ireland, lent him sums amounting in all to 500l.; and, as security for the same, the defendant Ireland on the 4th March 1901, without the knowledge or consent of the plaintiff, executed a blank transfer of the shares in question and handed it to the defendant Hart. The transfer was under seal.

According to the evidence of the defendant Hart, he was ignorant of the fact that the defendant Ireland held the shares in trust for the plaintiff, and would not have advanced the money if he had been aware of such trust; but he admitted that it was agreed between him and the defendant Ireland that he would not dispose of the shares without giving Ireland an opportunity to redeem them. But the defendant Ireland alleged that he had informed Hart at the time of the execution of the transfer that he held the shares in trust for his wife, the plaintiff.

On the 18th Nov. 1900 Hart, having reason to doubt the goodness of his security, or the position of the defendant Ireland, filled in the transfer by inserting his own name as the transferee, and therein stated the consideration money to be 100l.

On the 23rd Nov. 1901 Hart sent the transfer with the certificate to the office of the defendant company, and a formal receipt was given for it.

On the 26th Nov. 1901 the managing director of the defendant company called on the defendant Ireland in reference to the transfer, pointing out the smallness of the consideration; and then Ireland told the managing director that Hart had no right to transfer the shares, and asked that the registration of the transfer might be postponed for a few days.

On the 27th Nov. 1901 an ordinary meeting of the directors of the company was held, when the managing director related what had taken place; but the transfer was not formally submitted to the board.

On the same day the writ in this action was issued, and an interim injunction was obtained to restrain the registration of the transfer.

The plaintiff now claimed (1) a declaration that the shares were held by her husband, the defendant Ireland, in trust for her; (2) an injunction to restrain the defendant Hart from procuring or attempting to procure the registration of the transfer, and from dealing with the certificate of the shares, or parting with the same except to the plaintiff, and to restrain the defendant company from registering any transfer of the shares except to the plaintiff; and (3) to have the transfer delivered up to be cancelled, and to have the certificate of the shares delivered to the plaintiff.

It was provided by art. 30 of the company's articles of association that the instrument of transfer of any share should be signed by both the transferor and transferee, and the transferor should be deemed to remain the holder of such share until the name of the transferee should be entered in the register in respect thereof.

Art. 31 provided that the instrument of transfer of any share should be in writing in the usual common form, or in the form prescribed, or as near thereto as circumstances would admit. The form prescribed was similar to that given in table A to the 1st schedule of the Companies Act 1862.

Art. 33 provided that every instrument of transfer should be left at the office for registration, accompanied by the certificate of the shares to be transferred, and such other evidence as the company might require to prove the title of the transferor or his right to transfer the shares.

Hughes, K.C. and C. T. Mitchell for the plaintiff.—As there has been no registration of the transfer, the legal title to the shares is in the defendant Ireland by virtue of art. 30 of the articles of association. And the defendant Hart has not a "present, absolute, unconditional right" to be registered:

Société Générale de Paris v. Walker, 54 L. T. Rep. 389; 11 App. Cas. 20;

Roots v. Williamson, 58 L. T. Rep. 802; 38 Ch. Div. 485.

Moreover, Hart had notice of the trust in favour of the plaintiff, and therefore can have no title in priority to her:

Earl of Sheffield v. London Joint Stock Bank, 58 L. T. Rep. 735; 13 App. Cas. 333.

Sydney C. N. Goodman for the defendant Hart.—The evidence of Hart that he had no notice of the trust in favour of the plaintiff

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should be accepted. That being so, everything required to be done by Hart before registration had been done by him, and there simply remained a ministerial act to be performed by the defendant company. Under these circumstances the title of Hart should prevail over the prior equitable title of the plaintiff :

Nanney v. Morgan, 58 L. T. Rep. 238; 37 Ch. Div. 346.

In the cases of *Société Générale de Paris v. Walker* (*ubi sup.*), *Moore v. North-Western Bank* (64 L. T. Rep. 456; (1891) 2 Ch. 599), and *Roots v. Williamson* (*ubi sup.*) there was some important requisite to be fulfilled before registration could be required by the transferee.

C. T. Mitchell in reply.

Cur. adv. vult.

JOYCE, J.—The subject of this action is 180 fully paid-up shares in a company called Samuel Kidd and Co. Limited, and there is no doubt that the shares in question were held by Mr. Ireland, who was a solicitor, as trustee for his wife from probably Feb. 1900. With regard to the transfer of shares, the articles of association provided as follows: [His Lordship read arts. 30, 31, and 33.] Now, Mr. Ireland desired a loan, and there appears to have been a conversation between him and the defendant Mr. Hart, an accountant, who first audited the books and afterwards practically kept the books of Ireland; and on the 4th March 1901 Ireland incloses a transfer in blank of the shares in question, in a letter of that date, saying, "I inclose blank transfer forms," and then he says: "The Bowdens were here to-day; he is going to split up the larger scrip, so I cannot send you this. I hope, however, you will be able to arrange on inclosed." That is to say, he sends the blank transfer of the shares in this company. The defendant Hart replies on the 6th acknowledging receipt of the transfer, and on that day he pays the balance of the loan, or some other sum, on the security of the blank transfer. Now, the transfer in question is a transfer which appears to be executed on that date, without mention of consideration, and it appears to be executed by Ireland under seal. I take it that upon the authority of *Ex parte Sargent* (L. Rep. 17 Eq. 273), although the articles of association do not require a transfer to be by deed, that is in effect a good transfer, and I consider the defendant Hart had thereby authority to fill up the blanks and to complete the transfer. There appears to have been some conversation between the parties as to not registering that transfer, or at all events not disposing of the shares, without Ireland being informed and having an opportunity to redeem, or something of that kind. On the 18th Nov. 1900 Hart, having reason to doubt the goodness of his security, or the position of Ireland, in order to protect himself filled up the transfer; and on the 23rd Nov. the transfer was sent for registration to the company's office, and a formal receipt given for it. I consider that Hart had authority to fill up the transfer, and to do what he did. Now, the next ordinary meeting of the directors of the company was on Wednesday, the 27th Nov. On Tuesday, the 26th, Mr. Wright, the managing director, called on Ireland in consequence of some objection taken by the secretary of the company that the consideration of 100*l.*, as filled in by the defendant, was insufficient; and

then, as I understand, Ireland intimated to or told Wright that the defendant Hart had no right to transfer the shares, and he asked that the registration of the transfer might be postponed for a time. Wright appears to have agreed to that; and on the same day Ireland addressed a letter to Wright at the company's office, requesting that the registration of the transfers might be delayed a few days. At the meeting on the 27th Wright told the directors what had taken place. No resolution at all was come to; but, as I understand, the directors raised no objection to what had been done. In point of fact, the transfer was not formally submitted to the board. On the same day the action was commenced, and an interim injunction was obtained from me on that day, and the company had formal notice thereof on the next morning. Now, in my opinion, the board of directors were not bound to register that transfer at the meeting on the 27th. It is well settled that, although directors may have no power to refuse to register a transfer, they are entitled to have a reasonable time after the transfer is lodged to make inquiries for the purpose of finding out if the transfer is in order; but, after being satisfied on this point, they are bound at their next meeting to register the transfer. But I consider that, after what had taken place, the directors were not bound to pass the transfer at their meeting of the 27th Nov. At all events, they did not pass the transfer. In my opinion, an application made, under sect. 35 of the Companies Act 1862, on the 27th Nov., to rectify the register, could not have succeeded. The cases of *Société Générale de Paris v. Walker* (*ubi sup.*), *Roots v. Williamson* (*ubi sup.*), and *Moore v. North-Western Bank* (*ubi sup.*) establish that where the articles are in the form in which they are in the present case, a legal title is not acquired to shares as against an equitable owner before registration, or, at all events, until the person seeking to register has a present, absolute, and unconditional right to have the transfer registered. I am not called upon to say precisely when there is such a "present, absolute, and unconditional right"; but I am not sure that anything short of registration would do, except under very special circumstances. At all events, I am of opinion that in this case, prior to the date of the injunction, the defendant Hart had not a present, absolute, and unconditional right to the registration of the transfer of these shares, and therefore that the prior equitable right of the plaintiff Mrs. Ireland must prevail. That is my judgment in the action, but a great part of the costs seems to me to have been incurred on the question as to whether Hart had notice of Mrs. Ireland's title. Now, Ireland says that Hart knew very well that the shares were his wife's at the time; but the account which he gives in his affidavit, although perhaps not very detailed, appears to be misleading; and, as this case may come to be further considered, I think I am bound to say that Ireland—who no doubt was in a difficult position as between his wife and Hart, whom he admits to be a perfectly honest man—did not give his evidence by any means in a satisfactory manner, and Hart denies positively that he knew that the shares were Mrs. Ireland's. His statement to that effect was not in the least shaken in cross-examination; and I do not hesitate to say

that, where there is a conflict between Ireland and Hart in reference to fact, on their testimony in this case I prefer to rely upon the evidence of Hart, and I accept his statement that he had not notice and did not know of Mrs. Ireland's title. I do not believe that Hart would have lent the money if he had known that Mrs. Ireland was the owner of the shares. And although I think the plaintiff has the equitable title, which title must prevail, each party must pay its own costs. There will accordingly be a declaration that the equitable title of the plaintiff prevails over the claim of the defendant Hart, and that the transfer to him executed by the defendant Ireland was inoperative. There will also be an order upon the defendant Hart to deliver up the certificate of the shares to the plaintiff, and the plaintiff will have liberty to apply for delivery up of the transfer to be cancelled and generally.

Solicitor for the plaintiff, *S. J. R. Stammers*.
Solicitor for the defendant Hart, *S. A. Jones*.

Saturday, Feb. 1.
(Before JOYCE, J.)

Re BENJAMIN; NEVILLE v. BENJAMIN. (a)

Presumption of death—Legatee—Disappearance nine months before testator's death—Not since heard of—Elapse of nine years.

By his will D. B. gave his residuary estate to trustees upon trust for sale and conversion, and to divide the proceeds into as many shares as he should have children who should be living at the date of his death, or should have died in his lifetime leaving children living at his death, and to appropriate one share to each child respectively.

On the 25th June 1893 D. B. died. D. B. had had thirteen children, of whom twelve were living at his death. The remaining one, P. D. B., had not been heard of since the 1st Sept. 1892.

On a summons being taken out by the trustees of D. B.'s will to determine in what manner the share, to which P. D. B. would have been entitled if alive at the testator's death, should be dealt with, the court held upon the evidence that P. D. B. must be presumed to be dead, and directed that, in the absence of evidence to show that P. D. B. was alive at the death of the testator, the share should be divided by the trustees upon the footing that P. D. B. did not survive the testator.

By his will, dated in 1891, David Benjamin gave his residuary estate to trustees upon trust for sale and conversion, and to divide the proceeds into as many shares as he should have children who should be living at the date of his death, or should have died in his lifetime leaving children living at his death, and to appropriate one share to each child respectively.

On the 25th June 1893 the testator died. He had thirteen children, of whom twelve were living at his death. As to the remaining one, Philip David Benjamin, it was uncertain whether he had predeceased the testator or not, for on the 1st Sept. 1892, being then twenty-four years of age, he had disappeared under the following circumstances: He was employed as a traveller to a Birmingham firm, being related to some of the members of the firm. In Aug. 1892 he went

abroad for a holiday, and on the 1st Sept. 1892 was at Aix-la-Chapelle with a friend. Whilst there he received a communication from his firm requiring him to return to London; and left his friend, apparently starting for London. From that time nothing had been heard of him, although inquiries had been made and advertisements issued in all the English colonies and in other parts of the world. His accounts, it appeared, showed large defalcations; but the communication from the firm contained no threat or suggestion of prosecution.

Philip David Benjamin was entitled, on the assumption that he survived the testator, to about 30,000*l*.

Letters of administration to his estate had been granted to one of his brothers, leave having been obtained from the Probate Division to swear his death on or since the 1st Sept. 1892.

The trustees of the testator's will had taken out an originating summons to determine in what manner the share of Philip David Benjamin in the estate of his father ought to be dealt with or disposed of by them. The master stated, in answer to inquiries directed by the court, that he was unable to certify whether Philip David Benjamin was living or dead, or, if dead, when he died. He certified, however, that Philip David Benjamin was not married at the time of his disappearance, and that no person claiming to be his wife or child had come in under the advertisements which had been issued, or made any application to the trustees or their solicitors.

The trustees now asked for an order upon the summons giving them liberty to distribute the estate as if Philip David Benjamin had predeceased the testator.

Hughes, K.C. and *E. Ford* for the trustees.—The onus is upon the administrator of Philip David Benjamin to show that he was living at the testator's death:

Re Walker, 25 L. T. Rep. 775; L. Rep. 7 Ch. 120.

In that case a testator gave a legacy to be equally divided, within twelve months, between the children of W. P. who should be living at his (the testator's) death, such sum to be raised out of the property thereafter given to his executrix for life. He then gave to his executrix certain real and personal estate for her life, and after her death to the children of W. P. living at his (the testator's) death. At the testator's death in Jan. 1847 there were four children of W. P. living, but another, J. T. P., had not been heard of since Feb. 1845, and nothing ever was heard of him afterwards. On the question arising in 1871 as to whether the administrator of J. T. P. was entitled to a share of the legacy, the court held he was not, for "no evidence had been adduced, nor apparently could be obtained, to show that he was living at the testator's death, and so included in the class; and it lay upon those claiming under him to show that he was included." That case, we submit, shows that the administrator of Philip David Benjamin is not entitled.

Jessel for the administrator.—The court will not presume a person's death in a case such as this, when there is good reason for his not communicating with his friends. In the case of *Re Walker* (*ubi sup.*), the person, whose existence was uncertain, was on the best of terms with his relatives, and had no grounds for refraining from

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communication. But even if the court presumes that Philip David Benjamin is dead now, it should not be presumed that he was dead at the death of the testator. He referred to

Bowden v. Henderson, 2 Sm. & Giff. 360;
Watson v. England, 14 Sim. 28;
Re Corbishley's Trusts, 14 Ch. Div. 846;
Hickman v. Upsall, 35 L. T. Rep. 919; L. Rep. 20 Eq. 136;
Re Rhodes, 57 L. T. Rep. 652; 36 Ch. Div. 586;
Re Phéne's Trusts, 22 L. T. Rep. 111; L. Rep. 5 Ch. 139.

JOYCE, J.—I think that Philip David Benjamin must be presumed to be dead on the evidence in this case; there being no reason why he should hesitate to come home now, although there might have been ground for some hesitation at first. The question, then, is as to when he died. If he is to be presumed to be dead, I think the case of *Re Walker* (*ubi sup.*) applies, and the onus is on his representative to show that he survived the testator. But his representative has failed to bring any evidence to show that. In my opinion, then, the man must be taken to be dead, and the trustees are therefore at liberty to distribute. I am anxious to do nothing which would bar him if by some chance he should turn up. I therefore prefer not to declare that he is dead, although I give liberty to distribute. The order will be that the trustees be at liberty to divide the share of the testator's residuary estate upon the footing that Philip David Benjamin did not survive the testator.

Solicitors: Emanuel and Simmonds.

KING'S BENCH DIVISION.

Monday, Nov. 25, 1901.

(Before WRIGHT, J.)

Re AN ARBITRATION BETWEEN LOCKIE AND CRAGGS AND SON. (a)

Contract—Building ship—Delay—Allowances—“Circumstances beyond builders' control.”

A contract for building a ship provided that due allowance should be made for delays through certain causes “or other circumstances beyond the builders' control.”

It was within the contemplation of the parties that the ship should be commenced as soon as a suitable berth became vacant, and the first berth which became vacant was one in which another ship was being built, and delay was caused in the completion of this ship by the same kind of causes which were provided for in the contract relating to the ship in question.

Held, that allowances were properly made for delay in building the ship in the contract owing to the delay in completing the former vessel.

SPECIAL case stated by an arbitrator.

By a contract in writing dated the 6th July 1898 it was agreed between John Lockie (therein called the purchaser) and R. Craggs and Son (therein called the builders) that the latter should build and sell and the former purchase a steel screw steamer.

The clause as to delivery was as follows:

The builders undertake to build and deliver the vessel complete and ready for sea after satisfactory trial trip

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

not later than the 31st June 1899, due allowance being made for delays through bad weather, strikes, fires, and accidents on board ship at shipbuilders' works or at any works upon which they may be dependent for supplies of material, delay in delivery of material, or other circumstances beyond builders' control or marine risks.

The arbitrator found as facts that it was contemplated by the parties that the steamer should be built at the builders' yard at Middlesbrough, and that the purchaser was at the date of the contract aware that the steamer (called No. 160) could not be commenced until a suitable berth was vacant; that the first suitable berth that became vacant was one in which another steamer (called No. 149) was being built at the date of the contract, and that the builders acted reasonably in arranging to build No. 160 in that berth; that the completion of No. 149 was delayed by the following causes, bad weather, strikes, accidents at ship and at builders' works, and delay in delivery of material; and that, owing to the non-completion of No. 149, the building of No. 160 could not be commenced until the 31st March 1899, when it was in fact commenced.

The arbitrator held that the delays in building No. 149 from the causes mentioned delayed the commencement and completion of No. 160, and that due allowance ought to be made in fixing the date at which No. 160 ought to be completed and delivered. He accordingly made due allowance for delays during the building of No. 149 due to the causes mentioned.

Scrutton, K.C. (*Mackenzie* with him) for the purchaser.—The question here that arises is whether the arbitrator can take into consideration causes which did not interfere with the actual building of the ship, but other circumstances altogether. The clause of exceptions which is inserted can only apply to the ship, the subject-matter of the contract, and, as they are in the favour of the builders, it must be construed against them. In *Re an Arbitration between Richardsons and M. Samuel and Co.* (77 L. T. Rep. 479; (1898) 1 Q. B. 261) the charter-party excepted “strikes, lock-outs, accidents to railway,” and “other causes beyond charterers' control.” It was held that the general clause excepting “other causes beyond charterers' control” referred to matters *ejusdem generis* with the antecedent exceptions. That principle applies here, and the words “other circumstances beyond builders' control” must be confined to matters *ejusdem generis*, as bad weather, strikes, fires, accidents, &c., and not to delays in the completion of another ship.

Hamilton, K.C. (*Roche* with him) for the vendors.—The case of *Re an Arbitration between Richardsons and M. Samuel and Co.* (*sup.*) is quite different to the present one, because the delay upon the railway did not in fact delay the loading. He referred to

The Alne Holmes, 68 L. T. Rep. 862; 7 Asp. Mar. Law Cas. 344; (1893) P. 173.

The allowances here were properly made under the contract, and the finding of the arbitrator was right.

Scrutton, K.C. in reply.

WRIGHT, J.—The question here is a nice one, but upon the findings of the arbitrator I cannot say that the allowance in question was improperly made to the shipbuilders. I think that any

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abnormal delay to the first ship was intended to be included by the parties in the period of building. Taking the matter as one of construction upon the first two findings of the arbitrator, the parties took the chance of the first ship being out of the way, and the completion of that ship was a preliminary to the building of the second. The question is whether the provisions for an allowance for delay come into operation when the causes of delay apply to the former ship. Under the circumstances of the case, any specified hindrance which delays the first ship may be said to be beyond the builders' control if it affects the second ship, No. 160. I think I ought to hold that the delay was unavoidable, and that the delay in the predecessor, No. 149, is within the clause of the contract as to No. 160, as to delay under which allowance must be made. It seems to me, on the findings of the arbitrator, the builders ought to succeed. Could it be said that if the berth had been destroyed the builders would have been compelled to complete within the specified time? I do not think so. The case of *The Alne Holme* (sup.) is not in point, though the cases there cited are to some extent. I think that the allowance ought to be made.

Judgment accordingly.

Solicitors for the purchaser, *Nash, Field, and Co.*, for *W. Mark Pybus and Son*, Newcastle-on-Tyne.

Solicitors for the vendors, *King, Wigg, and Co.*, for *Wilkinson and Marshall*, Newcastle-on-Tyne.

Monday, Feb. 24.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

JUSTICES OF OLDHAM (apps.) v. GEE (resp.). (a)

Licensing — Transfer — Condition on original grant — Licence to be given up on applicant leaving — Application for transfer — Discretion.

A licence was granted by justices subject to the condition that it should be given up upon the original holder leaving or ceasing to carry on business upon the premises.

Held, that this condition was not a bar to the justices granting a transfer of the licence upon the original holder leaving or ceasing to carry on business on the premises.

CASE stated by the quarter sessions for the Hundred of Salford.

On the 23rd Aug. 1894 one Samuel Turner applied at the general annual licensing sessions for the borough of Oldham for a certificate or licence to sell by retail, at a house situate at 52, Abbey Hills-road, in the borough, beer to be consumed off the premises, in pursuance of 11 Geo. 4 and 1 Will. 4, c. 64, and the statutes amending the same.

When Samuel Turner made the application to the justices of the borough sitting in such licensing sessions, he proposed that such certificate or licence should be granted to him subject to the condition: (1) That the premises in respect of which the licence was granted should be closed during the whole of Sunday; and, pending the application, assented to another condition which was suggested by the justices, namely, (2) that the licence should be

given up upon his leaving or ceasing to carry on the grocery business on the premises.

Thereupon the justices granted the licence to Samuel Turner subject to the conditions, which were duly embodied in the licence. The justices would have refused the application if the applicant had not offered to submit to condition No. 1 and assented to condition No. 2.

At the date of the application Samuel Turner was the tenant of the premises under a lease granted by the owner, Mrs. Jane Kershaw, for a term of five years expiring on the 23rd July 1899, and carried on the business of a grocer upon the premises. Upon the determination of the lease Samuel Turner became a tenant from year to year of the premises, and continued to carry on his grocery business.

The certificate or licence was renewed to Samuel Turner each year at the general annual licensing sessions of the borough, subject to the conditions embodied in the licence, and remained in force until the 24th Dec. 1900.

On the 24th Dec. 1900 the respondent Thomas Gee applied to the appellants for a transfer of the licence to him from Samuel Turner, who was about to give up possession of the premises and to cease to carry thereon the business of a grocer. The respondent was willing, if the transfer was granted, to take over and continue to carry on upon the premises the business of a grocer as theretofore carried on by Samuel Turner.

Thereupon the appellants refused to grant the transfer from Samuel Turner to the respondent on the ground that the transfer was contrary to the second of the above conditions inasmuch as Samuel Turner would, in the event of the transfer being granted, leave the premises and cease to carry on the grocery business upon the same.

It was contended before the quarter sessions on behalf of the appellants that they sitting as a court of special sessions of His Majesty's justices of the peace for the purpose of granting and transferring licences as aforesaid could lawfully in their discretion impose the above conditions on the original grant of the licence to Samuel Turner, and could lawfully refuse the transfer from Samuel Turner to Thomas Gee on the ground that such transfer was in contravention of the second of the conditions.

It was contended on behalf of the respondent that the appellants sitting as such court as aforesaid had no such power vested in them.

The Court of Quarter Sessions held the contention of the respondent to be right, and reversed the order of the appellants and granted the transfer.

Acland for the appellants.

F. H. Mellor for the respondent.

Lord ALVERSTONE, C.J.—We agree with Mr. Acland that the real question for our decision, or the real grounds on which the magistrates acted in the statement of this case, are not very clearly stated in the special case. It is only because stating the special case seems to me to be only consistent with one view that we think we see our way to decide this case. It seems to us that the objection must have been taken before the licensing justices, not that they could take this matter of the previous conditions into their consideration amongst other circumstances, but it was urged that they had no power to grant the

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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transfer, because of the pre-existing conditions. They having adopted that view, there being, we are told, no dispute as to the suitability of the applicant, or the other necessary conditions upon which justices exercise their discretion. When it came to a matter of appeal it was again contended on behalf of the present appellants that the pre-existing condition which had been imposed some four or five years before, but renewed, or taken to have been renewed, on the occasion of every renewal of the licence, prevented the licensing justices from having power to grant this transfer. That point was taken as going to the root of the jurisdiction of the justices. We think that, although it was a circumstance which could be taken into the consideration of the justices, it was not an objection which prevented the justices entertaining the application for a transfer of the licence. If that is so, the quarter sessions have set the matter right by holding that it was not a bar on the power of the licensing justices to grant the transfer, but only a circumstance to be taken into consideration. In my opinion, as the question of transfer must be dealt with judicially, no condition of this kind would bind future justices. This the quarter sessions considered was not a bar, and they granted the transfer to the respondent. Therefore we think that this appeal should be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Appeal dismissed.

Solicitors: *H. Booth and Sons, Oldham; R. M. Sizemith, Oldham.*

Monday, Feb. 24.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

CHURCHWARDENS OF ST. STEPHEN (apps.) v. GREAT NORTHERN AND CITY RAILWAY COMPANY (resps.). (a)

Bating — Distress warrant — Objection before justices on application for—Jurisdiction to rate —Appeal.

By sect. 69 of the Great Northern and City Railway Act 1892 it was enacted: "The company shall in respect of all lands and buildings acquired by them under the powers of this Act be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such lands and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant, and shall continue liable to and pay all such consolidated sewer and other rates and contributions until the undertaking shall be completed and assessed or liable to be assessed to the before-mentioned rates and contributions, or until such of the said lands and buildings as may not be required for the purposes of the undertaking shall have been otherwise duly assessed or liable to be assessed and become liable to the before-mentioned rates and contributions."

The railway company acquired certain land under this Act upon which buildings formerly existed but had been pulled down before the railway company had acquired any interest in the land. Held, that the railway company were not liable to be rated in respect of these buildings under sect. 69.

Held, further, that as the objection raised by the respondents as to their liability went to the jurisdiction to rate, that objection could be entertained by the justices upon an application for a distress warrant.

CASE stated by two justices for the city of London.

On the 20th July 1901 complaint was made on behalf of the appellants, the churchwardens and overseers of St. Stephen, Coleman-street, that the respondents, being duly rated and assessed in two poor rates, amounting to 45l. 0s. 4d., had not paid and refused to pay the same.

The following facts were proved or admitted before them:—

The respondents were incorporated under the Great Northern and City Railway Act 1892. Under that Act and the Acts incorporated therewith the company were authorised to acquire lands for the purposes of the works thereby authorised.

The respondents on the 1st Jan. 1900 acquired certain land in the parish of St. Stephen, upon which premises consisting of a shop, offices, and warehouse, formerly known as 30, Finsbury-pavement, had existed, but they did not take actual physical occupation until Oct. 1900. The shop, offices, and warehouse were pulled down about May 1899, at which time the railway company had no interest therein.

At the time the respondents acquired the land in Jan. 1900 no business of any kind was carried on upon it. It was a piece of vacant land.

In the valuation list in force in Jan. 1900, being the quinquennial valuation list made in 1895, the premises were assessed at 292l. rateable value.

In 1899 a supplemental valuation list was made for the parish pursuant to the Valuation (Metropolis) Act 1869, by which this property was proposed to be taken out of rating, as it was then vacant land. The list was duly confirmed pursuant to the said Act on the 24th Nov. 1899, but did not come into operation until the 6th April 1900.

Before that date—viz., on the 4th April 1900—a provisional list continuing the property in the valuation list was made for the parish, which was confirmed by the Assessment Committee of the City of London Union, in which the parish is situate, on the 31st Oct. 1900. In this provisional list premises therein described as No. 30, Finsbury-pavement were inserted at the rateable value at which the premises formerly known as No. 30, Finsbury-pavement were assessed and rated before the shop, offices, and warehouse were demolished—viz., 292l.

A poor rate was duly made and published on the 8th May 1900, and another on the 5th Nov. 1900. The rate-books were produced, in which the respondents were rated in respect of premises described as "shop, offices, and warehouse," upon the rateable value at which the premises described as No. 30, Finsbury-pavement were assessed in the said provisional list—viz., 292l.

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Payment of the sums claimed under the said rates was duly demanded, but the amount was not paid. At the dates of the rates respectively, the undertaking of the respondents had not been completed and assessed or become liable to be assessed to consolidated sewer and other rates, nor had such of the lands and buildings acquired by the respondents as were not required for the purposes of the undertaking been otherwise assessed or become liable to be assessed or become liable to the said rates and contributions.

On behalf of the respondents it was contended: (a) That their liability (if any) in respect of the said property was enforceable only by action to recover the amounts charged by the said rates, and was not enforceable before justices, and *Fourth City Mutual Building Society v. Churchwardens and Overseers of East Ham*, (1892) 1 Q. B. 661, *Farmer v. London and North-Western Railway Company* (59 L. T. Rep. 542; 20 Q. B. Div. 788), and sect. 69 of the Great Northern and City Railway Act 1892 were referred to; (b) that at the time the rates in question were made the land was vacant land, and the respondents were not liable to be assessed in respect of it; (c) that the respondents were only liable to be rated (if at all) in respect of the land as if they were assessed in respect of it in the valuation list in force for the parish at the time they acquired the land.

On behalf of the appellants it was contended that under sect. 69 of the Great Northern and City Railway Act 1892 the respondents were rightly rated in respect of the property in question and were liable to pay the rates whether the lands and buildings were occupied or not, and that, as the respondents had not appealed, the justices were bound to enforce the payment.

The justices overruled the contention of the respondents that the amount could only be recovered by action, and they held that they had jurisdiction to go behind the rate-book and inquire into the validity of the rate, and on the ground that at the time when the rate was made there were no such premises in existence as were described in the rate-book, and had not been when the respondents acquired their interest, but the property was then only vacant land, they declined to issue a distress warrant.

Ryde for the appellants.—In this case the clause of the special Act is somewhat like sect. 133 of the Lands Clauses Consolidation Act 1845. Three questions arise—namely, whether the proceedings by distress warrant were right; what is the construction to be placed upon sect. 69 of the Great Northern and City Railway Act, and whether the respondents should have appealed against the rate to quarter sessions. You can take objections before the justices upon a summons for a distress warrant. No doubt under the Lands Clauses Consolidation Act there would be no liability to pay this rate and these proceedings would be wrong, but although the present section is somewhat like the section in that Act, it differs, and the respondents are liable to pay this rate. He referred to

Mayor of London v. St. Andrew, Holborn, 16 L. T. Rep. 665; L. Rep. 2 C. P. 574.

In the light of that decision and of the Lands Clauses Consolidation Act, it is clear that there is a liability under sect. 69 of the present Act.

Under this the company must be rated, otherwise the effect of the section is *nil*. As to the liability to pay the rates. This point cannot be taken before the justices, but must be appealed to quarter sessions. He referred to

Marshall v. Pitman, 9 Bing. 595; 2 M. & S. 745.

If there is jurisdiction to rate, then you cannot take any objection on the application for a distress warrant, but you must appeal. He referred to

Reg. v. Justices of London, 80 L. T. Rep. 286 (1899) 1 Q. B. 532.

Cunningham Glen for the respondents.—The railway company could show before the justices that the premises did not exist. Existence or no existence is a matter for the justices. In *Fourth City Mutual Building Society v. Overseers of East Ham*, (1892) 1 Q. B. 661 it was laid down that justices sitting to hear an application for the issue of a distress warrant for the nonpayment of poor rates are not necessarily exercising a ministerial duty, but are authorised to inquire into the validity of the objections taken by the party summoned. There could not have been an appeal here against the provisional list. The respondents are not rendered liable by sect. 69 at all. The liability contemplated by the section is not a liability to be rated or assessed, but merely a liability, if any, to pay, and an action should be brought and not proceedings taken before the justices.

Ryde in reply.

LORD ALVERSTONE, C.J.—In this case we have to construe a most obscurely worded section. There is this additional difficulty to my mind, that I think one can see very clearly what the persons who framed the section wanted to enact and were driving at; and therefore one is rather tempted to try and construe words which I do not think will bear that construction. They were enacting in respect of other rates than the poor rate, a substitution for sect. 133 of the Lands Clauses Consolidation Act. I think they had in their minds that they wished the railway company to pay what would have been paid if they had not acquired the property. But when you come to apply these words to the actual state of facts found, in my opinion the language is not sufficient to enable the company to be made liable in respect of this particular rate, and that will be found to be important when we deal with the question of the right to raise this point in answer to an application for a distress warrant. The words are: "That the company shall in respect of all lands and buildings acquired by them under the power of this Act be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such lands and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant." Now, it is contended by Mr. Ryde that, because in the valuation list for the year 1895 these buildings when they existed stood at 2921, it must be taken that the company must be liable not only to be assessed, but to be rated in respect of that land because they had taken

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the land on which the buildings had stood. In my opinion the section, if that was the intention of it, does not carry it out. I think that argument overlooks the cardinal fact that prior to the time of the land and buildings being taken the buildings had ceased to exist, and it is not denied by Mr. Ryde, who has argued the case perfectly fairly, that in the hands of the then owners, the company, they were entitled, either by means of the overseer doing his duty, or by means of an appeal against the supplemental list, to have said: "There is no rate leviable in respect of this property now, because the building is pulled down, and therefore the land is not liable; it is vacant land, and we have no buildings upon it." Applying this section to that state of things, it seems to me that further words would be required than those which are in this section. It seems to me that the words required are: "The company shall be liable to be assessed and to be rated at the amount at which this land and building stood in the last valuation list, even although it had been pulled down before the company took possession"; and I must say I think, inasmuch as the primary object of the Legislature was to substitute provisions for making good, you would not expect to find the company made liable to pay more than the persons from whom they bought the property paid. Mr. Ryde says that difficulty is met by the words "whether such lands and buildings be occupied or vacant." I cannot think that those words were intended to apply to the state of things we are now considering, the governing words being "rates leviable in respect of such lands and buildings." The words "whether such lands and buildings be occupied or vacant" are necessary to apply to the interim state of things when the company pull down the buildings and may leave the land vacant for a considerable time. Those words are wanted, it seems to me, in order to show that, though the company have no beneficial occupation out of the land, if they have taken possession of the land and buildings they are to be liable to be rated in respect of the same rateable value as the parish could have enforced and exacted from the owners from whom they bought. I think it is not established on the facts here that there was a rate or contribution leviable in respect of these lands at the time the company was assessed to the extent of 292*l.* or any sum. In order to meet that difficulty, Mr. Ryde's next point is that this ought not to be raised by way of an answer to an application for a distress warrant, which was only a ground for appeal as I understand it. The principle has been stated more than once by my brother Channell. If the objection raised in answer to the application for a distress warrant is, "You have no jurisdiction to make us liable in respect of this rate at all," that is an objection which can be taken, but if, on the other hand, it is, "You ought not to have assessed us in respect of this property at this amount," or on some other ground which is a ground for an appeal, that cannot be taken. In this case this rate is for shops, offices, and a warehouse at 30, Finsbury-pavement which were in the occupation of the Great Northern and City Railway Company. There were no shops, offices, or warehouses in their general occupation. What can be said is that there once had been there

shops and offices, and that they levied rates in respect of the assessment. If the rate had purported to be, on the face of it, a rate in respect of making good a deficiency, I think it would have been a difficult point as to whether or not it could be raised in answer to an application for a distress warrant, but I think this was an objection which went to the jurisdiction of the rating of the Great Northern and City Railway Company for the shop, offices, and warehouse that they did not exist at the time of the rate, and that they did not exist at the time when they acquired the property, although there was a pre-existing state of things in respect of which they could not be properly assessed. With regard to the contention which Mr. Glen raises—namely, that the company could be rated or could be assessed—I should have thought it was right, and that, having regard to the words of the section, the company could not be sued by means of an action, but I do not wish to express a final opinion about that, because I think there are difficulties with regard to it. For the reasons I have given I think on this section the appellants have failed to make the company liable on the hypothetical theory that they are still occupying houses which were in fact pulled down some months before they acquired the property. The appeal will therefore be dismissed.

DARLING, J.—I am of the same opinion. The liability of the railway company depends upon the effect to be given to sect. 69 of the Great Northern and City Railway Act 1892, and there is no doubt that the payment of this rate, which it was said the company was liable to pay, might have been escaped from by the people from whom the company bought that land, because the buildings upon that land had been pulled down, and those who were the owners before the company bought could have escaped payment of the rate, and could have escaped it very justly and properly, for the simple reason that it is not fair to make people pay rates upon buildings which have ceased to exist. Now, the company acquired the land, and the section which makes them liable says: [Reads it.] Now, it seems to me that they are not liable in respect of this, because they never did acquire the buildings at all. The buildings had been pulled down before they had acquired the land. They did not acquire land and buildings. They acquired land and no buildings. If it is said that they are to be made liable on the valuation list in force, when is it to be in force? It is put in force at the time the company acquired such lands and buildings. No such list ever was in force, because there was no time when they acquired lands and buildings, since they never acquired buildings at all. It is perfectly obvious I may say in passing, that to hold otherwise than what we are going to hold would be to do the company a manifest and gross injustice, because it would be to make them pay on what other people would not have had to pay on. It would be to make them pay on the value of buildings which they never had got. It is said that this necessarily follows from the section, which I will not read, and, to show that it follows, these words are relied upon: "Whether such lands and buildings be occupied or vacant." Now, it seems to me that the expression liable for buildings, whether occupied or vacant, does not apply, for there were no buildings at all, either occupied or

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vacant, and the expression "occupied or vacant" is not confined to the land at all, but it is applied to the land and buildings. If it had been applied to the land alone, I think it would have been possible to say that shows that Parliament in 1892 was bent upon doing a gross injustice, and used language applicable to it. But, short of words from which one could not escape, I should not feel inclined to hold any such thing.

CHANNELL, J.—I think this appeal must fail and substantially upon the ground upon which the justices appear to have decided—namely, that at the time the rate was made there were no such premises in existence as those described in the rate-book, and that at the time when the Great Northern and City Railway Company acquired their interest it was only vacant land. Now, the section undoubtedly was intended to make up to the local authority a deficiency in the consolidated sewer and other rates which might be occasioned by the act of the company. So far as the poor rate was concerned, that was provided for in the Lands Clauses Consolidation Act, and the Lands Clauses Consolidation Act was incorporated with this Act. The main object of this section, I cannot help thinking, was to include the other rates. It may or it may not have been intended to alter the machinery by which the local authorities were to get their deficiency in respect of the poor rate; but the difficulty is that, when one comes to look at the section, it is absolutely impossible to understand the machinery by which it was intended that the local authorities should get their deficiency, or this additional rate, or to understand what it was that they were to do. I myself feel quite unable to understand the section. I think it arises very possibly from the clause being hurriedly drafted; I do not know. But it arises from the fact that the draftsman, whose language of course it is, although adopted by the Legislature, certainly did not understand clearly the machinery of rating—namely, what the effect of putting a name in the valuation list was, or what the effect of property being vacant, and so on, was. It is quite clear he did not understand it, or it was impossible that the words could have been used that are used here, and inasmuch as the local authorities, in order to get this money, have got to show us what the meaning is. If we cannot understand it we can only say they fail. But, apart from technical grounds and the difficulty of understanding the machinery, there is a point of substance. There is not a word in that section to indicate anything more than an intention to make the company liable for a loss arising from their own act. What was contemplated no doubt was that the company coming will pull down the buildings, will leave the land vacant for a considerable time, and will in consequence cause loss. But there is not a word here indicating any intention that the company shall pay anything more than the rates which would have been paid if everything had remained exactly as it was at the time when they acquired their interest. At the time they acquired their interest, if things had remained exactly as they were, there would have been none of these rates leviable, and consequently it seems to me that in point of substance it cannot be made out on this section that the company have got to pay anything more than the

former owners would have paid if the state of things had continued exactly as it was on the date in Jan. 1900 when the company acquired the property. That is all I have to say on that point of substance, but, as far as construing the section is concerned, I am quite sure I do not understand it, and I cannot give any judgment on that ground, except to say that anybody who has to show the court the meaning of this section in my opinion fails.

Appeal dismissed.

Solicitors: Roche and Son; Le Brasseur and Oakley.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 21 and 22.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

KELLY'S DIRECTORIES LIMITED v. GAVIN AND LLOYD'S. (a)

APPEAL FROM THE CHANCERY DIVISION.

Copyright—Infringement—Injunction—"Print or cause to be printed"—Agent—Copyright Act 1842 (5 & 6 Vict. c. 45), s. 15.

The plaintiffs were the proprietors and publishers of a directory of merchants, manufacturers, and shippers.

The defendant G. published a book entitled L's Diary for Merchants, Shippers, and Foreign Buyers, which contained a list of colonial and foreign importers and also of export commission merchants. The words "Printed at L's, Royal Exchange, London," appeared on the title-page.

An arrangement had been entered into between G. and L's by which it was arranged that the book should be published in connection with L's, that they should print it, and should receive a subsidy for the use of their name together with certain commission. L's wrote to their agents requesting them to give certain information required for the book.

L's began the printing, but finding they could not complete it in time it was arranged that G. should get some of it done elsewhere.

It appeared that certain lists in the part not printed by L's were compiled by copying the names and particulars contained in the plaintiffs' directory.

The plaintiffs brought an action for an injunction restraining G. and L's from publishing any book containing these lists. G. did not appear, and L's had never sold any copies of the book and had no intention of doing so.

Held, that there was no partnership between G. and L's, and the work done by the printer under G's orders could not be considered as work done by an agent of L's; and, therefore, L's had neither printed or "caused" the pirated portion to be printed within sect. 15 of the Copyright Act 1842, and were not liable under that section.

Decision of Byrne, J. (84 L. T. Rep. 581) affirmed.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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THE plaintiffs were the proprietors and publishers of the directory known as Kelly's Directory of the Merchants, Manufacturers, and Shippers of the United Kingdom and Guide to the Export and Import Shipping and Manufacturing Industries of the World, which contained a list of the names of the leading merchants, manufacturers, and shippers, in the various towns in Great Britain and Ireland, and in the colonies and abroad. The names for insertion in this directory were obtained by independent inquiries by the plaintiffs' canvassers and agents especially employed by them for that purpose. A new edition of this directory was brought out for each year, the edition for 1899 having been published in March.

The defendant Gavin had lately published a book entitled Lloyd's Diary for Merchants, Shippers, and Foreign Buyers for the year 1900, which the plaintiffs alleged was published under the supervision of and in conjunction with Lloyd's, and stated on the title-page "Printed at Lloyd's, Royal Exchange, London." This work contained a list of colonial and foreign importers, and also of export commission agents, and the plaintiffs alleged that this list had been compiled by copying and pirating the names and other particulars therein contained from the plaintiffs' directory, and that such copying had taken place without their leave or licence.

This was an action by the plaintiffs for an injunction to restrain the defendants, their managers, servants, printers, publishers, and agents from printing, publishing, selling, delivering, or otherwise disposing of any copy or copies of their publication, or causing or permitting any such copy or copies to be so printed, published, sold, delivered, or otherwise disposed of, or from copying or pirating from any edition of the plaintiffs' directory, or any part or parts thereof, and from otherwise infringing the plaintiffs' copyright in their said directory.

It appeared that the defendant Gavin, having conceived the idea of publishing such a work, entered into negotiations with Lloyd's, in order that the book might be published in connection with them, and an agreement was come to, the terms of which were contained in a letter from Gavin to Lloyd's of the 25th May 1899:

In reply to your favour of the 17th, respecting the printing and publication of a work to be called Lloyd's Diary for Merchant Shippers, I agree to the following terms: 1. For the use of Lloyd's name I will pay the committee a subsidy of 100*l.* a year, 5*l.* per cent. upon all moneys received by me for advertisements appearing in the diary, and 5*l.* per cent. upon all moneys which accrue to me from the sale of the publication. . . . 2. I will pay the committee for printing the diary 25*l.* per cent. above the actual cost of composition and machining, the cost referred to not to be exorbitant or excessive. 3. I guarantee that the total minimum profit to the committee from the printing, commission on advertisements, and sales and subsidy referred to shall not be less than 200*l.* per annum, and it is understood that when the sum of 500*l.* is reached, I shall be free from any payment in such year of the 100*l.* subsidy referred to. . . . 10. The committee shall be entitled to refuse the insertion of any advertisements which may be of an objectionable kind; but beyond this all matters relating to the form and the character of the advertisements, reading matter, sale price of the work, &c., shall be decided by me.

Clause 13 provided that the agreement was to continue for fourteen years unless after two issues it was found that the publication did not pay.

For the purposes of the book, Gavin wrote to the secretary of Lloyd's as follows:

I send you herewith a copy of the letter I would suggest your writing to the agents [that is, Lloyd's agents abroad]. If you will send me over the paper I will have it manifolded, and send them back for you to sign.

The inclosure as originally drawn was subjected to certain alterations, and finally ran as follows:

It is the intention of the committee to sanction the publication of a diary for 1900, intended to circulate amongst British merchant shippers. The information which you have been good enough to supply in connection with the Shipping Diary [another publication of Lloyd's] has been, I understand, greatly appreciated by shipping firms in this country, and I would deem it a favour if you would kindly supply me for the new diary with information in the inclosed form. In recognition of the trouble thrown upon you, I am informed that it is the intention of the publishers of the Merchant Shippers' Diary to give you an advertisement amongst the reading matter in connection with your port, and also to forward you a complimentary copy of the work.

That document was manifolded, and as manifolded was signed by Lloyd's, and was made use of for the purpose of obtaining from Lloyd's agents abroad the information required by Gavin for his book.

Gavin at the same time sent out certain lists which were clearly proved to have been copied from the plaintiffs' book, and were returned in due course.

Lloyd's finding it impossible to complete the printing of the book by the end of the year, an agreement was come to with Gavin by which he employed another firm of printers to print the rest of the work. The sheets so printed, containing the pirated matter, as well as the sheets printed at Lloyd's, were sent to the binders, and, when bound, the title-page of the book had on it the words "Printed at Lloyd's, Royal Exchange, London."

The defendant Gavin did not appear, and it was not disputed by Lloyd's that as to a portion of the book there had been a clear case of copying and infringement; but it was admitted that neither the committee of Lloyd's, nor any of the officials, had any knowledge of this at the time; that they had never sold any copies of the diary, and had no intention of doing so, and were willing to deliver up to the plaintiffs the infringing parts of such diaries as might be in their possession.

The only question was whether Lloyd's, under these circumstances, were liable within the meaning of sect. 15 of the Copyright Act 1842 as having caused this diary to be printed.

Byrne, J. held (84 L. T. Rep. 581; (1901) 1 Ch. 379), that Lloyd's were not liable, and the plaintiffs were not entitled to any costs against them, but as Lloyd's had allowed their name to appear on the book as printers, they were not entitled to costs.

The plaintiffs appealed.

Levett, K.C. and E. Ford for the appellants.—Lloyd's and Gavin acted conjointly with reference to this book from beginning to end. Lloyd's have

allowed their name to appear on the title-page and must take the responsibility of it, and they were to share in the profits under the agreement with Gavin. They actually assisted Gavin to obtain materials for the book, and if it had not been for Lloyd's the book would never have existed. Lloyd's were bound to print the book and must have done so if Gavin had not consented that it should be done elsewhere, and the case must be treated as if Lloyd's as well as Gavin had signed the order to the printer to print the book. The cases cited on behalf of the respondents in the court below of *Russell v. Briant* (8 C. B. 836) and *Lyon v. Knowles* (7 L. T. Rep. 670; 3 B. & S. 556; on appeal, 10 L. T. Rep. 876) were both cases of dramatic copyright, and the plaintiffs attempted to make a landlord liable because his tenant infringed the copyright of a play. In *Rez v. Gutch* (Moo. & M. 433; 31 R. R. 744) Lord Tenterden, C.J. said: "A person who derives profit from, and who furnishes means for the carrying on the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication." All the facts there mentioned have been proved here. The table of contents shows that Lloyd's intended the book to contain this text:

Watts v. Fraser, 7 C. & P. 369.

Scrutton, K.C. and *F. D. MacKinnon*, for Lloyd's, were not called on.

WILLIAMS, L.J.—The real question in this appeal is whether Byrne, J. was right in coming to the conclusion that Lloyd's neither printed or caused to be printed the infringing passages in this book. In my judgment his conclusion was perfectly right. I think it is impossible to say that Lloyd's either "printed or caused to be printed" those passages. It was hardly contended that the actual printers could be properly described as agents of Lloyd's, and when one comes to that conclusion one must fall back on the words "caused to be printed," because they could only have "printed," these parts of the book if the actual printers were their agents. But admittedly the order to print was given to the printers by Gavin, and admittedly he was the person on whose credit these passages were printed, and Gavin is the person whom the printer would have to sue to obtain payment for the work. If it could be shown in the present case that Lloyd's were the partners of Gavin or joint adventurers with Gavin in the publication, the fact that those printers were the agents of Gavin would, it may be, make them the agents of Lloyd's also; but on the evidence it is plain that they were the agents of Gavin alone, and no such connection is proved between Lloyd's and Gavin in respect of this printing as would make them partners or joint adventurers. The consequence is that counsel for the appellants had to fall back upon the words "caused to be printed"; but when the facts were considered, and they were asked in what sense Lloyd's caused these sheets to be printed, they really said Lloyd's at one time were under a contract with Gavin to print the whole book, and it was only by a lucky accident they were so busy that they were unable to complete the printing in time, and these pages

were printed elsewhere. Gavin was willing that they should forego it, probably because he could get it done at a cheaper rate elsewhere than if it were done by Lloyd's. But what does that come to? At the outside it only comes to this, that Lloyd's permitted Gavin to get the printing done by other printers. I do not think that it can be said that if a man who has a right to print a book chooses to let someone else do the printing or get the printing done he has "caused" the book to be printed within the statute. In my judgment there is no evidence that Lloyd's printed or caused to be printed the infringing passages of the book, and the appeal must be dismissed with costs.

STIRLING, L.J.—I agree.

COZENS-HARDY, L.J.—I agree. The attempt to show that Lloyd's printed or caused to be printed the infringing passages in this book was partly rested on the statement on the title-page that the book was printed by Lloyd's. If that had been relied on as an estoppel, and that Lloyd's were prevented from saying they had not printed it, I should have understood it, but to put it in that way would have been a hopeless contention, and when that is once admitted I fail to see the relevancy of the proposition. I think the judgment of Byrne, J. was quite right, and that the appeal must be dismissed with costs.

Solicitors: *Scott, Spalding, and Bell*; *Waltons, Johnson, Bubb, and Whetton*.

Saturday, March 22.

(Before **WILLIAMS, STIRLING, and COZENS-HARDY, L.J.J.**)

WHITBREAD AND CO. LIMITED v. WATT. (a)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser—Contract to buy plot on building estate—Deposit—Balance to be paid on completion of certain houses by vendor—Non-completion within time stipulated—Rescission—Right of purchaser to a lien on the estate for the deposit against the assignee of the vendor.

By an agreement between S. of the one part and the plaintiffs of the other part, S. agreed to sell and the plaintiffs to purchase a public-house plot for 500l., 200l. to be paid by way of deposit, and the balance as soon as 300 houses should have been erected on the estate; if not erected within two years, the plaintiffs might cancel the agreement and claim the return of the deposit without interest. The 200l. was duly paid.

By divers mesne assignments the estate came into the hands of the defendant, who bought with notice of the agreement.

The houses were not erected within the stipulated time, and thereupon the plaintiffs gave notice to rescind the agreement.

Held, that the estate was subject to a lien for the amount of the deposit; and that the plaintiffs were entitled to enforce that claim against the assignee of the vendor.

Rose v. Watson (10 L. T. Rep. 106; 10 H. L. C. 672) and *Wythes v. Lee* (3 Drew, 396) followed.

Decision of Farwell, J. (84 L. T. Rep. 419) affirmed.

(a) Reported by *W. C. Biss, Esq., Barrister-at-Law.*

By a contract in writing, dated the 25th Jan. 1897 and made between F. Saunders (as vendor) of the one part, and the plaintiffs (as purchasers) of the other part, the vendor agreed to sell and the purchasers agreed to purchase a freehold public-house plot in a certain building estate belonging to the vendor, known as the Woodhouse estate, for the sum of 500*l.*, to be paid as to 200*l.* by way of deposit on the signing of the contract, and as to the balance of 300*l.* on the completion of the purchase, with interest as therein mentioned.

The contract contained (amongst others) the following clauses:

3. The purchase is to be completed, as soon as 300 houses have been erected on the said estate (but without prejudice to clause 10 hereof), at the office of the vendor's solicitors, and the purchasers are to have possession as from the day of the completion, when the balance of purchase money with interest as aforesaid is to be paid; all outgoings up to that time will be cleared by the vendor, his heirs or assigns.

9. This was the usual clause enabling the vendor to cancel the contract if the purchasers made any requisition which the vendor should be unable to comply with.

10. If 300 houses shall not be erected on the said Woodhouse estate within two years from the date of this agreement the purchaser shall have the right by giving seven days' notice in writing to the vendor, to rescind and cancel this agreement, and at the expiration of such seven days the agreement shall absolutely cease and determine.

11. In the event of either the vendor or the purchasers cancelling this contract by virtue of any of the powers herein given, no costs, expenses, loss, or damage of any kind whatsoever shall be claimed or paid from one to the other, but the deposit without interest shall be returned by the vendor to the purchasers.

The plaintiff paid the vendor (Saunders) the deposit of 200*l.* on signing this contract. Subsequently Saunders sold and conveyed the Woodhouse estate to one Saxelby, who mortgaged it, and in Nov. 1900 the mortgagees sold and conveyed the estate to the defendant Watt, with notice of the contract of the 25th Jan. 1897.

The 300 houses had not been built on the estate, nor had Saunders paid or accounted for the deposit to any of his successors in title.

On the 3rd Dec. 1900 the plaintiffs wrote to the defendant rescinding the contract of the 25th Jan. 1897, and claiming payment of the deposit 200*l.* which was refused.

An originating summons was then taken out by the plaintiffs, claiming (1) a declaration that under the contract of the 25th Jan. 1897 they were entitled to a charge or lien on the hereditaments therein described by way of security for the repayment of the deposit of 200*l.* paid by them to Saunders on signing the said contract; and (2) enforcement of this security by foreclosure or sale.

Farwell, J. held (84 L. T. Rep. 419; (1901) 1 Ch. 911) that the plaintiffs were entitled to the order asked, and the defendant appealed.

Brinton for the appellant.—Saunders had the money and the only remedy is against him personally. The plaintiffs have no lien on the land. If a contract goes off otherwise than by the default of the purchaser, the purchaser has only a right to recover the deposit from the man who has it:

Howe v. Smith, 50 L. T. Rep. 573; 27 Ch. Div. 89.

In some cases the purchaser may have a lien on the land, but the two rights are distinct. In some cases the courts have refused to give a lien on the land to the purchaser, and left him to recover the deposit. A purchaser may have no lien for the deposit though the contract comes to an end without any default on his part. *Rose v. Watson* (10 L. T. Rep. 106; 10 H. L. Cas. 672) is a different case, and does not apply to the present one. It does not show that the purchaser has a lien for the deposit if there is an option to refuse to complete the contract. It only applies to a case where the contract goes off through the default of the vendor. There was no obligation on Saunders to build the 300 houses. The money was not paid on the faith of the vendor doing anything but merely for an option. The purchaser now abandons his interest in the land and abandons the contract. Where the contract comes to an end by one term of it and by no default of the vendor the purchaser has no lien for the deposit. The lien lives and dies with the contract. The argument in *Wythes v. Lee* (3 Drew, 396, 400) shows that was a different case to this. Counsel admitted there that if there was a contract to terminate in an event, and that event happens, there is no contract and no lien, which is the present case, and then counsel points out that did not apply to that case. In *Ewing v. Osbaldiston* (2 My. & Cr. 53, 88) Lord Cottenham, L.C. said: "The mere payment of money can give no lien." Unless there is default on the part of the vendor there is no lien: (per Kay, L.J. in *Rodger v. Harrison*, 68 L. T. Rep. 66, 71; (1893) 1 Q. B. 161, 173). He also referred to

Levy v. Stogdon, 78 L. T. Rep. 185; (1898) 1 Ch. 478;

Cornwall v. Henson, 81 L. T. Rep. 113; (1899) 2 Ch. 710.

Hon. F. Russell for the plaintiffs.—The defendant Watt is in no better position than Saunders, who bought knowing the conditions under which the property was held. When a purchaser pays a part of the purchase money under a contract, on payment a lien arises for repayment of that amount if the contract goes off without any default on his part:

Wythes v. Lee, 3 Drew, 396, 403.

This case is within *Rose v. Watson* (*ubi sup.*).

Brinton in reply.

WILLIAMS, L.J.—I think this appeal fails. When one speaks of the lien of a purchaser, one is not speaking of anything which the purchaser gets as the result of any express contract, but of some right in the purchaser which has only been invented (and to that extent it is a fiction) for the purpose of doing that which is just, and bringing about a just result. It is a fiction which one has to resort to not only in equity but at law. For instance, when an action is brought for money had and received to the use of the plaintiff, it is not true, but it is the way in which the law puts it to do justice. When Lord Westbury speaks in *Rose v. Watson* of a transfer to the purchaser of the ownership of a part of the estate corresponding to the purchase money paid, and Lord Cranworth of the purchaser being in the position of a mortgagee of the estate to the extent of the purchase money which had been paid, all those expressions are merely verbal vehicles to carry the right which justice demands that the pur-

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chaser should have. Having read the report of *Rose v. Watson* I must say that I agree with Mr. Brinton to this extent, that that decision does not expressly carry the lien of the purchaser beyond a case where the contract has gone off through the default of the vendor. But Mr. Brinton admits that the purchaser immediately upon paying the deposit gets either a lien or an inchoate right of lien (I do not think it makes much difference what you call it), but he says that that right or inchoate right of lien is defeasible not only in the case (as everybody admits it is) of the purchaser himself being in default, but that it is also defeasible in the case where the purchaser elects without any default of the vendor to rescind the contract. He says that if the purchaser chooses to give up a contract, not being driven thereto by any default of the vendor he not only gives up the contract, but he gives up the lien or the inchoate lien which is the creature of the contract. I agree *Rose v. Watson* (*ubi sup.*) does not absolutely negative that view, although I think that the illustration given by Lord Cranworth of the mortgage goes a very long way to do so. No one, I suppose, would suggest that in the case of a contract with a clause giving the purchaser a right to rescind, and the purchaser really had a mortgage on the lands for the purchase money that he had paid, that he would lose his mortgage because he elected to rescind the contract. In this state of things one would, on the assumption that *Rose v. Watson* has more or less left the point open, look to see what other cases say, and Mr. Russell has cited a statement of the law by Kindersley, V.C. in *Wythes v. Lee*. That learned judge said (3 Drew, 402): "The point most discussed and the most important is this abstract question—suppose a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays a deposit in part payment of the purchase money, and by reason of the vendor being unable to make a title, or from any other reason, not being misconduct on either side, the contract goes off and cannot be completed, has the purchaser a lien on the estate for his deposit? That is the most important question." And then he goes on to decide that in such a case the purchaser has a lien. That statement of the law by Kindersley, V.C. covers this case, and it follows in my judgment that the decision of Farwell, J. is right and ought to be affirmed. I do not mean by having thus attempted to give reasons of my own in any way to depart from or vary the reasons that Farwell, J. has given in his extremely clear and extremely forcible judgment, and I am not very sanguine that I have added to it anything by what I have said in my judgment now. But I was very much struck with what Farwell, J. said (84 L. T. Rep. 420; (1901) 1 Ch. 915) as to the ordinary condition in a contract, that if the purchaser makes or insists upon any requisition or objection to the title which the vendor is unable or unwilling to comply with the vendor may rescind, viz.: "There is no default there, but I venture to think it would not be arguable, and I do not think counsel for the defendant contended that the purchaser in such a case would have no right to a lien in the same way as if the purchaser went off by reason of want of title on the part of the vendor. It is not default. It is rather misfortune." I think to-day Mr. Brinton was so impressed with that passage that he ceased to

argue that the purchaser's lien would be lost in such a case. For the reasons which I have given, and for the very cogent reasons which Farwell, J. has given, I think this appeal fails.

STIRLING, L.J.—I am of the same opinion, and after the judgment of Farwell, J., with which I entirely agree, and also that of Williams, L.J., in which I also agree, I have very little to add. I think it is quite true, as Mr. Brinton has contended, that the question of the existence of the purchaser's lien for his deposit arises in this case in circumstances which differ from those of previous cases. The contract here has been brought to an end, not by any act or default of the vendor but by reason of the purchaser exercising a power of rescinding which is reserved to him by the contract itself. That circumstance does not seem to have occurred in any previous case. Nevertheless in the judgments in the two leading cases on the subject—*Wythes v. Lee* (*ubi sup.*), before Kindersley, V.C., and the case of *Rose v. Watson* (*ubi sup.*) in the House of Lords—the rule is stated in terms which cover the present case. And if one looks at what after all is the foundation of the whole doctrine—namely, the desire to do justice as between vendor and purchaser, it appears to me that that reason applies not less forcibly to the present case than in the ordinary cases in which the rescission of the contract takes place by reason of some default on the part of the vendor. In a case where the vendor has rescinded I think it would be absolute injustice if the purchaser were not allowed to have a lien for the purchase money which he had paid and which was the security on his part for the performance by him of his contract. And I think also that the justice of the case applies here to give the purchaser a lien.

COZENS-HARDY, L.J.—I think the lien for the deposit exists so long as, and in every case in which, the right to recover the deposit has not been lost by reason of the misconduct of the purchaser. In other words, when the contract goes off either by reason of the default of the vendor, or without any default on the part of the purchaser, the lien becomes operative. It would be shocking injustice if the purchaser's lien were to be lost in the common case of a rescission by the vendor under the common form condition. Such a rescission is not unlawful, is not a breach of contract, and is not any default on the part of the vendor.

Solicitors for the plaintiffs, Martineau and Reid.

Solicitor for the defendant, H. S. Spottiswood.

March 12 and 13.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

HULTHEN v. STEWART AND Co. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Ship — Charter-party — Discharge of Cargo — Demurrage — "Customary steamship dispatch" — "As fast as steamer can deliver" — "According to custom of port" — Delay through unavoidable causes — Obligation of receiver of cargo.

By a charter-party it was provided that a steamer

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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should proceed to London and there deliver a cargo of timber, the cargo to be discharged with customary steamship dispatch, as fast as the steamer can deliver . . . according to the custom of the port"; and there was an express exception in respect of delay in discharging the cargo caused by a strike or lock-out.

The vessel arrived at London and was ready to deliver the cargo, but the dock to which the defendants, the receivers of the cargo, directed her to proceed was so crowded that she could not enter the dock for some days, and further delay arose in obtaining a berth for discharging. The vessel could not have been more quickly discharged elsewhere in the port, and the defendants used all reasonable means to procure the discharge of the cargo, which could not in the circumstances have been discharged more quickly. Held (affirming the judgment of Phillimore, J.), that the obligation of the defendants was only to use all reasonable means to procure the discharge of the cargo as quickly as was possible in the circumstances, and that, as they had performed that obligation, they were not liable for demurrage.

THIS was an appeal by the plaintiff from the judgment of Phillimore, J. at the trial of the action as a commercial cause, without a jury.

The plaintiff in this action claimed demurrage in respect of his steamer *Anton*, and the defendants were sued as indorsees of bills of lading which incorporated the provisions of a charter-party, and as receivers of the cargo under those bills of lading.

The charter-party was made on the 22nd Aug. 1900 and provided that the *Anton* should proceed to Heret, in the White Sea, and there load from the agents of the charterers a full and complete cargo of battens, and therewith proceed to London and deliver the same always afloat, on being paid freight as provided.

The charter-party provided, in clause 3, as follows:

The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging, excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 30*l.* per day, and *pro rata* for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary.

And clause 5 was as follows:

If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge by reason of epidemics (a strike or lock-out of the shippers' or receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter if by the use of reasonable diligence they could have obtained other suitable labour), and in case of any delay by reason of the before-mentioned causes, no claim for damages shall be made by the shippers, the receivers of the cargo, the owners of the ship, or by any other party under this charter.

A cargo was duly loaded under the charter-party, and the *Anton* arrived at Gravesend on the 12th Oct. On that day the captain received a notice from the defendants directing him to

discharge the cargo in the Surrey Commercial Dock.

Owing to the crowded state of the dock at that time it was impossible to get the vessel into the dock immediately, and she therefore remained at Gravesend.

On the 18th Oct. the vessel was able to get into the dock, and did enter the dock on that day; but, the dock being still crowded, she was unable to obtain a berth for discharging alongside the quay until the 20th Oct., which was a Saturday.

The discharge of the cargo commenced on the 22nd Oct., and, some further delay being caused by the crowded state of the dock, the discharge was completed on the 29th Oct.

The plaintiff alleged that the vessel arrived and was ready to discharge on the 12th Oct., and that the discharge of the cargo according to the terms of the charter-party ought to have been completed on the 18th Oct.

At the trial evidence was given on behalf of the plaintiff that, if it was impossible to commence the discharge of the cargo in the Surrey Commercial Dock on the 12th Oct., the vessel might have been discharged at that date either in the Millwall Dock, or at a tier in the river. Evidence was, however, adduced on behalf of the defendants that the Millwall Dock was at that time as much crowded as the Surrey Commercial Dock; that the vessel could have entered the West India Dock, but that it was impossible to discharge in that dock at that time owing to a strike of lightermen; and that it was impossible for a vessel of the size of the *Anton* to discharge at a tier in the river.

The action was tried before Phillimore, J. without a jury as a commercial cause. The learned judge found as a fact that the defendants had used all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could; that they were not liable for the short delay which took place after the vessel was alongside the quay; and that, with the appliances which were available at the time, the vessel could not have been discharged more quickly than she was in fact discharged; and judgment was given in favour of the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C. and *D. C. Leek* for the appellant.—The judgment of the learned judge was wrong, and ought to be reversed. Upon the true construction of clause 3 of the charter-party the time allowed for the discharge of the cargo ought to be calculated from the time when the vessel arrived and was ready to discharge, that is, from the 12th Oct. The construction of this charter-party is not governed by the series of cases which decide that the obligation of the receiver of the cargo is to discharge as quickly as he can with the appliances which are available, and to use all means to procure for the vessel an opportunity to discharge as quickly as can be done:

Postlethwaite v. Freeland, 42 L. T. Rep. 845; 5 App. Cas. 599;

Lyle Shipping Company v. Cardiff Corporation, 83 L. T. Rep. 329; (1900) 2 Q. B. 638;

Good v. Isaacs, 67 L. T. Rep. 450; (1892) 2 Q. B. 555;

Pym v. Dreyfus, 61 L. T. Rep. 724; 24 Q. B. Div. 152;

Tharvis Sulphur and Copper Company v. Morel,
65 L. T. Rep. 659; (1891) 2 Q. B. 647;
Hick v. Raymond, 68 L. T. Rep. 175; (1893)
A. C. 22.

In those cases the charter-party was either entirely silent as to the time for discharge, or the obligation was to discharge as fast as possible under the circumstances with the special appliances available at the port. In the present case the obligation is to discharge as fast the vessel is able to discharge without without any reference to her ability to find a discharging berth, or to procure the use of special appliances;

Maclay and others v. Spillers and Baker Limited,
6 Com. Cas. 217.

This vessel was an arrived ship as soon as she got to Gravesend and was ready to go into dock:

Pyman v. Dreyfus, 61 L. T. Rep. 724; 24 Q. B. Div. 152.

She was then ready to go to a discharging berth, and the obligation of the receivers of the cargo was to find then a clear quay berth for her to discharge at, and their inability to do so does not absolve them from that obligation and from liability for the delay. Upon the proper construction of clause 3 of the charter-party the time for discharge is to be measured solely by the ship's capacity to deliver the cargo, independently of the state of the docks or quays. This is not in any sense a case in which the discharge is to be effected by special port appliances of limited quantity. In this charter-party there is, in clause 5, an express exception of liability for delay caused by strikes or lock-outs, and that shows that there are not any other exceptions in respect of other matters which may prevent the receiver of cargo from taking the cargo as fast as the vessel is able to deliver. The receiver of cargo takes the risk of every matter, except that expressly specified, which may prevent him taking delivery of the cargo as fast as the vessel can deliver.

Robson, K.C. and Loehnis, for the respondents.—The judgment of Phillimore, J., was right and in accordance with all the authorities. The contention of the appellant is that the respondents by this contract undertook the obligation to procure the discharge of the cargo as fast as the ship could deliver, whatever obstacles there might be to prevent that being done, strikes and lock-outs only excepted. That is not the proper business view of this contract. This particular charter-party has already been construed in several cases, besides the present case, by *Barnes, J.*, *Mathew, J.*, *Bigham, J.*, and *Kennedy, J.*

The Jaederen, 68 L. T. Rep. 266; (1892) P. 351;
Rodenacker v. May and Hassell, 6 Com. Cas. 37;
Wallenberg v. Payne, unreported;
Reid v. Lee, 17 Times L. Rep. 771.

And in all those cases the learned judges have construed this charter-party in the same way as Phillimore, J. has construed it in the present case. Ever since the case of *Postlethwaite v. Freeland* (*ubi sup.*) was decided in 1888 the construction of the clause in a charter-party that the cargo shall be discharged "as fast as steamer can deliver" has always been that, looking at the circumstances of the port at the time, the discharge must be made as fast as it can reasonably be made. The appellant, however, is now con-

tending that this provision means that the cargo must be discharged as fast as the steamer can deliver under the most favourable ordinary conditions of the port. It is now too late to contend for that construction, for the proper construction of this clause is now settled by a series of authorities and the continuous practice. The express exception in this charter-party in respect of strikes cannot alter the well settled construction of the previous clause; it was merely introduced *ex majore cautela*, and was not really necessary. This vessel had not performed the obligation to carry the cargo to the port of London until she had reached a place where, in the ordinary course and with the ordinary appliances which were available, she was ready to discharge, and could discharge, the cargo:

Nielsen v. Wait, James, and Co., 54 L. T. Rep. 344;
16 Q. B. Div. 67.

The learned judge has properly construed the charter-party, and has come to a right conclusion upon the facts.

Leck in reply.

COLLINS, M.R.—This is an appeal from the judgment of Phillimore, J. at the trial of the action upon a claim by a shipowner for demurrage. The question in this case really turns upon the construction of the charter-party, the material clause of which (clause 3) is in these terms: "The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general, or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 30l. per day, and *pro rata* for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." It was also provided, in clause 5 of the charter-party, as follows: "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge of the cargo, or by reason of epidemics (a strike or lock-out of the shippers' or receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter, if by the use of reasonable diligence they could have obtained other suitable labour), and in case of any delay by reason of the before-mentioned causes, no claim for damages shall be made by the shippers, the receivers of the cargo, the owners of the ship, or by any other party under this charter." The vessel arrived at the port of London and came, in effect, to the gates of the dock indicated by the defendants as the place of discharge. The state of that dock was such that it was impossible for the vessel to get into the dock for some time. Eventually the vessel did get into the dock, but there was then a further delay in getting a berth for discharging the cargo, owing to the crowded state of the dock. The same difficulty existed in the case of the other dock at which the vessel might have been unloaded, the West India Dock, because it was impossible to get lighters in that dock. The learned judge has found as a fact that when the vessel arrived at Gravesend there was no place to

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HULTHEN v. STEWART AND CO.

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which she could have been ordered so as to be discharged without any delay; that Millwall Dock was full; that there was no tier at which this vessel could have safely discharged; and that the discharge could not have been carried out any more quickly at the West India Dock. He has also found that the defendants used all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could; and that, with the appliances available at the time, the ship could not have discharged her cargo more quickly than she in fact did. Upon those findings the charterers did all they could reasonably be expected to do in order to get the cargo discharged as quickly as possible. Then the question arises whether the defendants are liable for demurrage under the terms of the charter-party, although they have done all that it was reasonably possible for them to do. The only point made by the appellants is that, on the terms of clause 3, inasmuch as the cargo is to be discharged "as fast as the steamer can deliver," the proper time for the discharge of cargo can be ascertained in all ordinary cases, and that the proper time in this case would be six days. If the appellants can fix the time in that way, then there was an absolute burden upon the charterers to discharge within that time, and to pay demurrage if they did not unload within that time. Therefore the question is whether that clause in the charter-party is equivalent to a clause which expressly fixes the time for discharging the cargo. It is clear that it is not, and there is a clear line of authorities which show that it is not. It does not impose the same absolute unconditional obligation on the charterers as is imposed where a fixed number of days is allowed for discharging the cargo. There is, as I have said, a long line of authorities to that effect. The first is the case in the House of Lords, *Hick v. Raymond* (68 L. T. Rep. 175; (1893) A. C. 22), in which it was decided that, where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo, his obligation is to discharge within a reasonable time; and that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him. That case really only followed the decision in *Postlethwaite v. Freeland* (42 L. T. Rep. 845; 5 App. Cas. 599), in which the words of the charter-party were, "the cargo is to be discharged with all dispatch according to the custom of the port," and those words were held not to be equivalent to a provision for discharge within a fixed number of days, and evidence of the circumstances of the case was admitted in order to show what was a reasonable time. It appears to me that the special difficulties which existed in those cases are not really material to the question. It seems to me that there was not anything particular about the actual difficulties in discharging the cargo in those cases. When once it appears that the receiver of the cargo is outside of the absolute obligation to discharge within a fixed number of days, the question then is whether he did all that he reasonably could do to procure the discharge of the cargo. The particular facts of the case are not really material. With respect to the words which were used in the different cases, the words

in *Postlethwaite v. Freeland* (*ubi sup.*) were "with all dispatch," and stronger words than those could not be used. In the case of *Lyle Shipping Company v. Cardiff Corporation* (83 L. T. Rep. 329; (1900) 2 Q. B. 638), the words were, "the ship to be discharged with all dispatch as customary"; in the Scotch case of *Wyllie v. Harrison* (13 Court Sess. Cas. 4th series, 92) the words were, "as fast as the steamer can deliver after having been berthed, as customary"; and in *Good v. Isaacs* (67 L. T. Rep. 450; (1892) 2 Q. B. 555) the words were, "to be discharged at usual fruit berth as fast as the steamer can deliver, as customary, and where ordered by the charterers." The only way in which the appellant in the present case tried to distinguish this case from those cases was by showing that the particular conditions existing in those cases were not the same as those in the present case. But in the present case the learned judge has found that the defendants exercised all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could, and the evidence clearly justifies that finding. There is, therefore, authority that this evidence can be admitted in cases where it is stipulated that the cargo is to be discharged "as fast as the steamer can deliver." That concludes the whole case. This vessel got to the dock gates and, if the cargo had to be discharged within a fixed number of days, she was then an arrived ship, and the lay days would have begun from that time. But as the number of days was not fixed, assuming that she was an arrived ship, the question has to be considered whether she was detained beyond a reasonable time. Upon the finding of the learned judge she was not so detained, because it was impossible for the consignees to discharge the cargo more quickly than they did. It remains to observe that a charter-party in this form has come under the consideration of Barnes, J. in *The Jaederen* (68 L. T. Rep. 266; (1892) P. 351), of Mathew, J. in *Rodenacker v. May and Hassell* (6 Com. Cas. 37), of Bigham, J. in *Wallenberg v. Payne* (unreported), and of Kennedy, J. in *Reid v. Lee* (17 Times L. Rep. 771), and that all of those learned judges have taken the same view of the question. I think that I ought to refer to the argument of the appellant based upon the existence of the strike clause in this charter-party, for I think that it does found some argument for the appellant. According to the argument of the respondents that clause was really unnecessary. In some of the cases to which I have referred there was a strike clause, but the existence of that clause did not alter the construction of the clause as to the discharge of the cargo. The words of this clause as to the discharge of cargo are clear of themselves, and it would not be fair to use the fact that the common strike clause has been inserted so as to alter the meaning of the clear words as to the discharge of cargo and prevent the application of the series of authorities as to its meaning. I think, therefore, that the judgment of the learned judge was right, and that this appeal must be dismissed.

ROMER, L. J.—I am of the same opinion. Upon the question of the construction of clause 3 of the charter-party, in my opinion it cannot be distinguished from the clause in the charter-party in the case of *Lyle Shipping Company v. Cardiff*

Corporation (ubi sup.). In that case all the authorities were considered, and they have all been referred to again to-day, and I adhere to what I said in that case as to the settled result of the authorities. This case, therefore, is really governed by the decision in *Lyle Shipping Company v. Cardiff Corporation (ubi sup.)*, except only as to the argument founded upon the strike clause. No doubt that clause was unnecessary, considering the construction which has been placed upon the other clause as to discharge of cargo. It would, in my opinion, be wrong to say that the strike clause was a necessary clause so as to give a different effect to the well settled construction of the earlier clause which has been established by the authorities. Such a construction ought to be avoided in the case of charter-parties; additions to and alterations in a charter party are made from time to time without duly considering what effect they may have upon other clauses in the charter-party, and it would be rash to say, in the case of a charter-party, that every clause must be taken to be necessary and upon that hypothesis to hold that they affect other clauses which have a well-settled construction and meaning. The construction of this clause is well settled, and therefore this appeal must fail because it is impossible to differ from the judgment of Phillimore, J., who came to the conclusion that the discharge of the cargo had been taken with all reasonable dispatch. I agree, therefore, that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. I should have thought that by this time the meaning of this common clause in charter-party was well known and settled. We have, however, been once more brought to the consideration of this clause and of all the authorities. The clause in this charter-party is as follows: "The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the customs of the respective ports. . . . The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary." It is contended that "customary steamship dispatch" in this case means five days because the cargo could be discharged from this steamer within five days. I cannot so construe this clause. The vessel had arrived at the dock gates. What then is the meaning of "the cargo to be discharged with customary steamship dispatch as fast as the steamer can deliver?" In *Postlethwaite v. Freeland (ubi sup.)* light was thrown upon the meaning of this provision, and in the numerous cases which followed—*Good v. Isaacs (ubi sup.)*, *Lyle Shipping Company v. Cardiff Corporation (ubi sup.)*, *The Jaederen (ubi sup.)*, *Wallenberg v. Payne (ubi sup.)*, and *Reid v. Lee (ubi sup.)*—the same principle was adopted, and it was held that the shortest time within which the cargo could be discharged applied in ordinary circumstances but not in extraordinary circumstances. In my opinion we must put the same construction upon this clause as was put upon similar clauses in the numerous decided cases. So much for the construction of the clause. A further argument was urged that, because of the existence of the strike clause, the charterers were made liable for any-

thing else which might prevent the discharge of the cargo. That would, I think, be an utterly unreasonable construction. This strike clause was not intended to deprive the charterer of the protection to which he is entitled upon the ordinary meaning of the well-known clause as to discharge of cargo. I agree that this appeal fails, and must be dismissed. *Appeal dismissed.*

Solicitors for the appellant, *Stokes and Stokes*.
Solicitors for the respondents, *Trinder, Capron, and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 13 and 14.

(Before KEKEWICH, J.)

Re SMITH; SMITH v. THOMPSON. (a).

Trustee—Loss to estate—Fraud by solicitor's clerk—Trustees acting reasonably and honestly—Liability of trustee—Judicial Trustee Act 1896 (59 & 60 Vict. c. 35), s. 3.

A trustee living in the country employed her London solicitors to act as her agents in the trust, the trust account being kept at a London bank. The solicitors kept the cheque and pass books, drawing cheques, and sending them to the trustee for her signature as required. A clerk to the solicitors by fraud obtained the trustee's signature to cheques for 129l. inducing her to initial alterations of two of the cheques from order to bearer. He then cashed the cheques and absconded. Upon summons to make the trustee reimburse the 129l. to the trust estate:

Held, that under the circumstances the trustee had acted reasonably, and was not liable to make good the loss to the estate.

THIS was a summons taken out by Dorothy Partridge, a beneficiary under the will of her father, Thomas Smith, deceased.

The defendants were Mrs. Lucy May Thompson, who, as executrix of the will of her husband Barnard Tyrrell Thompson, the last surviving trustee of the will of Thomas Smith, was now trustee of his estate and some infant beneficiaries under Thomas Smith's will.

The summons asked that the defendant Mrs. Thompson might be directed to forthwith reimburse to the estate of Thomas Smith the sum of 129l. wrongfully paid away by her, and that in default of her making such reimbursement the sum of 129l. be ordered to be deducted from the amount of costs to be taxed and paid to her in pursuance of an order of the court of the 10th Aug. 1901.

It appeared that the sum of 129l. belonging to the estate of Thomas Smith had been fraudulently appropriated by Albert Cookson Carling, a clerk to Messrs. Webster and Webster, solicitors to Mrs. Thompson, under the following circumstances. Mrs. Thompson, after her husband's death, resided at Reigate, and acted as trustee to the estate of Thomas Smith pending the appointment of new trustees, and in so doing she followed her deceased husband's practice with regard to the trust estate, which was to have the

(a) Reported by O. F. DUNCAN, Esq., Barrister-at-Law.

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dividends on the estate paid direct to a separate account at the Chancery-lane branch of the Union Bank of London, the cheque and pass books relating to the account being kept by Messrs. Webster and Webster, Lincoln's-inn-fields, who had been her husband's solicitors. When payments were required from the account Messrs. Webster and Webster used to fill up the necessary cheques and send them to Mrs. Thompson for her signature, with letters explaining for what purpose they were needed, and on receiving the cheques back signed, used to forward them to the payees.

By an order of the court of the 10th Aug. 1901 an agreement for the division of the trust funds and for the appointment of new trustees was ordered to be carried into effect, the order also providing for the payment to Mrs. Thompson of her costs.

On the 4th Feb. 1902 Mrs. Thompson, being aware that certain matters still remained to be done to complete the transference of the trust estate to the new trustees, received a telegram purporting to come from Messrs. Webster and Webster stating that they were sending down a clerk that evening with documents for her signature, and accordingly on that evening Albert Cookson Carling, a clerk of Messrs. Webster and Webster, whom Mrs. Thompson well knew as such, called and handed her a letter purporting to be from Messrs. Webster and Webster and to be signed by them, instructing Mrs. Thompson to sign and initial the cheques which Carling would produce. This letter Carling retained after showing it. He then produced four cheques already written out. One was for 10*l.* and was drawn to Mrs. Thompson's own order to pay her out of pocket expenses relating to the trust. Two of the cheques for 66*l.* and 48*l.* respectively were drawn to "taxation fees or bearer," the word order having been scratched out. Carling explained that the alterations were necessary in order to enable them to be cashed early next morning. The fourth cheque was for 25*l.* drawn to the order of a Mr. Gilbert, who was accountant to the trust estate. Carling said this was for certain fees of his in relation to the trust estate. These cheques were all filled up in Carling's handwriting, which was the custom, and Mrs. Thompson, believing Carling's statements, signed and initialled all the cheques. As a matter of fact, Messrs. Webster and Webster had never authorised the telegram or written the letter, and Carling, having obtained payment of 129*l.* for the three cheques, absconded with the money.

G. B. Bashleigh for the summons.—Mrs. Thompson cannot be said to have acted reasonably in leaving the cheque and pass books with the solicitors and in signing and initialling the cheques to bearer:

Re Whiteley; Whiteley v. Learoyd, 55 L. T. Rep. 564; 33 Ch. Div. 347, 355.

The Judicial Trustee Act 1896 is not applicable, as there may not be any loss to the estate, as the solicitors may have to make it good. In *Re de Clifford (Lord); de Clifford (Lord) v. Quilter* (83 L. T. Rep. 160; (1900) 2 Ch. 707) the money was completely lost.

C. Gurdon for Mrs. Thompson.—Mrs. Thompson simply followed the practice adopted by her husband, which was a most suitable one. All that

she did was well known to the plaintiff and the solicitors for the infant beneficiaries. She was quite right in employing her husband's solicitors to act as agents for her. She has acted honestly and reasonably and ought fairly to be excused from bearing the loss personally. There can be no set off of costs, for a large part of them arose before Mrs. Thompson became trustee:

Bacon v. Bacon, 5 Ves. 531;

Re de Clifford (Lord); de Clifford (Lord) v. Quilter (ubi sup.);

Speight v. Gaunt, 50 L. T. Rep. 330; 9 App. Cas. 1;

The Judicial Trustee Act 1896, s. 3;

Re Grindley; Oless v. Grindley, 79 L. T. Rep. 105; (1898) 2 Ch. 593, 601.

Jason Smith for infant beneficiaries.

KEKEWICH, J.—This is one of those painful cases with which the court is from time to time confronted, when the question is upon whom a loss occasioned by the fraud of some third person is to fall, the parties to the litigation themselves being more or less innocent, certainly in this case completely innocent so far as moral blame is concerned. It may be that Mrs. Thompson did not take all the precautions which a very careful or a very astute person might have taken, and it may be that these solicitors did not look after their clerk, whom they trusted, so carefully as they would have done if they had acted upon the principle that no one ought to be trusted; but beyond that no possible blame can be placed upon anyone, and there is no suggestion of dishonesty on the part of any of the parties to this litigation, either Mrs. Thompson, the solicitors, or the persons interested under the trust. Now Mrs. Thompson says, that having succeeded to the office of trustee through the death of her husband, she followed the practice which he had followed until his death. That, however, in itself is no defence. She as a trustee was bound to act both reasonably and prudently and in accordance with the law, and the fact that her husband followed a certain practice does not excuse her. But then she makes another defence which equally cannot be taken into account in deciding this question. She says that the plaintiff and the other persons interested in the trust knew of this practice—that they knew through their solicitors what was being done. Well, that can't go as far as acquiescence. I cannot conceive that the plaintiff has acquiesced in anything so as to bind herself. I must simply consider the bare facts of the case and see whether Mrs. Thompson acted reasonably or not. What did she do? She lived at some distance from London. That is a material fact, because a trustee is not bound to come up to London from the country every time a cheque has to be signed. On the contrary, a trustee who went up to London too frequently at the expense of the trust estate, would be found fault with unless the business was sufficiently urgent. But she had to do a certain part of the trust business through an agent at a distance, and there is no reason why she should not employ her London solicitors as her agents as well as anybody else, and this she did. The course of the procedure was this: Messrs. Webster and Webster ascertained what sums had to be paid on account of the trust estate, and they having been intrusted with the cheque book drew cheques for the amounts and sent them to Mrs. Thompson for

her signature. It was suggested that she ought not to have allowed the solicitors to keep the cheque-book, and I am not sure that it would not have been better if she had kept it herself, but I cannot say that the practice was unreasonable. Well, the solicitors drew the cheques and sent them to her. They were always drawn to order. She signed the cheques and sent them back to the solicitors, who passed them on to the payees. It is really difficult to suppose a more convenient way of doing the business if the trustee did not do it herself, and she was certainly not bound to do it herself, she was quite entitled to employ an agent to do it for her. Then how did the loss occur? On a certain occasion, knowing that a business transaction affecting the trust was being carried on and reasonably supposing there was a good deal to be done Mrs. Thompson receives a telegram from the solicitors' office (the telegram being in fact sent by the clerk to the solicitors without any authority) informing her that the solicitors were sending down a clerk to her with cheques for her to sign. The clerk committed a fraud both upon his employers and upon Mrs. Thompson. He came down and submitted to her certain cheques for signature. As to one cheque no question arises, that was pay for her own expenses in relation to the trust, and was no doubt a blind. But there were three other cheques. Two were drawn to "taxation of fees or bearer," the word "order" having been scratched out, and the alteration therefore requiring initialling before they could be safely negotiated. The other cheque was to the order of a Mr. Gilbert, who she knew was accountant to the trust. The clerk also produced a letter which purported to be from the firm of solicitors, but which in fact was not, though she might well suppose it was, the clerk being no stranger to her, as she was accustomed to see him in connection with the trust. In fact, Mrs. Thompson was thoroughly imposed upon, and under the circumstances nothing could have prevented that. That being so, at the clerk's instance and being misled by the letter, she signed and initialled these three cheques. With regard to the cheques for taxation fees, the clerk explained that the fees had to be paid at once and that the cheques must therefore be cashed the next morning, and that that was the reason why they could not be drawn to "order." Of course, you could not draw a cheque "to taxation fees or order." A plausible story invented by the clerk on purpose to deceive Mrs. Thompson. Under these circumstances, I do not think there was anything unreasonable in Mrs. Thompson signing and initialling those cheques. The other cheque in favour of Mr. Gilbert was left drawn to "order," the clerk having no excuse to offer for changing it to "bearer," though he subsequently managed to get it cashed. No fees were, in fact, due to Mr. Gilbert, but it was a small sum which might have been payable to him. Now, why should Mrs. Thompson be called upon to make good this loss out of her own pocket, because her solicitor's clerk has defrauded the trust? She listened to the story perhaps too easily, and believed it, but no moral blame can be laid upon her. The result is that 129*l.* has been lost to the trust estate; but why should I make her pay it out of her own pocket? She will be liable for costs to her solicitors, and it may be that they

may have to bear some part of the loss. But it seems to me that it would be extremely unjust that she should bear the loss occasioned by the fraud of this clerk. I do not propose to go into the authorities and to make any distinction between the decisions on the liability of trustees and the power given to the court by the Judicial Trustee Act 1896. It seems to me that in whatever way this case is looked at Mrs. Thompson cannot be said to have acted otherwise than reasonably, and there is therefore no reason why she should suffer. The summons must be refused with costs.

Solicitors: Greenfield and Cracknall; Webster and Webster; W. H. Osgood.

Friday, March 14.

(Before KEKEWICH, J.)

GROUND RENT DEVELOPMENT COMPANY
LIMITED v. WEST. (a)

Vendor and purchaser—Land register—Conditions annexed—Modification of conditions—Persons "principally interested"—Land Transfer Act 1875 (38 & 39 Vict. c. 87), s. 84.

The persons "principally interested" in the enforcement of conditions annexed to land registered under the Land Transfer Acts within the meaning of sect. 84 of the Land Transfer Act 1875 are all parties who have bought with notice of the conditions and upon whom they are binding; and either their consent must be obtained to any modification of the conditions or it must be proved to the satisfaction of the court that any such modification will be beneficial to them.

On the 20th Sept. 1899 Sarah West and Richard John Bowerman sold some land forming part of an estate situate at Bush Hill Park, Enfield, in the county of Middlesex, of which they were registered under the Land Transfer Acts as proprietors with an absolute title to the Ground Rent Development Company Limited. The land was thereupon transferred to the company by an instrument of transfer, and the company registered as absolute proprietor, and a land certificate (No. 5321) delivered to them. Certain restrictive building conditions were, however, registered as annexed thereto, and (*inter alia*) the following: (a) that no house should be erected on any part of the land which should cost less than 250*l.*; (b) that no house should be erected fronting a road called St. Mark's-road which should cost less than 300*l.*; (c) that no house should be erected on any plot of land with a frontage less than 16ft., or having a superficial area less than 160 square yards; (d) that no houses should be erected on any plot of land west of St. Mark's-road with a frontage less than 17ft., nor on any plot east of that road with a frontage less than 18ft.

This was a summons taken out by the company to which the vendors were made defendants under rules 234 and 236 of the Land Transfer Rules 1898, asking that these restrictive conditions might be modified as follows: (1) That houses erected on the land (except those fronting St. Mark's-road) need not cost more than 200*l.* instead of 250*l.*; and (2) that plots of land on which houses were erected (excepting those

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

fronting St. Mark's-road) need not have a greater frontage than 15ft., instead of 16ft., 17ft., and 18ft. respectively, nor a greater superficial area than 100 square yards.

It appeared that there were no restrictive conditions of this nature annexed to the title of the vendors, but that as they were then retaining a part of the estate they had considered it desirable to impose them.

It was stated in an affidavit by the company's solicitor that it would be more beneficial to the estate and also to those interested in the enforcement of the conditions that they should be altered as proposed by the summons, as by so doing a better class of tenant would be secured, it being found that the larger houses were being each occupied by two families, whereas if slightly reduced in size it was thought one family only would occupy each house. The court was asked to modify the conditions under the powers conferred upon it by sect. 84 of the Land Transfer Act 1875 (38 & 39 Vict. c. 87), which is as follows:—

Where any land is about to be registered or any registered land is about to be transferred to a purchaser for valuable consideration there may be registered as annexed thereto, subject to general rules and in the prescribed manner, a condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, and the first proprietor and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition; nevertheless any such condition may be modified or discharged by order of the court on proof to the satisfaction of the court that such modification will be beneficial to the persons principally interested in the enforcement of such condition.

The question arose as to who were the "persons principally interested," within the meaning of the section. The parties interested in addition to the vendors and the company were John Henry Rafferty, who had contracted to purchase the remainder of the vendors' estate; Messrs. Truman, Hanbury, Buxton, and Co. Limited, incumbrancers on the company's land; W. Burrell, A. Theobald, and W. King, purchasers from the company of part of their land. Also three other purchasers of outlying plots of the company's land. All these parties consented to the proposed modification except the three purchasers of the outlying plots, and it was not anticipated that they would object. A Mr. Tweedy had purchased a portion of the vendors' land before their sale to the company. There were no other incumbrancers or purchasers either of the vendors or the company. Messrs. Truman, Hanbury, Buxton, and Co., and Messrs. Burrell, Theobald, and King, were parties to the application.

Warrington, K.C. and *B. J. Parker* for the company.—All the parties principally interested either consent or will consent. The purchasers of the three outlying portions are not principally interested. This is not really a building scheme. The evidence shows that the modifications will be beneficial.

L. Clare for the vendors consented, and said he would appear and consent for Mr. Rafferty if required.

The other parties interested did not appear.

KEKEWICH, J.—By virtue of sect. 84 of the Land Transfer Act 1875, once conditions have been placed upon the register they can only be modified or discharged by an order of the court. That implies, of course, that the court must look at it from a judicial point of view, but it may be done "on proof to the satisfaction of the court that such modification will be beneficial to the persons principally interested in the performance of such condition." I must assume that the Legislature anticipated that in hearing any applications of this character the court would be governed by its ordinary rules. One of the ordinary rules of the court is to accept the consent of parties competent to consent, and appearing by counsel. Of course, if there is an infant it is another matter. There are many cases in which the court has required the consent of the parties themselves where there is such a departure from the ordinary procedure that one would not presuppose that counsel or solicitors, by virtue of their retainers, would be able to bind the parties. But in the ordinary case, where you have a person competent to consent, the consent is usually given by counsel. I cannot think that these provisions ought to be construed as excluding that rule when it says that the court must be satisfied that such modifications would be beneficial to the persons interested. If the persons come here and say that the application is with their consent, I do not see why the court should inquire whether their consent has been purchased or given inadvertently, or insist upon proof that what they testified to be beneficial, because they consented to its being done, is in fact beneficial to them. I cannot think one ought to go as far as that. But where the consent is not given, the court has to be satisfied that the modifications will be "beneficial." The argument has been rather addressed to this, that the proposed modifications cannot do these persons any harm. That is not enough, according to the Act. The Act requires that the court must be satisfied that the modifications are "beneficial," and that must be construed strictly. As regards the particular conditions, it is said that it is not a case of a building scheme. I agree that there has been no building scheme in the ordinary sense of the word. At the same time it is in the nature of a building scheme, and these conditions have been placed upon the register, so that there is a public restriction upon the user of this land. It seems to me, and at any rate it is possible, that any person buying this land with these restrictions on the register may be entitled to say: "I bought the land because, for some reason or other—it may be a very bad one—I attributed importance to their restrictions, and I should not have bought if these restrictions had been removed, or if they had not been there." The particular restrictions here are with regard to the class of houses to be built, the quantity of land, the extent of frontages, and the money to be spent upon the houses, and these restrictions may be regarded as of the greatest importance, and my experience of building schemes shows that persons do regard them as of importance. They regard them as standing precisely on the same footing as restrictions on the erection of public-houses, and other restrictions of a like character. It is said here that if the frontage is made narrower, and the value of the houses is reduced, a better class of tenants will

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be attracted, who will occupy the houses themselves instead of sub-letting. I have no doubt that it is true myself, but I can readily allow for other persons taking a different view. They might say that they would rather have tenants who paid a higher rent. It might be a prejudiced or a foolish view, but I do not see how I can, upon the application in this case, go into the views of these people if they are entitled to object. Who are those entitled to object? The persons "principally interested" in the enforcement of these conditions. I must assume, for this purpose, that all persons who have bought with notice of the conditions are interested in the modifications. What the difference is between "interested" and "principally interested" at present I do not understand. I confess I cannot understand what is meant by a person "principally interested." Take this example: Suppose I came to the conclusion that the purchaser of one of these lots who was originally interested was a person "principally interested" a person whose consent must be given or who must be supposed to be benefited by these modifications. Suppose this man has mortgaged a property worth 500*l.* for 100*l.* Who are, then, the persons principally interested? The mortgagor or the mortgagee, or both? Suppose then that he has mortgaged it twice for an amount in excess of its value. Who are interested then? Surely both these mortgagees would be principally interested, though it might be that if the equity of redemption was of no value, the mortgagor might be disregarded. That illustration has occurred to me to show the difficulty in considering that word "principally." At present I do not feel called upon to define what is "principally interested." At present I think I must deal with it as including all the persons who have had notice of the scheme with its restrictions. They are the persons "principally interested" for the present purpose, and must either consent or must be proved to be benefited by the modifications. That being the construction I put upon the provision, I must apply it to these various parties. The two vendors are clearly interested, and appear by counsel and consent. Mr. Rafferty has purchased a substantial portion of the estate, and is a person interested; he is prepared to consent. If his name is added to Mr. Olare's brief, that will be sufficient; but if not, his consent must be proved, because, on the evidence, I cannot say that the modifications will be beneficial to him. Mr. Tweedy bought before the sale to the defendants, so he is not interested as a matter of law under sect. 84. Messrs. Truman, Hanbury, and Buxton, who are mortgagees, consent, as they join in the application. So do Messrs. Burrell, Theobald and Walter King, who are parties to the application. The consent of the other three purchasers of the outlying lots must be obtained, though, as to one of them, I do not see how he could be hurt at all, as his land is to be made into a road; but I do not see my way to distinguish between him and the others, and to say that he is not a person principally interested.

Solicitors: *Thornycroft and Willis.*

March 12, 13, 14, 15, 17, and 24.

(Before FARWELL, J.)

NEWCASTLE (DUKE OF) v. WORKSOP URBAN DISTRICT COUNCIL (a)

Fair tolls—Construction of ancient charters and lease relating to—Meaning of the term "fair toll"—Whether the term "fair" is included in the term "market."

Action for (1) a declaration that the defendants were not entitled to establish or maintain at Worksop any cattle or other market, or to take or exercise tolls or dues in respect of the sale of cattle, horses, sheep, pigs, or other animals, or any other market profits or rights, except in accordance with a lease made between the predecessors in title of the plaintiff and defendants in 1851 and to the extent of the tolls and premises thereby demised, but not otherwise, and so that any market held by the defendants shall be the plaintiff's franchise market only; (2) to have the plaintiff's rights under certain charters and the lease of 1851 declared and enforced; (3) an injunction to restrain the defendants from collecting toll or dues and from purporting to exercise rights belonging to or connected with a cattle market otherwise than under the said lease of 1851 and in accordance with the declaration claimed; (4) an account of and payment of the tolls and other payments collected or received by the defendants in respect of fairs during the six years preceding the date of the issue of the writ in this action.

The defendants by their defence alleged (inter alia) that the express purpose of a further lease made in 1878 was to enable their predecessors to hold a weekly Wednesday cattle market on the Fair Green and to take tolls thereof for their own benefit; that the plaintiff, who in 1855 had commenced to receive rents reserved by the lease of 1878, could not be heard to say that the obligation of the lease of 1851 was broken by reason of the removal of the site of the Worksop cattle market. With regard to the fair tolls they argued that as these had never (upon the evidence) been exacted from time immemorial, no account of them could now be claimed.

Held, (1) that although an entire change of days is a cause of forfeiture against the Crown only, the original charters did not support any action to recover tolls in respect of fairs held on other days; (2) a market or fair cannot be a legal market or fair without a grant of the right to hold it on the day claimed; (3) that the omission of all express reference to fair tolls in a lease is evidence that the parties were contracting with the knowledge and on the basis that there were no fair tolls; (4) a fair toll may be defined to be a toll payable to the owner of the franchise in respect of goods sold in his fair or brought into the fair for sale whether he be the owner of the soil or not, and has nothing to do with the ownership of the soil; (5) it is not necessary that tolls charged shall be the same for all persons; (6) that defendants were entitled to judgment with costs as between solicitor and client.

Middleton (Lord) v. Power (19 *L. Rep. Ir.* 1) distinguished.

Hungerford Market Company v. City Steamboat Company (3 *L. T. Rep.* 732; 3 *El. & El.* 365) followed.

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

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ACCORDING to the statement of claim it appeared that by a charter of 24 Edw. 1 (the material parts of which are set out in the judgment of the court), one Thomas de Furnivall, the plaintiff's predecessor in title, became entitled to hold one market for merchandise, &c. (hereinafter called the goods market) in every week in his manor of Worksop, in the county of Nottingham.

By another charter of 13 Car. 2 one Henry Howard of Norfolk, another predecessor in title of the plaintiff, became entitled to hold one market for buying and selling all manner of beasts of cattle, together with the market granted by the 24 Edw. 1 as above mentioned, on each Wednesday in the manor of Worksop; also three new fairs to be held on the 21st March, the 21st and 22nd June, and the 3rd and 4th Oct. in each year with all customs, tolls, stallages, &c. This market is hereinafter called the cattle market.

By an indenture of lease, dated the 11th Nov. 1851, the then lord of the manor of Worksop leased the right to hold the markets to the defendants' predecessors in title for the term of ninety-nine years.

The first recital in the lease was to the effect that the lessor

Is seized to him and his heirs for an estate of inheritance in fee simple of and in or is otherwise well entitled to the tolls and all other the market dues now receivable and payable at the market held in the town of Worksop

subject as therein mentioned.

The second recital was to the following effect:

And whereas it is intended to remove the said market from the open street in the said town of Worksop where the same is now held into or within the market house and ground now erected and inclosed for that purpose by a certain joint-stock company, which was . . . duly registered under the name or style of the Worksop, Nottinghamshire, Corn Exchange and Market Company, the site of which new market is adjacent to the present situation of the said market, and within the precincts within which the said market ought to be held, which removal is for the public benefit and convenience, and of which removal due and public notice is intended to be given as is hereinafter mentioned.

The words of demise in the lease were as follows:

Doth by these presents, grant, demise, and confirm to (the lessees), &c., all those the tolls, customs, stallage, picage, and all and singular other the market dues now receivable and payable at the market held in the town of Worksop belonging to (the lessor). And also all that the right and power of appointing the clerk of the said market from time to time, and all profits, benefits, advantages, emoluments, appendances, and appurtenances whatsoever to the said premises belonging or in any wise appertaining (but excepted always out of the aforesaid grant or demise and reserved unto the said (lessor, &c.) all fairs, courts, perquisites of courts, royalties, jurisdictions, franchises, and other manorial rights whatsoever other than the said tolls and premises hereinbefore granted or demised to the said market belonging or in any wise appertaining or incident).

The lease contained a covenant providing that the lessees

Shall not nor will do any act or commit any default whereby or by reason or means whereof the said market shall or may during the continuance of the grant or demise hereby made cease to be held in or within the said market house and ground as aforesaid, or whereby or by reason or means whereof the said tolls, market

dues, and premises hereby demised, or any of them or any part thereof, shall or may or can be or become forfeited or liable to be forfeited or surrendered, or whereby or by reason or means whereof the grant of the said market shall or may or can be repealed or revoked by the Crown, or the right of the said (lessor) to receive or enjoy the same tolls, market dues, and premises, subject to the grant or demise hereinbefore contained, shall or may or can be prejudiced or affected in any way.

At the date of the above lease the goods market was held in the streets. It was subsequently removed to the market house. After the said date fairs continued to be (as they had before been) held under the charters, and in a place called Fair Green. Such fairs were formerly held on the 31st March and the 14th Oct., but in 1845 the days were changed, as the plaintiff alleged for the public convenience, to the second Wednesdays in April and October.

In 1878 the defendants' predecessors applied to the trustees of the then lord of the manor of Worksop, representing that they were entitled under the lease of 1851 to tolls and dues of a cattle market as well as of a goods market, and the trustees, upon such representation, demised the Fair Green to the defendants' predecessors by indenture dated the 29th May 1878 for a term of twenty-one years, and the steward of the manor in the names of the trustees proclaimed a cattle market to be held there, and purported (by the proclamation) to authorise them to receive tolls and dues. The plaintiff complained (*inter alia*) that no account of the fair tolls had ever been rendered to him.

The defendants, by their defence, alleged that the express purpose of the lease and proclamation of 1878 was to enable their predecessors to hold a weekly Wednesday cattle market on the Fair Green, and to take tolls thereof for their own benefit. They also contended that the plaintiff, who in 1835 began to receive the rent, reserved by the lease of 1878, could not be heard to say that any obligation of the lease of 1851 was broken by reason of the Worksop cattle market being held elsewhere than in the places mentioned in the lease of 1851. They denied that the fairs in question were ever held, and if the days on which they were held had been altered, such alteration made the fairs a nullity. They contended that if they had received any tolls of any fair, the same were received by them in the nature of stallage or picage, due not to the owners of the fair, but to the defendants as occupiers of the soil. An alternative defence, that the defendants had established a statutory market, was abandoned at the trial of the action.

Haldane, K.C., Butcher, K.C., and Vaughan Hawkins, for the plaintiff, referred (*inter alia*) to the following authorities:

- Gunning on Tolls (1833), p. 44;
- Rolle's Ab. tit. Market (B), plac. 1;
- City of London v. Vanacre, 12 Mod. 270; 1 Salk. 142;
- Islington Market Bill, 3 Cl. & F. 513; 12 M. & W. 20;
- Mosley v. Walker, 7 B. & C. 40; 9 D. & R. 863;
- Mosley v. Chadwick, cited in note to Mosley v. Walker (sup.) at 7 B. & C. p. 47;
- Brooke's Ab. tit. Prescriptions, plac. 98;
- Yard v. Ford, 2 Wms. Saund. 172;
- Rees v. Marsden, 3 Burr. 1812; 1 W. Bl. 579;
- Reg. v. Casswell (or Caswell), 26 L. T. Rep. 574
- L. Rep. 7 Q. B. 328

Yarmouth (Mayor of) v. Groom, 7 L. T. Rep. 161; 1 H. & C. 102;

London (Mayor of) v. St. Sepulchre (Overseers of), L. Rep. 7 Q. B. 338, n.

Upjohn, K.C. and Herbert Chitty, for the defendants, referred (*inter alia*) to

Benjamin v. Andrews, 5 C. B. N. S. 299; 6 W. R. 692;

Swindon Central Market Company v. Panting, 27 L. T. Rep. 578;

Bedford (Duke of) v. Emmett, 3 B. & Ald. 366;

Northampton (Mayor of) v. Ward, 2 Stra. 47;

Bedford (Duke of) v. Overseers of St. Paul, Covent Garden, 45 L. T. Rep. 616; 46 J. P. 581;

De Buisson (Baron) v. Lloyd, 5 A. & E. 456; 6 N. & M. 776;

Hungerford Market Company v. City Steamboat Company Limited, 3 El. & El. 365.

Cur. adv. vult.

The arguments of counsel and the evidence of witnesses called on either side appear sufficiently in the following written judgment:—

March 24.—**FARWELL, J.**—The question in this case depends on the construction of a lease of certain tolls demised by the predecessor of the plaintiff to the predecessor of the defendants on the 11th Nov. 1851; and for its determination it is necessary to understand the subject-matter with which the parties were dealing and to consider the condition thereof at the date of the demise, a consideration which has entailed a prolonged examination of facts and law out of all proportion to the value of the subject-matter of the action. By charter 24 Edw. I, the King granted to Thomas de Furnivall that he and his heirs for ever might have one market in every week on Wednesday at his manor of Worksop, and one fair there in every year to last for eight days—that is to say, on the eve, and on the day, and on the morrow of St. Cuthbert's day, and on the five days following. In the third year of Edward III. Thomas de Furnivall was summoned to answer *quo warranto* he claimed to hold a market, fair, gallows, timbrel, &c., in his manor of Worksop, and Thomas answered that he and his ancestors from time whereof memory does not exist have had in their manor of Worksop a market on Wednesday in every week and one fair there in every year on the eve and the day and morrow of St. Cuthbert in March, and he also set up the charter of Edward I. To this it was answered for the King that Thomas had abused certain of the liberties aforesaid (amongst other things) by taking from persons coming to his market and fair superfluous tolls and other than were accustomed. Thereupon twelve jurors found that Thomas and all his ancestors had in their manor, market, and the other liberties, but that Thomas had abused the said market and fair in that he had always taken two pence as toll *de quacunq[ue] re venali emptā vel venditā ibidem in mereatu sive feriā*, whereas before his time there were not wont to be taken but one penny; and thereupon Thomas de Furnivall's aforesaid liberties were resumed by the Crown, but granted again to Thomas on payment of a fine. Both sides relied on this proceeding as evidence that tolls were properly payable and had been paid down without duty in respect of the market and of the March fair; and for the reasons stated in *Attorney-General v. Simpson* (85 L. T. Rep. 325; (1901) 2 Ch. at p. 688), I think that this is admissible in

evidence and is sufficient to show that Thomas de Furnivall was entitled to take and work tolls in respect of his market and fair. By charter 13 Car. 2, the King granted to Henry Howard, his heirs, and assigns that he and they might have one market on every Wednesday in the year at Worksop for the buying and selling of all manner of beasts or cattle, together with an ancient market in and upon that day in times past then usually held, and also three new fairs to be held at Worksop (1) on the 21st March; (2) on the 21st and 22nd June; and (3) on the 3rd and 4th Oct. in every year, with court of piepowder and with all liberties, tolls, stallages, piccages, &c., with said markets or fairs and courts of piepowder pertaining or therewith usually had or enjoyed. The title of the plaintiff to the reversion of the markets and tolls demised by the said lease of 1851 on the determination thereof, and to the fairs granted by the said two charters, is admitted by the defence (par. 3). The markets have been held regularly every week in former years in the streets, but since 1851 the provision market has been held in the Corn Exchange, Town Hall, and Market-square, all of which belonged to the defendants or their predecessors in title in fee, and the cattle market has been held in Shaw's field, a field belonging to the duke and leased by his predecessors in title in and before 1856 to Rhodes, then to Reuben Shaw, and then to W. Reuben Shaw and Son. Shaw's field was demised in 1878 by the duke's trustees to the Worksop Corn Exchange and Market Company Limited, for a term of years from the 25th March 1878, and on the 17th Aug. 1882 this company assigned the residue of this term to the defendants' predecessor in title. On the expiration of this lease the plaintiff conveyed to the defendants a piece of land in Worksop for the purpose of erecting a market thereon, and they have since done so. In the year 1845 or thereabouts, the days for the fairs (which had been previously held on two of the days fixed by the charters) were changed to the second Wednesday in March and the second Wednesday in October, and were then held in the street and afterwards in the same place where the market was held. No new charter or licence for this change was produced, but the change was made by the duke's predecessors by a simple notice. These fairs have been duly proclaimed by the crier of the duke, but there is no evidence to show that any toll has ever been paid since the third year of Edward III. under the first charter, or at any time under the charter of Charles II. On the evidence before me I find that the lord has never appointed any collection of tolls, nor provided any buildings or ground for holding the fair, nor any stalls or pens; nor appointed anyone to settle disputes, nor, in short, done anything whatever except proclaim the fair in order to comply with the Statute of Northampton, 2 Edw. 3, c. 15. This then being the state of circumstances, on the 11th Nov. 1851 the plaintiffs' predecessor in title granted to the defendants' predecessor in title the lease under which the question arises. [His Lordship here read recitals 1 and 2, the words of demise, and the covenant of the lease, and continued:] As the pleadings originally stood, the plaintiff disputed the right of the defendants to take cattle market tolls, and the defendants set up an alternative claim in case the

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plaintiff succeeded in this, to hold a statutory market under the Public Health Act; but on the opening of the case the plaintiff's counsel withdrew this claim at the Bar, and stated that he understood that it was not alleged by the amended pleadings, and the defendants' counsel thereupon at once withdrew his claim to a statutory market, which had only been put forward as an alternative. The only questions, therefore, left for my determination relate to the fairs, and with respect to these several points were taken. The plaintiff claims that all tolls taken on fair days are fair tolls, and contends that the defendants must account for them accordingly. A fair, they say (quoting Gunning on Tolls, p. 44), is a great sort of market, and a market is less than a fair, and they cite Coke's Inst. 2, at p. 406: "Note there be words in the grant of a market *ita quod non sit ad nocumtum alterius mercati*, and note that fairs are taken within this law, for every fair is a market, but every market is not a fair." If it were impossible for a market and a fair to co-exist on the same day in the same manor and for the benefit of the same lord, there might be some force in this contention; but it was not and could not be contended that there was anything like merger of the two. The two franchises are separate and distinct, and of equal dignity. There is no question of a greater or a less estate such as is essential to merger. And the very charter of Edward I., under which the plaintiff claims, is inconsistent with any such contention, for the eight days' fair thereby granted on and around St. Outhbert's day necessarily included a Wednesday; and yet the charter grants a market on every Wednesday. I cannot say that it is impossible for a fair to be held in one part of the manor of Worksop on the same day that the market is held in another part; and no authority has been cited showing the impossibility of the co-existence of the two franchises on the same day. Then it is said that even if this is so, a double set of tolls cannot be exacted, and that the tolls paid must be deemed to be fair tolls. It is not necessary for me to decide the first question, because if it were correct, the tolls taken by the defendants under this lease are in my opinion market tolls. The parties to the lease were contracting on the basis of the existing facts—viz., that no fair tolls had in fact been paid since the reign of Edward III., and that no fair tolls could be recovered in respect of the fairs on the two new fair days, and on the face of the deed itself it is apparent that the non-existence of fair tolls was in the contemplation of the parties. The first point is the result of the evidence in the case. It is really inconceivable that where franchise has been for the last three or four centuries enjoyed by two great families such as the Howards and the Pelham-Clintons, no record of any payment in respect thereof could be found, if any such had really ever been made. It is urged that the franchise remains, although the tolls have not been paid for centuries, and that there is nothing to prevent the plaintiff from now exacting them. I agree that the franchise of fair is unaffected by the omission to collect the tolls. Toll is not incident to a fair (*Heddy v. Wheelhouse*, Cro. Eliz. 591), but as appears in the *Maidenhead* case (Palmer, 76, at p. 86), "*per op. del Court*, Toll n'est incident al market, mes sont distinct choses," it owes its origin to a further grant, and exists as a subordinate franchise appurtenant

to the fair or market, differing in this respect from the court of piepowder which is incident to a market: (Coke's Inst. 2, 220-221; Com. Dig. Market I.). The statement in *Vin. Abridg. Market*, F. 7 and 8, rests merely on the statement of counsel in the *Corporation of London* case (2 Show. 265, 276), and, as pointed out by Messrs. Pease and Chitty in their excellent little treatise on Markets and Fairs, p. 60, n. (c), this statement of counsel is founded upon the false assumption that tolls are incident to fairs and markets. There is great difficulty in presuming the extinction of the tolls which formed this subordinate franchise. It has been urged that the effect of a surrender or forfeiture would not be to extinguish them, but to restore them to the Crown, and this appears to me to be correct. Thus in *Heddy v. Wheelhouse* (Cro. Eliz. 591), it was held by Popham, Gandy, and Fenner, "that such liberties which the common person hath by presumption or grant, and which if the common person had not, the King himself should have throughout England, as waif, estray, wreck. These, if the common person hath them by grant or presumption, and they come to the King by forfeiture or otherwise, they are extinguished in the owner, and the Queen shall have such liberties by her prerogative, and they cannot afterwards be granted but by new creation. But such liberties which a common person hath by grant or prescription, which the King (if such prescription had not been) could not have by his prerogative, as warren, fair, market with toll, &c., if these come to the Crown so, they remain *in esse* and are not extinct, for if the King should not have them by this means they would be lost." And to the same effect is the decision in the case of the *Abbot of Strata Mercella* (9 Co. at p. 25 (b)): "When the King grants any privileges, liberties, franchises, which were privileges, liberties, franchises, &c., in his own hand as parcel of the flowers of his Crown . . . then if it come again to the King, they are merged in the Crown and he has them again *in jure coronæ* . . . but when a privilege, liberty, franchise, or jurisdiction was at the beginning erected and created by the King, and was not any such flower before in the garland of the Crown, then by the accession of these again to the Crown they are not extinct," &c. It is not easy to see how the franchises of fair can be in the lord and the subordinate franchises of tolls, which exist only as appurtenant to the franchise can be in the Crown. It is not, however, necessary for me to determine this point; for, whether the tolls are extinguished or not, I find as a fact that they had not been paid for many years before 1851, and that the parties to the lease of 1851 were contracting with that knowledge and on that footing. I have been dealing so far with the tolls payable under the charter in respect of fairs held on the days appointed by the charter. I have now to consider the effect of the change of days made in 1845. The duke's predecessors altered these days *mero motu*; there is no evidence of any licence or authority from the Crown, or any assent of the inhabitants, even if the latter could have any legal effect. At the date of the lease the alteration had been in force for five or six years only, a period far too short to give rise to any presumption of a lost grant or licence. Now, an entire change of days such as this is doubtless a cause of forfeiture; but it

has been held in *Middleton v. Power* (19 L. Rep. Ir. 1), that the Crown only can take advantage of such a forfeiture. I will assume that this is correct, but the charters that continued in existence in 1851 were the charters to hold fairs on the days therein specified, and could not support an action to recover tolls in respect of fairs held on other days. It is said that the decision in *Middleton v. Power* is opposed to this; but I do not so read it. That case was for disturbance of fair. The Land League had without any title set up a rival fair, and the Vice-Chancellor held that the plaintiff, who had changed the days on which his fairs were held some twenty years or so before, was entitled to a declaration of his tolls, and an injunction restraining the defendants from disturbing the plaintiff's fairs, and to damages, and he put it on the ground that the defendants were obviously wrongdoers. No question of tolls arose; the plaintiff had held a market on the days in question for some years, and was therefore *prima facie* in possession. This, however, is no authority for the proposition that the owner of a fair on a given day with tolls who changes the day without licence can recover tolls. The lord proclaims his fair, and thereupon everyone has *prima facie* the right to buy and sell at such fair toll free (*Earl of Egremont v. Saul*, 6 Ad. & El. 924), and if the lord sues for toll he must prove his title thereto; the persons buying and selling are not wrongdoers. "Every person has of common right a liberty of coming into a public market for the purpose of buying and selling," per Cockburn, C.J. in *Swindon, &c. v. Panbury* (27 L. T. Rep. 579), citing *Mayor of Northampton v. Ward* (2 Strange, 1238), and the lord has against them such rights only as he can prove; in this case the fair was not held on the plaintiff's ground, but in the streets, or on some occasions possibly in Shaw's field with Shaw's permission. The plaintiff's predecessors must therefore have put in evidence his charter, and on its production must have failed. A market or fair cannot be a legal market or fair without a grant of the right to hold it on the day claimed: (*Benjamin v. Andrews*, 5 C. B. N. S. 299). Tolls claimed in respect of it were not recoverable. I find, therefore, that in 1851 the plaintiff's predecessor had no right to demand any tolls in respect of the fairs held on the altered days; and that the contract between the parties in 1851 must be read on this basis. I now turn to the lease itself, and I find that its contents are entirely consistent with the facts which I have stated. It recites the lessor's title to the tolls and market dues, but it is silent as to any fair tolls or dues; it demises all the market tolls or dues without any qualification, and then excepts and reserves to the lessor "all fairs, courts, purquisites of courts, royalties, jurisdictions, franchises, and other manorial rights whatsoever, other than the said tolls and premises hereinbefore granted"—that is to say, although the market tolls on the subject-matters of the demise and the word tolls is mentioned both before and after the exception, there is an entire omission of any mention of tolls with reference to fairs. I do not of course say that if there were in fact any tolls in respect of the fairs, they would not be duly excepted and reserved; but on the point of construction, the omission of all express reference to fair tolls is

strongly corroborative of the view which I have expressed, that the parties were contracting with the knowledge and on the basis that there were in fact no fair tolls. But if this were not so, the plaintiff's contention is in my opinion quite untenable. It must extend to this—either that such market tolls as are payable on fair days are not demised, or that if they are, the lessee has in some way or other a duty cast on him of not collecting his own market dues until fair dues are paid, or of collecting the fair dues in preference to the market dues as and for the lessor. It is, in my opinion, impossible that a grantor can so derogate from his own grant or that such a meaning can be given to this demise on any of the ordinary rules of construction. Further, during the six years prior to the writ, for which an account of tolls is claimed, it is true that the fair has been proclaimed, but the proclamation carries with it no right to hold the fair on the land of the defendants. No buying or selling has taken place during these six years, except on the land of the defendants; and it is certainly difficult to see how the plaintiff can claim that the lessees are not only bound to collect his tolls for him, but also to provide the land on which the fair is held. Assuming that the plaintiff's fairs still exist, and can be held on the proper days, they cannot be held on the defendants' land without their consent. Then it is said that the defendants have in fact received fair tolls as such, and some colour is lent to this contention by two items in the list of tolls to be taken in the provision market of the 16th June 1892—viz.: "Stalls in market yard, Wednesdays, Saturdays, per lineal foot, 2d. Do., fairs and stallages, 6d. Eggs, per lot, 3d. Do., fairs and stallages, 6d." The latter toll (i.e., 6d. on eggs) has never been taken—the toll has been, in fact, the same on fair days as on market days. But with reference to stalls, the facts are as follows: the defendants provide stalls and seats, and for these they charge 1½d., not 2d., on market days. On fair days they charge the same toll to their old customers—i.e., the people who frequent the market—but they charge 3d. to new customers—i.e., to people who come in on fair days only. I am of opinion that these tolls are not fair tolls, but stallage tolls: a fair toll is payable to the owner of the franchise in respect of goods sold in his fair or brought into the fair for sale, whether he be the owner of the soil or not, and has nothing to do with the ownership of the soil; stallage is paid in respect of some use of the soil, and can be exacted only by the owner of the soil. It is sufficient to refer to the case of *Mayor of Northampton v. Ward* (2 Stra. 1238; 1 Wilson, K. B. 107, 114) and *Duke of Bedford v. St. Paul* (45 L. T. Rep. 616). The land on which the stalls stand belongs to the defendants, and they make a charge for the exclusive occupation of the land and the convenience of stalls thereon. It is said that the fact that the toll is increased on fair days is fatal to this conclusion, because it is intended that tolls must be the same for all persons, and that it follows that the extra 1½d. must be fair toll. In my opinion that is not the law. So long as the lord does not exceed the maximum toll that he is entitled to demand—i.e., a reasonable amount when the charter specifies no sum (*Corporation of Stamford v. Pawlett*, 1 Cr. & J. 57, and it is not suggested that 3d. is unreasonable)—he may

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remit all or a part of the toll to whomsoever he pleases. The reasoning in the case of *Hungerford Market Company v. City Steamboat Company* (3 L. T. Rep. 732; 3 El. & El. 365) applies, in my opinion, to the present case. In that case the company were authorised by statute to take tolls in return for services to the public, and Cockburn, C.J. in delivering the judgment of the court, consisting of himself, Hill and Blackburn, J.J., says at p. 380: "We were at first struck with the argument that as by the 76th section of the Hungerford Market Act (11 Geo. 4, c. lxx.) the tolls authorised to be taken are required to be fixed and appointed by the company, a toll lower than that so fixed could not be properly considered as coming within the terms of the power. But we think a sufficient answer to this argument was given by the counsel for the plaintiffs, and that the true construction of the clause in question is that the tolls must be fixed and appointed in order to communicate to the public or persons interested the maximum toll they can be called upon to pay, leaving the right of the company to lower or remit the tolls if it otherwise exist wholly untouched." The justification for the grant of tolls in a market or fair is the same as that in the *Hungerford* case—any services to the public. The principle that everyone may waive an advantage to himself applies as much to the owner of market tolls as to a railway or steamboat company. I see no ground on which the variation of tolls within the due limit can be said to be a wrong to anyone. This applies to all tolls, but, with regard to stallage, the case of *Duke of Bedford v. Emmett* (3 L. & Ald. 366) is a direct authority for the variation when different prices are charged for different places in the market. It is said that these tolls cannot be stallage, because the defendants are not rated in respect of them; and it is no doubt true that franchise tolls, as distinguished from tolls in respect of the occupation of the land, are not rateable (*B. v. Caswell*, 26 L. T. Rep. 574; L. Rep. 7 Q. B. 328); but I am not satisfied on the evidence that the defendants are not rated in respect of these tolls. The only evidence on the point is that Mr. Featherstone, the defendants' clerk, stated in cross-examination that the market and buildings were rated, but not the tolls; but in re-examination he explained that he meant the tolls were not separately rated; their default or mistake cannot alter the character of the use and occupation of the ground, which is the fact on which the question depends. There can, I think, be no doubt that the 1½d. and 3d. are stallage, and the question as to the payment for baskets, which might give rise to more difficulty, does not arise, because there is no variation of the tolls in respect thereof on market and fair days. Finally, it was urged that the lease contained a covenant that the lessees would do nothing to prejudice the right of the lessors to receive the market tolls; and it was said that as these sums are unequal, some of them must be either too much or too little: if too much, there is danger to the charter; if too little, the lessor's right to receive the larger sums is prejudiced. It is sufficient for me to say that no such cause of action is pleaded in this case, and I cannot regard the breach of this covenant (if it is a breach, which I doubt) as any answer to the defendants' case. The action wholly fails, and must be dismissed with costs, which under the Public Authorities Pro-

tection Act must be as between solicitor and client.

Solicitors: *Richard Smith and Sons*, for *Marshalls and Bate*, East Retford; *Baker, Lees, and Co.*

Feb. 26 and 27.

(Before BUCKLEY, J.)

Re BEAUMONT; BEAUMONT v. EWBANK. (a)

Donatio mortis causa—Cheque—Presented but not paid in donor's lifetime—Donor's account at bank overdrawn—Validity.

The delivery of the donor's cheque on his bankers, which was presented by the donee though not paid, either actually or constructively, before the donor's death:

Held, not a good donatio mortis causa.

Hewitt v. Kaye (L. Rep. 6 Eq. 198) and *Re Beak; Beak v. Beak* (26 L. T. Rep. 281; L. Rep. 13 Eq. 489) followed.

Bromley v. Brunton (18 L. T. Rep. 628; L. Rep. 6 Eq. 275) explained.

On the 19th Feb. 1901 M. Beaumont was very ill and in expectation of death. His niece was called to his room, and he told her he must draw a cheque in favour of his sister, Mrs. Ewbank, at once for fear he got worse and was unable to do it at all. The niece got his cheque-book, and by his directions filled up a cheque for 300l. and he signed it. He did not hand the cheque himself to Mrs. Ewbank, although she was in the same house, but it was, at his request, handed by his niece to Mrs. Ewbank who, on the following day, sent the cheque to her bankers for collection, and they presented it for payment at the bank on which it was drawn on the 23rd Feb. Beaumont's account there was overdrawn, and the bank manager did not pay the cheque, but returned it and required Beaumont's signature on the cheque to be confirmed.

On the 25th Feb. Beaumont died, and the cheque was never cashed.

The question now arose whether Beaumont's executors ought to pay Mrs. Ewbank the 300l.

There was some conflict of testimony as to whether the bank manager did not pay the cheque because he doubted the signature or because the account was overdrawn, but his Lordship held that the manager was prepared to lend the money to pay the cheque, subject to his being satisfied that the signature was correct.

P. Tindal-Robertson for the executors of Beaumont.

C. H. Sargant for Mrs. Ewbank.—There was a *donatio mortis causa* of the cheque. The inference from the facts is that the deceased intended the cheque or its proceeds, if cashed, to be returned if he recovered:

1 W. & T. Equity Cases, 7th edit., vol. 1, p. 404;

Gardner v. Parker, 3 Madd. 184.

Further, there was a sufficient *traditio* as the cheque was presented before the donor's death, and the bank was prepared to give credit. The fact that the banker made a mistake as to the signature makes no difference. In all the cases

(a) Reported by H. PROCTOR, Esq., Barrister-at-Law.

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presentation and not payment is treated as the vital circumstance:

Duffield v. Elwes, 1 Bl. (N. S.) 497; 30 E. R. 69;
Veal v. Veal, 2 L. T. Rep. 228; 27 Beav. 308;
Hewitt v. Kays (*ubi sup.*);
Bromley v. Brunton (*ubi sup.*);
Re Beak; *Beak v. Beak* (*ubi sup.*);
Re Mead; *Austin v. Mead*, 43 L. T. Rep. 117; 15
 Ch. Div. 651;
 Chalmers' Bills of Exchange, 5th edit., p. 250.

A cheque of a person other than the donor is a valid subject-matter of a *donatio mortis causa*, whether it is paid in the donor's lifetime or not, and whether there are funds to meet it or not. In *Re Dillon*; *Duffin v. Duffin* (62 L. T. Rep. 614; 44 Ch. Div. 76, 81) Lindley, L.J. doubted whether there was any distinction between the donor's own cheque and that of a third person. The executors ought to pay Mrs. Ewbank that which the donor intended her to have. They are trustees for her of the amount by which the estate is the richer through the cheque not having been paid.

A. H. Jessel for the residuary legatees.—There was not a good *donatio mortis causa* because there was no intention on the part of Beaumont that, if he recovered, the amount of the cheque should be paid back:

Cain v. Moon, 74 L. T. Rep. 723; (1896) 2 Q. B. 283.

This was at the most a gift *inter vivos* of a cheque—that is, a mandate capable of being revoked until payment:

Edwards v. Jones, 1 M. & C. 226, 233; 43 E. R. 178;

Byles on Bills, 16th edit., p. 206.

Notice of the donor's death was a revocation of the bank's authority to pay. *Bromley v. Brunton* (*ubi sup.*), so far as it is good law, does not apply. Here the donor was in default in not keeping the bank in funds to pay the cheque, and the bank was under no obligation to pay. A cheque is not an equitable assignment of the drawer's balance at his bankers:

Hopkinson v. Forster, L. Rep. 19 Eq. 74;
 Bills of Exchange Act 1882 (45 & 46 Vict. c. 61),
 s. 53.

He also referred to

Williams on Executors, 9th edit., pp. 683, 686, 688.

[BUCKLEY, J. referred to *Rolls v. Pearce* (36 L. T. Rep. 438; 5 Ch. Div. 730.)]

Sargent replied.

BUCKLEY, J.—The question to be determined is whether the deceased made a valid *donatio mortis causa* to his sister, Mrs. Eva Ewbank, of a sum of 300*l.* Subject to a more accurate statement of the facts hereafter, it is sufficient for the moment to say that the act which the deceased did was to hand, or cause to be handed, to his sister a cheque for 300*l.*, which before his death was not paid. *Donatio mortis causa* is a singular form of gift. It is, if I may use the expression, of an amphibious nature—neither a complete disposition *inter vivos* nor a testamentary gift. It is something done by which the donee is to have an absolute title if the donor dies, but not otherwise. If he dies, the donee's title becomes absolute, and becomes absolute not under but against the executor of the donor. In order to constitute a valid *donatio mortis causa* the gift must be one intended to take complete

effect only in the event of the donor's death. The court must find as a fact that the donor did not intend the gift to be absolute if he did not die. It is not necessary to find that in express words, but that must be the true inference from the facts of the case. To read from the judgment of Sir John Leach in *Gardner v. Parker* (*ubi sup.*), at p. 185: "It was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death." That, therefore, is a question of fact to answer as best one can. Is it under the circumstances of the case to be inferred that the gift was not present and absolute, but was only to take effect in case of death? In *Duffield v. Elwes* (1 Sim & St. 239) Sir John Leach held that a mortgage or bond given as a collateral security for money due on mortgage could not be made the subject of a *donatio mortis causa*. That decision was reversed by Lord Eldon, sitting in the House of Lords (*ubi sup.*), who there pointed out that in a case of *donatio mortis causa* the question is not similar to that which arises where a court of equity is asked to give complete effect to an incomplete voluntary conveyance, because it is of the very nature of a *donatio mortis causa* that the title of the donee is not complete till the donor is dead. The question is not whether the donee has acquired a complete title, but whether he has acquired a right against the legal personal representative of the donor to have his title made complete—that is, whether the legal personal representative is a trustee for the donee. Lord Eldon, at p. 530, points that out, and concludes: "The opinion which I have formed is, that this is a good *donatio mortis causa*, raising by operation of law a trust." Accordingly, upon the principle of *Duffield v. Elwes*, the following have been held to be good *donationes mortis causa*: First, a promissory note payable to the order of the deceased, but not indorsed (*Veal v. Veal*, *ubi sup.*); secondly, bills of exchange to the order of the deceased, which from the report I gather, though it is not distinctly stated, had been indorsed by the donor; but this, however, is unimportant (*Rankin v. Weguelin*, 27 Beav. 309); thirdly, bills of exchange in favour of the deceased, or order, unindorsed (*Re Mead*; *Austin v. Mead*, *ubi sup.*); fourthly, a cheque payable to the donor or order and unindorsed (*Clement v. Cheesman*, 27 Ch. Div. 631); and, lastly, a deposit note of the London and Westminster Bank (*Re Dillon*; *Duffin v. Duffin*, *ubi sup.*). In all these cases of mortgage debt, promissory note, bill of exchange, and deposit receipt, the donee had not got a complete title, but there had been handed over to him the *indicia* of property—that is, the property had been given to him on terms that it was to be his if the donor died—and against the legal personal representative of the donor he could say, in the case of a mortgage debt, "sue the mortgagor," and in the case of a bill of exchange, "lend me your name so as to make effectual the trust in my favour." But how does the matter stand as regards the deceased's own cheque? It is plain law that a donor's own cheque in favour of another and handed to that other, does not operate as an equitable assignment in favour of the donee of the donor's balance at his bankers: (*Hopkinson v. Forster* (*ubi sup.*)). The cheque is

no more than a revocable mandate which the drawer can at any time before payment revoke, and which in the event of his death is *ipso facto* revoked, and becomes inoperative. If before the donor's death the cheque is presented and paid, the donee receives money, and there is no question of a *donatio mortis causa* of a cheque. The only question, then, is whether the money was received on the terms that the donee should only keep it if the donor died. But if the cheque be not presented or paid before the donor's death, it is no more than an ineffectual revocable order which is revoked by the donor's death. For that proposition I refer to *Hewitt v. Kaye* (*ubi sup.*) and *Re Beak; Beak v. Beak* (*ubi sup.*). In the latter case there was an additional feature which Bacon, V.C. held made no difference—viz., the delivery of a banker's pass book, which may be said to be the bankers' acknowledgement of a debt. But the Vice-Chancellor held it was no further disposition of property than was effected by the delivery of the cheque. In *Re Dillon; Duffin v. Duffin* (*ubi sup.*)—a case of a deposit note—Lord Lindley said: "It is said that here there was no good *donatio mortis causa*, because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration; but assuming it to be correct, I think it does not dispose of the present case." Now, if the doctrine of *Hewitt v. Kaye* and *Re Beak; Beak v. Beak* is to be reconsidered, it must be in a higher court than this. Those are authorities binding on me, and I follow them. But, as the parties may wish to carry this case further, I desire to state my own view of the law. It appears to me that in all those cases of mortgage debt, promissory notes, &c., that which was handed over by the deceased to the donee, was property or *indicia* of property belonging to the donor. The donor's cheque is not property at all. It is a mere revocable mandate—it is not the handing of money. If the donee goes to the banker and the banker does an act, either by paying the cheque or by undertaking to hold the amount of it for the donee, there is a *traditio* thus constituted—a delivery of property. If the cheque is acted on thus, you may reach an equitable assignment of the amount to the credit of the donor, *pro tanto*, at the bank. But unless you get as far as that, there is no delivery of property at all, but only an order which, if acted upon, will lead to the passing of property. The decision of Stuart, V.C. in *Bromley v. Brunton* (*ubi sup.*) at first puzzled me. There the deceased gave a cheque to the donee who presented it at the bank, the donor's account being in credit; but the banker was not sure about the signature and wished to verify it, and refused payment on that ground. The donor died, and the cheque had not been paid. The Vice-Chancellor held that there was a complete gift *inter vivos* of the amount of the cheque. That decision must have been based on one of two grounds—either that the cheque was constructively paid when the banker received it, and substantially said: "I will pay this, but must see that the signature is all right," so that you get payment referred back to a time before the death of the donor; or the banker was to be taken to have said: "The account is in credit; I will hold the requisite amount for you to answer the cheque subject to my being satisfied as to the

signature." That may have been by reason of the act of the banker a good equitable assignment. The Vice-Chancellor said, at p. 277: "The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers." I cannot suppose that the Vice-Chancellor meant by that that a cheque is an equitable assignment. If you insert these words, and read it in this way, it is sound: "The effect of the cheque and of the banker's action in respect of it was to appropriate so much of the donor's money to meet the cheque." The bank there had in effect honoured the cheque. If so read *Bromley v. Brunton* does not seem in conflict with *Hewitt v. Kaye* and *Re Beak; Beak v. Beak*; and I think all the authorities are rightly to the effect that the donor's own cheque given and not acted on by payment, either actually or constructively made, will not constitute a valid *donatio mortis causa*. With that statement of the law, I will state shortly what the facts are in this particular case. [His Lordship then stated the facts as above, and continued:] The delivery by the niece to the sister was, for the purpose of a *donatio mortis causa*, as effectual as if the deceased had given it himself. The circumstances were such as that I infer he gave it in anticipation of his death, and to take effect as a *donatio mortis causa* if he died. But the legal result is, that in the first place there cannot have been, as in *Bromley v. Brunton*, anything which, by coupling the deceased's act and the banker's act, constituted an equitable assignment of moneys in the banker's hands, because there were none such. Even if the banker was minded to lend, it was not binding on him, because there was no consideration moving at all. It would have been a purely voluntary promise; and if, when the cheque came back with the signature confirmed, he had said "I will not lend," he would have been within his rights. The donee acquired no rights, but a mere expectation. Even if the banker did not change his mind, but remained in the mind to lend, still an agreement to lend is not an enforceable agreement, and the donee acquired no right to property. I hold, therefore, that there was no valid *donatio mortis causa* for two reasons—first, because the mere drawing by the deceased of a cheque and the handing over of the cheque to the drawee, coupled with the subsequent acts, did not amount to such a delivery or *traditio* as is required in order to give the donee a right to the cheque to become absolute in the event of the death of the donor; secondly, that even if it might have been enough if the account had been in credit, yet, inasmuch as it was in debit, there could not be any such right. Suppose the case of a cheque given by a person seriously ill, and the donee goes to the bank—say a small country branch—just before closing hours, and presents the cheque, and the cashier, who may be the only person in charge, says he is in a hurry to catch a train, and asks the drawee to call in the morning as a favour to him, and says he will pay the cheque then, and the drawee says he will, and the drawer dies during the night. If that is so, the bank, by undertaking to pay the next morning, may have appropriated a sufficient amount of the credit balance to meet the cheque. That might be a

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good *donatio mortis causa*, but here the facts do not come up to that. There was not any promise to pay, in fact, when the cheque was presented, and as this account was in debit, there could not have been a promise to pay, but only a promise to lend. On these grounds I hold that there is no valid *donatio mortis causa*.

Solicitors for the plaintiff and the residuary legatees, *Lovndes and Son*, agents for *Griffith, Davis, and Smith*, Brighton.

Solicitors for Mrs. Ewbank, *St. Barbe Sladen and Wing*.

Saturday, Feb. 1.

(Before EADY, J.)

Re FERNELEY'S TRUSTS. (a)

Will—Gift to females with restraint on anticipation—Rule against perpetuities—Restraint on anticipation valid as to shares of females born in the testator's lifetime though void as to shares of those born afterwards.

A testator who had vested property in trustees upon trust for his daughters for life with remainder for their children directed that the provisions for his daughters and their children, being females, should be for their respective separate use without power of anticipation.

Held, that the restraint on anticipation imposed on the shares of the female children of the testator's daughters was valid as to the shares of those born in the testator's lifetime, though void as to the shares of those born afterwards.

Herbert v. Webster (15 Ch. Div. 610) followed.

Re Ridley; Buckton v. Hay (41 L. T. Rep. 336; 11 Ch. Div. 645) dissented from.

PETITION.

By his will, dated the 8th Feb. 1844, George Ferneley devised and bequeathed the residue of his real and personal estate to trustees upon trust to sell and convert the same as therein mentioned and to divide the proceeds into four equal parts, and as to one fourth part upon trust to pay 1000*l.*, part thereof, to his daughter Betsy, the wife of Thomas Cockerill Wrigley, for her separate use, and to invest the remainder and stand possessed thereof in trust during the life of his said daughter to pay the income to such person or persons as she should, but not by way of anticipation appoint, and in default of and subject to any such appointment, into her own hands; and after the decease of his said daughter the testator directed that his trustees should stand possessed thereof in trust for all and every the child and children of his said daughter who should attain twenty-one or marry in equal shares of more than one. And as to one other fourth part, upon trust to pay 1000*l.* part thereof to his daughter Esther, and to invest the remainder and stand possessed of the investments and the income thereof upon the like trusts in all respects, and particularly against anticipation, for the benefit of his daughter Esther and her children as were declared respecting the remainder of the first-mentioned one fourth part therein before given for the benefit of his daughter Betsy Wrigley and her children. And the testator proceeded as follows:

Provided always and I do hereby order and direct

(a) Reported by J. THORNTON, Esq., Barrister-at-Law.

that the several provisions herein made for my said daughters and their children and also for any other persons or person being females shall be for their respective own sole and separate use and benefit, and that their respective receipts under their respective hands or the receipt or receipts of such person or persons as they respectively shall appoint to receive the same shall be the only effectual discharge and discharges for the same, notwithstanding any coverture to the end that the same may be for their respective separate maintenance and support and not to be paid to them by anticipation.

By a codicil, dated the 6th May 1848, the testator gave his daughters power to appoint by will life interests in their shares to their respective husbands.

In July 1844 the testator's daughter Esther intermarried with T. W. Wiley, and had seven children by him, of whom one daughter, Helen, was born before the death of the testator, which took place on the 3rd March 1850.

Esther Wiley died in June 1875, having appointed a life interest in her share to her husband T. W. Wiley.

In April 1872 Helen Wiley married Silvio Fugl, a Dane domiciled in Denmark, and in 1885 she joined with her husband in mortgaging her share of the testator's estate to secure 500*l.*

In 1892 she obtained a divorce from her husband.

In Sept. 1900 T. W. Wiley died.

In July 1901 the surviving trustees of the testator's will paid into court the sum of 1124*l.* 7*s.* 8*d.* the amount of Helen Fugl's share of the testator's estate.

This was a petition presented by Helen Fugl for payment out to her of the sum in court.

Gordon for Esther Fugl.—The petitioner is entitled to the sum in court, since the mortgage by her of her share is void by reason of the restraint on anticipation to which it was subject under the testator's will, which restraint was valid as to her share, since she was born before the testator's death.

Herbert v. Webster, 15 Ch. Div. 610.

There Hall V.C. followed *Wilson v. Wilson* (4 Jur. N. S. 1076) in preference to the decision of Jessel, M.R. in *Re Ridley; Buckton v. Hay* (41 L. T. Rep. 336; 11 Ch. Div. 645) and his own decision in *Re Michael's Trusts* (46 L. J. 651, Ch.). It is void, however, in respect of the shares of children born after the testator's death:

Re Russell; Dorrell v. Dorrell, 73 L. T. Rep. 195; (1895) 2 Ch. 698.

R. J. Parker for the mortgagee.—The restraint on anticipation upon the shares of a class of beneficiaries, some of whom were born after the testator's death, is void as to the shares of all members of the class.

Re Ridley (*ubi sup.*);

Armitage v. Coates, 35 Beav. 1;

Cooper v. Laroche, 43 L. T. Rep. 794; 17 Ch. Div. 368.

W. H. Cosens-Hardy for the trustee of the testator's will.

EADY, J.—In the case of *Herbert v. Webster* (*ubi sup.*) Hall, V.C. had the judgment of Jessel, M.R. in *Re Ridley; Buckton v. Hay* (*ubi sup.*) before him, and nevertheless followed what appears to me to be the sounder rule. I shall follow the decision of Hall, V.C., and declare

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the restraint on anticipation good and the mortgage void.

Solicitors: Slater, Heelis, Williamson, Colley, and Tullock, Manchester; Orford and Son, Manchester; Busk, Mellor, and Norris.

Feb. 14, 18, and 22.

(Before EADY, J.)

Re PEACOCK; KELCEY v. HARRISON. (a)

Power—Married woman—Will—General power—Administration with the will annexed.

A married woman, who died during her husband's lifetime, had a general power of appointment over a fund of personalty, in which the husband had a life interest. In exercise of that power she by will appointed the fund to her brother and sister upon trust to pay a legacy, and divide the residue among certain persons, and she appointed her brother and sister executor and executrix. The wife died in 1882, the husband died in 1900, and the brother and sister died without proving the will. Letters of administration were granted on the 31st May 1900. The question raised was whether the administrator could give a good receipt for the appointed fund.

Held, that the administrator could give a good receipt.

THIS was an originating summons to determine whether an administrator with the will annexed was able to give a good receipt for a fund.

By an ante-nuptial settlement, dated the 20th Jan. 1875 certain funds were settled in the events that happened after the death of the husband upon trust for such persons as the wife should during coverture by will or codicil appoint.

The marriage was solemnised on the 21st Jan. 1875.

The wife made a will dated 30th Sept. 1880, and referred to the settlement and to her power of appointment, and directed that the settled funds other than policy moneys should be paid or transferred to her sister E. J. Ogilvie, and her brother C. F. Ogilvie, upon trust to pay a legacy of 200*l.* and divide the residue among named persons, and E. J. Ogilvie and C. F. Ogilvie were appointed executrix and executor.

The wife made a codicil not affecting the trust funds, and died on the 14th Sept. 1882, leaving no estate other than the trust funds and no debts.

The husband died on the 6th April 1900, and both E. J. Ogilvie and C. F. Ogilvie died without proving the will.

Administration, with the will and codicil annexed, was granted to the plaintiff on the 31st May 1901.

A. J. Chitty for the administratrix.—The executors could have given a good receipt:

Farwell on Powers, 2nd edit. p. 325;

Re Philbrick's Trusts, 12 L. T. Rep. 200;

Re Hoskin's Trusts, 35 L. T. Rep. 935; 6 Ch. Div. 281;

Hayes v. Oatley, 26 L. T. Rep. 816; L. Rep. 14 Eq. 1.

The funds are equitable assets for the payment of

debts although the wife died before the Married Woman's Property Act 1882:

Vaughan v. Vanderstegen, 2 Drew, 185;

London Chartered Bank of Australia v. Lamprière, 29 L. T. Rep. 186; L. Rep. 4 P.C. 572;

Re Pinder's Settlement, 41 L. T. Rep. 579; 12 Ch. Div. 667.

The administratrix with the will annexed has a right to receive the appointed funds.

Martelli for the trustee of the settlement.—An administratrix, who only takes *virtute officii*, can only claim legal assets, and cannot give a receipt for the appointed fund:

Re Philbrick's Trusts (*ubi sup.*);

Re Treasure, 83 L. T. Rep. 142. *Cur. adv. vult.*

Feb. 22.—EADY, J.—The cases of *Re Philbrick's Trusts* (*ubi sup.*) and *Re Hoskin's Trusts* (*ubi sup.*) decide that where a married woman or any person having a general power of appointing a fund of personalty does appoint by will and names an executor, that executor on proving the will is entitled to receive the appointed fund, and can give a valid discharge for it. The trustee of the settlement does not dispute the authority of these cases, but contends that they only decide that an executor is so entitled, and that an administrator with the will annexed is in a different position. There is no authority, and I do not know any principle requiring this distinction to be made. If the donee of a power does not exercise it, the fund goes as in default of appointment, and is administered by the trustees of the instrument, who will also administer if the power is exercised by deed and only beneficiaries are named. If the donee appoints the fund to trustees on the trusts thereby declared, these trustees will have to deal with the fund. If the power is exercised by will, the original trustees can be appointed executors or different persons may be appointed executors, and in that case they will distribute the funds. If, however, the appointment is made by will, and no executors are appointed, or, if executors have been appointed, they die before the testator or disclaim, I think the donee commits the distribution of the fund to the person appointed by the Probate Court administrator with the will annexed. For many years it has been the practice of the Probate Court to grant administration with the will annexed in the case of the will of a married woman made by virtue of a power where no executor is named (Rules and Orders for the Principal Registry in Non-contentious Business 1862, r. 15). If the contention of the trustee of the settlement is correct, such an administrator has no duties to perform. There would also be great difficulty if there was a rule that an executor is the person to administer, but not an administrator. For instance, if an executor proved the will, received the trust fund, and died intestate before administering, who could complete the administration? Must the funds be repaid to the original trustees? It would seem so if an administrator *de bonis non* cannot do so. Again, it is well settled that a testator who executes a general power of appointment by will, makes the appointed property in equity assets for the payment of his debts to the extent that his own property is insufficient. It would be very inconvenient if the person to administer these assets was not the person whose

duty it is as executor and administrator to ascertain and provide for debts. Where a testator who has a general power of appointment gives legacies and appoints an executor, it is settled law that he must be taken to exercise his general power to the extent to which the fund subject to the power is required to make the legacies effective, and the same rule applies even if no executor is appointed (*Re Davies' Trusts*, 25 L. T. Rep. 785; L. Rep. 13 Eq. 163). The person to pay these legacies, and the only person who can ascertain how much of the appointed funds will be required to make up for any deficiency if the appointor's estate is insufficient, is the executor or administrator. In my opinion, the administratrix in the present case can give a valid receipt and discharge for the settled funds.

Solicitors: *Harry Wilson and Co.* (for *St. George Ashe*, Cambridge); *H. P. Spottiswoode*.

KING'S BENCH DIVISION.

Monday, Feb. 24.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

STOURBRIDGE MAIN DRAINAGE BOARD (apps.)
v. SEISDON UNION (resps.). (a)

Rating—Sewage farm—Lease to tenant—Sewage works on farm—Occupation by sewerage board.

The S. M. D. Board acquired a sewage farm, and laid down thereon certain carriers and other sewage works and plant.

They leased the farm to one C., reserving the right of entry thereon for the purpose of constructing, maintaining, altering, and repairing the works as might be requisite for using the farm as a sewage farm.

C. was to irrigate by means of the works on the farm, and was to keep the pipes and carriers properly flushed and cleaned.

The board kept the works in repair, and from time to time their surveyor and agents went on the land to see that the sewage was properly distributed and treated, and to do repairs.

Held, that the board were rightly held not to be in occupation of these carriers and other sewage works and plant, and so not legally rateable in respect thereof.

CASE stated by quarter sessions.

The appellants are a sewerage board duly constituted for the purpose of dealing with sewage from the urban district of Stourbridge.

For the purpose of carrying out the duties imposed on them they acquired a farm, and laid down upon the farm certain sewage works and plant, consisting of a valve-house, carriers, distributing chambers, effluent drain, and other accessories, all of which were necessary for the purpose of enabling them to carry out their statutory duties by dealing with the sewage in their district.

The hereditaments which formed the subject of the rate were (a) a rising main to the valve-house on the farm, and the valve-house, and (b) the carriers and other sewage works and plant.

The appellants were rated by a poor rate made the 29th Oct. 1900 in respect of both these hereditaments, and upon appeal to quarter sessions it

was held that they were legally rateable in respect of (a), and no appeal was brought therefrom, but in respect of (b) the quarter sessions held that the appellants were not legally rateable, and they allowed the appeal and reduced the rate.

By a lease dated the 9th Dec. 1897 the appellants let the farm to one Chatham, and under its provisions all the farm lands were demised, together with the appurtenances, but the right of entry was reserved to the board and their agents to construct, maintain, alter, or repair the main outfall chambers or outfall sewers, the rising main, valves, sluice chambers, sewers, drains, carriers, and other works as might be requisite for the purpose of the user by the board of the farm as a sewage irrigation farm; and the board were to have full and sole possession and control of the main outfall valve chambers and the valves and fittings therein, and the rising main or outfall sewer.

It was further provided that Chatham should during his tenancy keep the lands well cultivated as a sewage irrigation farm, and that he should properly irrigate to the satisfaction of the board surveyor every part of the farm with sewage, so far as he could, by a proper use of the sluices, pipes, carriers, and other works, and he was, so far as he was able, by a reasonable and proper use of the sluices, pipes, carriers, and other works to receive, pass, and distribute on the lands all the sewage pumped by the board, and he was, at his own cost, to keep the sluice chambers, pipes, carriers, and catch-pipes to all the effluent pipes and drains freed from deposit or sediment, and to keep the pipes and carriers properly flushed and cleansed.

By further provisions in the lease the board were to keep the outsides and insides of the valve chambers and carriers in substantial repair, and to cause the sewage to be pumped up into the outfall chambers.

By the rate appealed against Chatham was rated by the respondents in respect of the farm, apart from the hereditaments referred to above as (b).

The valves in the valve-house worked automatically and regulated the flow of sewage upon the farm. The key of the valve-house was kept by Chatham as a convenient depository for the same, and the various officials of the appellants obtained access to the valve-house when they required to enter to inspect or do necessary works to the apparatus in the valve-house. It was not necessary for Chatham to enter the valve-house for the purposes of the farm or to carry out the covenants of the lease.

From the valve-house the sewage flowed through the various distributing carriers upon the farm, and Chatham, by means of sluices and other proper apparatus connecting with the distributing chambers, could and did, subject to the provisions of the lease, but otherwise without interference from or control by the appellants, turn the sewage upon and to such parts of the farm as he required it, and could with the appellants' consent sell it.

The provisions of the lease were generally carried out in practice between the appellants and their tenant Chatham.

The surveyor and other officials of the appellants went upon the farm from time to time to see that the sewage was properly distributed and

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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treated upon the farm and that the works were in order, and for the purpose of doing the necessary repairs thereto.

The appellants from time to time, as they were required for the purpose of efficiently dealing with the sewage, made alterations and extensions in the works.

Upon the facts aforesaid the appellants contended that they had not such occupation of the sewage works and plant as to be rateable in respect thereof, but that Chatham was the occupier of such sewage works and plant, and was the person to be rated in respect thereof.

The respondents, on the other hand, contended that Chatham was in occupation only of the farm as an agricultural tenant; that the sewage works and plant were a distinct hereditament created by the appellants to enable them to carry out their statutory duties, and that in law they could not part with the possession, control, or occupation of such works and plant; and that if such works were in the physical possession, control, or occupation of Chatham, he was a mere agent of the appellants, who had and have the legal possession, control, and occupation of the works; and, further, that, on the true construction of the lease and the facts aforesaid, the appellants were such occupiers of the works, as distinct from the farm, as to be rateable.

The Court of Quarter Sessions held that the appellants were not rateable in respect of the carriers and other sewage works and plant, and accordingly reduced the rate and allowed the appeal as above stated.

Disturnal (Hugo Young, K.C. with him) for the union.—The point raised here is whether or not the drainage board are in occupation of the carriers and other sewage works and plant, and are therefore rateable in respect of them. It is said that the tenant under the terms of the lease is in occupation and liable to be rated. There is nothing in the parcels of the lease which shows a demise of the works, carriers, and plant to such tenant. The covenant by the tenant to irrigate and for that purpose to use the carriers cannot make him the occupier thereof. The board, the landlords, can enter upon the land and alter and repair the carriers, &c. They have the control. The covenant to keep the sluices, drains, &c., clean is the only one which imposes any duty on the tenant, and that cannot make him the occupier. [Lord ALVERSTONE, C.J.—The whole question is, Who is the occupier?] That is so. Who has exclusive occupation of these works and plant? The board keep the right of entry and the right of going on the land and altering the works, carriers, and chambers, and, in order to escape liability, they must show that the tenant has exclusive occupation. Under sects. 27 and 29 of the Public Health Act 1875 the board have the right to make the lease. A distinction is there drawn between the land and the works on the land, and, although they have the right to lease and so part with the land, when they have spent money on the works there is no statutory authority which allows them to part with the appliances they have put up. [Lord ALVERSTONE, C.J.—Do they not become land for this purpose?] No; they are distinct hereditaments. [Lord ALVERSTONE, C.J.—The question seems to arise whether or not the drainage board have cut off their occupation, under this lease, at the distributing house.] If

the lease was *ultra vires* and beyond the statutory powers of the board, the tenant would become the agent of the board and they would be liable as occupiers. If, however, they have power to make this lease, it is clear from its terms that, although the tenant has control of the land, a distinction is drawn between this land and these appliances, and the tenant is not in the exclusive occupation or control of the latter. In *Mayor of Southport v. Ormskirk Union* (69 L. T. Rep. 852; (1894) 1 Q. B. 196) the local board had to lay and keep in repair all gas mains, but the corporation of Southport were empowered to use these mains, and it was held by the Court of Appeal, affirming the Divisional Court, (1893) 2 Q. B. 468, that the corporation had only the right to the use of the mains for the sole purpose of the supply of gas, and had no exclusive occupation of the mains so as to render them liable to be rated in respect of them. [Lord ALVERSTONE, C.J.—Cave, J. in the Divisional Court laid down the test to be applied as follows: "Ownership and occupation are names given to certain bundles of rights. A man who is both owner and occupier possesses, roughly speaking, all the rights which attach to the portion of the land that he owns and occupies. When he lets off this land, he divests himself of some of those rights and retains others. When he grants a right of way or other easement over the land, he again divests himself of certain rights and retains others. When does he divest himself of the occupation and when does he retain it? If the cases are examined, I think they will be found to proceed upon this principle—that so long as a man who is both owner and occupier grants away certain limited rights only, reserving to himself all the rights except those which he so grants away, he retains the occupation and the grantee merely gets the limited rights; where, on the other hand, he grants away his rights generally (although, of course, only for a limited time, as must be the case in every tenancy), then, although he may reserve certain rights to himself, he ceases to be occupier, and the person to whom the general grant is made becomes the occupier in his place." Do you come within that test?] Yes. I say that here the owners, the drainage board, have only granted limited rights, and they are still the occupiers. In *Reg. v. St. Mary Abbots, Kensington* (12 A. & E. 824), a company had power to purchase land for a cemetery, to make vaults, &c., in it, and to sell in perpetuity or for a term the exclusive right of burial. They were bound to keep the whole of the cemetery in repair, and they were held to be liable to be rated as occupiers of the whole cemetery although they had sold the exclusive right of burial in the vaults, &c., and, having delivered the keys to the purchasers, had ceased to exercise any act of ownership. That case was followed in *Reg. v. Abney Park Cemetery Company* (29 L. T. Rep. 174; L. Rep. 8 Q. B. 515). He also referred to

London and North-Western Railway Company v. Buckmaster, 33 L. T. Rep. 329; L. Rep. 10 Q. B. 70, 444.

Although in this case limited rights passed to the tenant, that does not make him occupier. The drainage board are the occupiers, and therefore liable to be rated.

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Hon. A. Lyttelton, K.C. (Stamford Hutton with him), for the board, were not called upon to argue.

Lord ALVERSTONE, C.J.—This case was extremely well argued, and I am sure the appellants have in no way suffered from the absence of Mr. Young. Mr. Disturnal has argued it extremely well. Now, the real question is one of fact that has often been discussed before. It is difficult and impossible to say that any one case lays down a hard-and-fast rule as to what is or is not "occupation," though of course there are many cases that lay down or point out circumstances which are of great weight when you come to consider the particular case. In this case a sewage authority under its statutory powers possesses and has constructed, or has been in occupation of—for this purpose it is not very material now—a main drain and a valve-house in respect of which the sessions have found they are rateable. From that point there is an hereditament in respect of which this question, not without difficulty, arises. There is an ordinary sewage farm for receiving sewage, and with appliances that are perfectly well known. Over that sewage farm there are a number of carriers used in a great many places, and there are these valve chambers, sometimes called catch-pits, by which there is a means of diverting the sewage over particular areas of the land. The farm is let to a Mr. Chatham, who pays a rent. We have nothing in the world to do with that question, although there was an ingenious point raised by Mr. Disturnal as to the difficulties that might arise, but that is really only a question of *quantum*. It has been always a question whether a particular land was sufficiently rated, having regard to the facility the tenant has got for this or that sort of work. It is said under these circumstances that the drainage board are not the occupiers of these carriers, and that they were in Mr. Chatham's occupation. Now, the fact upon which Mr. Disturnal relies is the fact that there is a right to alter the carriers, and he says the only right Chatham has is an obligation to keep the carriers clean, and a right to turn the sewage out at various parts of the farm. That raises just the state of circumstances which was a question of fact for the tribunal; whether, looking at the nature and character of the structure, the way it is held, the way it is demised, and the rights that are reserved, they find as a matter of fact it was in the occupation of the one person or the other, or rather, to state it more accurately, that it was not so much in the occupation of the drainage board as to bring them within the case when it was held they were to be occupiers. I think it is a case where I should have come to the same conclusion as the sessions. It seems to me impossible for us to say, on the facts before us, that the sessions were bound to hold the drainage board were occupiers, and they must be liable in respect of that part of the hereditament; therefore I think this appeal must be dismissed with costs.

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

Solicitors for the board, *Harwards and Co.*, Stourbridge.

Solicitors for the union, *H. Taylor*, Wolverhampton.

Monday, Feb. 24.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HOARE (app.) v. TRUMAN, HANBURY, BUXTON, AND CO. (resps.). (a)

Factory—Non-textile—Bottling and aerating beer—Factory and Workshop Act 1878 (41 Vict. c. 16), s. 93.

Certain premises were used for the purpose of aerating and bottling beer in order to adapt it for sale as bottled beer. Gas engines were used for the purpose of aeration, but the bottling was done by hand, the bottling machine not being worked by mechanical power, and the bottle filling by means of the pressure of gas with which it had been aerated.

Held, that these premises were a non-textile factory within sect. 93 of the Factory and Workshop Act 1878.

Law v. Graham (84 L. T. Rep. 599; (1901) 2 K.B. 327) considered.

CASE STATED.

The respondents were charged on an information that they, the respondents, on the 7th June 1901, being then the occupiers of certain premises, the same being a non-textile factory within the meaning of the Factory and Workshop Acts 1878 to 1895, did unlawfully employ a certain young person of the age of fifteen years, one Samuel Williams, until 9.30 p.m., contrary to the statutes.

The following facts were proved or admitted:—

The appellant was one of His Majesty's inspectors of factories and workshops.

The respondents were on the 7th June 1901 the occupiers of certain premises, which premises included a building used as a bottling stores.

On the 7th June 1901 Samuel Williams, a young person within the meaning of the Factory and Workshop Acts 1878 to 1895, was employed by the respondents in the bottling stores from 7 a.m. to 9.30 p.m.—that is to say, beyond the period of employment permitted by sect. 13 of the Factory and Workshop Act 1878, or sect. 36 of the Factory and Workshop Act 1895.

If the bottling stores were a non-textile factory within the meaning of the Factory and Workshop Act 1878, s. 93, then the respondents on the 7th June 1901 infringed the provisions of sect. 13 of that Act.

The respondents contended that the bottling stores were not a non-textile factory, on the ground that mechanical power was not used in aid of any manufacturing process carried on there.

The bottling stores were used by the respondents for the purpose of aerating and bottling beer, and the gas engines situate in the bottling stores were used by the respondents in the manner hereinafter mentioned.

The beer was so aerated and bottled for the purpose of adapting it for sale as bottled beer.

The beer was brought in barrels into the bottling stores. It was then forced out of the barrels into a cooling tank by means of an air-pump, driven by mechanical power—to wit, a gas engine. Thence it was forced by an air-pump, driven by mechanical power, into a cylinder (hereinafter called the mixing cylinder) situate in

(a) Reported by W. DE B. HANBURY, Esq., Barrister-at-Law.

K.B. Div.] HOARE (app.) v. TRUMAN, HANBURY, BUXTON, AND Co. (resps.). [K.B. Div.]

a room adjoining and communicating with that in which Samuel Williams was employed.

The mixing cylinder contained a mechanical mixer rotated or driven by mechanical power—to wit, a gas engine. Attached to and communicating with the cylinder were high-pressure cylinders containing carbonic acid gas, which were brought already charged with such gas into the bottling stores. By the action of the mixer, the beer and the carbonic acid gas were mixed together and the beer aerated.

It was the duty of Samuel Williams, which he was performing during his employment on the 7th June 1901, to place an empty bottle in the bottling machine and pull down by hand into the neck of such bottle, by means of a lever, the nozzle of a tap communicating by a pipe with the mixing cylinder. The beer flowed through the pipe from the tap owing to the pressure of the gas with which it had been aerated and filled such bottle. The bottling machine was not worked by mechanical power.

The bottles before being filled were drained and soaked by hand, and afterwards rinsed out by a brush driven by a gas engine on another floor of the premises.

The magistrate dismissed the information on the ground that the premises were not a non-textile factory within the meaning of sect. 93 of the Factory and Workshop Act 1878, inasmuch as the work done by Samuel Williams was manual work only, and it was immaterial how the beer was conveyed to the bottling machine.

By sect. 93 of the Factory and Workshop Act 1878 (41 Vict. c. 16), factory means "textile factory" and "non-textile factory," or either of such description of factories. "Non-textile factory" means:

(1) Any works, warehouses, furnaces, mills, foundries, or places named in part one of the fourth schedule to this Act; (2) also any premises or places named in part two of the said schedule wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; (3) also any premises therein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them—that is to say; (a) in or incidental to the making of any article or of part of any article; or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or (c) in or incidental to the adapting for sale of any article and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

Sutton (G. S. Robertson with him) for the appellant.—The magistrate has held these premises not to be a textile factory because the work done by Williams was manual work only. That can have nothing to do with the question. *Law v. Graham* (84 L. T. Rep. 599; (1901) 2 K. B. 327) is no authority in this case. There certain premises were solely used for the purpose of washing bottles and bottling beer. Before the bottles were filled, which was done by manual labour, they were washed inside by a rotary brush driven by a small gas engine, the bottles being held in position by hand, and the outsides being washed by manual labour. Nothing was done to the beer itself, and no process of any kind,

manufacturing or otherwise, was done on the premises. That was very different to the present case. *Petrie v. Weir* (Ct. Sess. Cas. 5th series, vol. 2, 1041) is in point here. There the premises consisted of a yard in which stones were dressed by manual labour, and included an engine house where the workmen's tools were sharpened on a grindstone driven by a gas engine. No other mechanical power was used on the premises, but they were held to be premises in which mechanical power was "used in aid of the manufacturing process carried on therein." Again, in *Henderson v. Glasgow Corporation* (Ct. Sess. Cas. 5th series, vol. 2, 1127), in the Refuse Dispatch Works of the corporation certain saleable parts of the city refuse were separated from the unsaleable part by processes in which steam power was used. It was held that these works fell within the definition in sect. 93 of the Factory and Workshop Act 1878 as there was an adaptation for sale. In the present case there is an adapting for sale, and mechanical power is used in aid of a manufacturing process.

Travers Humphreys for the respondents.—There is no manufacturing process here at all. There may be an adapting for sale. The mechanical power here was not used in aid of the manufacture of the article—i.e., bottling the beer.

Lord ALVERSTONE, C.J.—When the words of this section are read, I think it is quite clear that in this case the magistrate ought to have convicted. The words are: "Any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them—that is to say, (c) in or incidental to the adapting for sale any article and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." In this case the facts show that upon these premises and in the curtilage and within the words of that section carbonic acid gas and beer are mixed together by mechanical means and are then together put into the bottles. It seems to me that that is clearly a case of adapting for sale beer, and adapting for sale bottled beer. Under those circumstances, there having been manual labour on those premises at the same time there is this mechanical power which is used for that purpose, the words of the section are fulfilled. I wish only to say that I think the distinction which I drew in *Law v. Graham* (84 L. T. Rep. 599; (1901) 2 K. B. 327) is right, and that it certainly is no authority against the view we are now holding. There we thought we could not overrule the magistrate, who came to the conclusion that the washing of the bottles was not doing anything incidental to the adapting for sale of bottled beer. Whether we were right or wrong in that case, it certainly is no authority against the view we are now taking in this case, and I think the case should go back to the magistrate to convict.

DARLING and CHANNELL, JJ. concurred.

Appeal allowed.

Solicitors: *The Solicitor to the Treasury; Clapham, Fitch, and Co.*

K.B. Div.]

DAVIES (app.) v. EVANS (resp.).

[K.B. Div.]

Feb. 24 and 25.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

DAVIES (app.) v. EVANS (resp.). (a)

Fishery—Bye-law—Fishing for salmon in weekly close time—Intention—Evidences.

D. had a net fixed and kept up and closed in salmon waters capable of taking salmon during the weekly close time provided by the bye-laws, and in which salmon had been in fact taken, and in respect of which he had taken out a salmon licence. The mesh of the net was smaller than that allowed by the bye-laws.

Held, that, provided the justices found intention, there was evidence of fishing for salmon otherwise than by rod and line during the weekly close time, and of attempting to take salmon with smaller meshes than that allowed by the bye-laws.

CASE stated upon two informations preferred by the respondent against the appellant charging him in the first with unlawfully fishing for salmon otherwise than by rod and line in certain waters during the weekly close time, contrary to certain bye-laws made by the Board of Conservators by virtue of 36 & 37 Vict. c. 71, s. 39, sub-ss. 2, 4, and in the second with attempting to take salmon with a net of less dimensions than that allowed by the bye-laws.

Upon the hearing the following facts were proved:—

The appellant was the owner of a net in the estuary of the Towy within the district of the board, permanently fixed in a position about 700 or 800 yards from the bed of the river Towy and about 240 yards from the bed of the river Gwenaethfach, which is a tributary of the Towy.

The mesh of the net was smaller than the mesh required by the law regulating the size of the mesh for salmon nets.

The net was kept up by the appellant during the weekly close time fixed by the bye-law in that behalf.

The net had been so used as aforesaid for many years.

The appellant shortly before the alleged offence against the bye-law had been warned by the water bailiffs to open the net during the weekly close time which the applicant refused to do, asserting his intention to keep it down.

Large quantities of coarse fish such as bass, herrings, flat fish, and sprats were caught in the net all the year round. As much as 4785lb. were caught from June 1900 to Jan. 1901.

Salmon were occasionally caught in the net as in other nets, fixed in the estuary for catching fish other than salmon. During the three weeks previous to the hearing 9½lb. of sewin had been caught. No salmon had been caught therein this season. In the summer months of 1900, salmon weighing 60lb. to 70lb. were caught in the net.

In the district in question the words "sewin" and "salmon" are used differentially, although in the Salmon Fishery Act 1861, s. 4, "salmon" includes "sewin."

The defendant held a salmon licence in respect of the net, in pursuance of a specific charge in respect thereof in the scale of licence duties.

No bye-law had been made by the board under sect. 39 (1) of 36 & 37 Vict. c. 71.

On the part of the appellant it was contended that the net was not a net peculiarly adapted for catching salmon, and that it was not fixed for that purpose, and that the licence which had been taken out was taken out for the purpose of enabling the appellant to keep any salmon which might occasionally be caught in the net, and did not convert it into a salmon net, so as to render it subject to the bye-laws under which the appellant was charged as aforesaid, and the cases of *Watts v. Lucas* (24 L. T. Rep. 128; L. Rep. 6 Q. B. 226), *Pidler v. Berry* (59 L. T. Rep. 23), *Marshall v. Richardson* (10 L. T. Rep. 605), and *Wood v. Venton* (54 J. P. 662) were referred to.

On the part of the respondent it was contended that the fact that the net was fixed in salmon waters, that it was capable of catching and it did in fact catch salmon, and the appellant had taken out a licence in respect of the net brought the same within the operation of the bye-law. The cases of *Lyne v. Leonard* and *Lyne v. Fennell* (18 L. T. Rep. 55; L. Rep. 3 Q. B. 156), *Short v. Bastard* (46 J. P. 580), and *Hill v. George* (44 J. P. 424) were referred to.

Upon the foregoing evidence the justices were of opinion that the appellant had offended against the bye-law, which had been made under statutory power, and they convicted him on both informations.

The question of law upon which this case was stated for the opinion of the court was whether the net having been fixed in salmon waters (which as a fact were tidal waters), being capable of taking and having taken salmon, and the appellant having taken out a salmon licence in respect of the net, brought the same within the operation of the bye-laws relating to the weekly close time.

S. T. Evans, K.C., and J. D. Williams for the appellant.

Willis Bund for the respondent.

LORD ALVERSTONE, C.J.—We all think that this case ought to go back to the justices with a direction, that, provided they find intention the facts would be sufficient to justify a conviction. The facts would give jurisdiction to find that there was an offence under the bye-laws. I think that intention is necessary, and it must be gathered from what the appellant does. It would not be sufficient for the appellant to say that he had no intention. That must be gathered from his conduct.

DARLING, J. concurred.

CHANNELL, J.—The facts here are sufficient evidence of intention. If on those the justices find there was intention, then that would justify a conviction.

Case remitted to the justices.

Solicitors: *Clarke, Rawlins, and Co., for Stephens and Soppiitt, Carmarthen; Indermaur and Brown, for James John, Carmarthen.*

K.B. Div.]

WHITAKER (app) v. POMFRET BROTHERS (resps.).

[K.B. Div.]

Tuesday, Feb. 25.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WHITAKER (app) v. POMFRET BROTHERS (resps.). (a)

Adulteration—Warranty from original vendor—Proceedings—Limitation—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 20—Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 20 (6).

Proceedings against a person who, in respect of an article of food or drug sold by him as principal or agent, has given to the purchaser a false warranty in writing, under sect. 20 (6) of the Sale of Food and Drugs Act 1899, must be commenced within six months from the giving of warranty.

CASE STATED.

On the 22nd July 1901 an information (dated the 6th July 1901) was preferred by the appellant against the respondent under sect. 20, sub-sect. 6, of the Sale of Food and Drugs Act 1899, charging that they (the respondents) on the 16th May 1901, in respect of an article of food—to wit, pepper—sold by them as principals did give to the purchaser thereof a false warranty in writing, the warranty so given stating the pepper to be genuine white pepper, whereas the same contained not less than 10 per cent. of pepper husks contrary to the provisions of the section.

Upon the hearing of the information the following facts were proved by the appellant and not disputed by the respondents:—

John Milne carried on business as a retail grocer in Manchester-road, Haslingden, and he, on the 20th Nov. 1900 purchased from the respondents, who carry on business as wholesale grocers, 3lb. of white pepper.

Milne purchased the pepper as genuine white pepper, and with a written warranty to that effect given by the respondents.

On the 16th May 1901 Milne sold to Arthur Bland, sergeant of police (a subordinate officer of the appellant), at his shop in Manchester-road, Haslingden, 6oz. of the pepper.

The pepper was bought by Bland for purposes of analysis, and was divided by him into three parts in the manner prescribed by the statute and one portion sent to the county analyst, and all the requirements of the Sale of Food and Drugs Act 1875, s. 14, were complied with.

On being analysed the pepper was found to contain not more than 90 per cent. of genuine white pepper, and not less than 10 per cent. of bleached pepper husks, and a certificate in the statutory form was given to that effect.

Thereupon a complaint was laid against Milne for selling to the prejudice of the purchaser an article of food, to wit, pepper not of the nature, substance, and quality demanded by the purchaser.

That complaint came on for hearing before the justices at Haslingden, on the 24th June 1901, and at the hearing Milne proved to the satisfaction of the justices that he had purchased the pepper as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect

—namely, the warranty given to him by the respondents on the 20th Nov. 1900, and that he had no reason to believe at the time when he sold it, that the article was otherwise, and that he sold it in the same state as when he purchased it. Thereupon the justices dismissed the complaint against Milne under the provisions of sect. 25 of the Sale of Food and Drugs Act 1875.

Upon the hearing it was contended on behalf of the respondents (a) that apart from the evidence relating to the warranty, dated the 20th Nov. 1900, no evidence had been offered to the justices of the giving of a false warranty by the respondents on the 16th May 1901; (b) that the offence (if any) was committed and completed on the 20th Nov. 1900 when the warranty was given, and the pepper sold to Milne; (c) that the information having been laid on the 6th July 1901 (more than six months after the 20th Nov. 1900) was not within the time specified in sect. 11 of 11 & 12 Vict. c. 43.

On behalf of the appellant it was contended (a) that the warranty given by the respondents was a continuing warranty running on until the whole of the pepper covered by it had been disposed of, and that the offence was a continuing offence; (b) that the warranty was in force on the 16th May 1901, when Milne sold a portion of the pepper to Bland, and which warranty protected Milne from conviction as hereinbefore set out; (c) that the information was laid on the 6th July 1901, and within six months of the 16th May 1901, the date of the sale to Bland on which date the warranty came into force for the purposes of this particular purchase, and therefore within the time specified by sect. 11 of 11 & 12 Vict. c. 43.

The justices, however, were of opinion that the prosecution was not brought in time under the provisions of 11 & 12 Vict. c. 43, and they dismissed the information.

The question of law arising on the above statement for the opinion of the court was whether the information was laid in time.

F. H. Mellor (James Openshaw with him) for the appellant.—The point raised here is what is the time within which proceedings are to be taken against a person who gives a false warranty under the sale of Food and Drugs Act. The summons was under sect. 20 (6) of the Sale of Food and Drugs Act 1899. The first section in point is sect. 20 of the Sale of Food and Drugs Act 1875, which, *inter alia*, provides: "Every penalty imposed by this Act shall be recovered in England in the manner prescribed by the 11 & 12 Vict. c. 43." That statute provides that such complaint shall be made, and such information shall be laid "within six calendar months from the time when the matter of such complaint or information respectively arose." That was the state of things in 1875, and in 1879 an amending Act was passed. By sect. 10 of that statute it was provided that in all prosecutions under the principal Act, and notwithstanding the provisions of sect. 20 of that Act, the summons shall be served upon the person charged within a reasonable time, and in case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person of the food or drug for test purposes. That section has been repealed but its words are important because of the case of *Cook v. White* (74 L. T. Rep. 53; 1896) 1 Q. B.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.]

SCOTT (app.) v. LOWE (resp.).

[K.B. Div.]

284) which was decided upon it, and upon which we found our argument. By sect. 19 (1) of the Act of 1899 it is provided that "when any article of food or drug has been purchased from a person for test purposes, any prosecution under the Sale of Food and Drugs Act in respect of the sale thereof, notwithstanding anything contained in sect. 20 of the Sale of Food and Drugs Act 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase." In the schedule to that Act sect. 10 of the Act of 1879 is repealed. Under that section proceedings must be taken within twenty-eight days, and in the case mentioned above it was argued that the reasonable time commenced to run after the twenty-eight days. That twenty-eight days was six months by *Jervis' Act* (11 & 12 Vict. c. 43). The time in this case begins to run from that time, and not from the date of the false warranty. In *Cook v. White (sup.)* it was laid down that a summons under sect. 27 of the Sale of Food and Drugs Act 1874 against the original vendor of a perishable article of food for giving a false warranty in writing in respect of it to a purchaser, need not be served within twenty-eight days from the purchase of the food for test purposes from that purchaser. He referred to the judgments of Lindley and Kay, L.J.J. The Legislature in repealing sect. 10 of the Act of 1879 has kept alive the twenty-eight days after the date of buying for test purposes, and it has only substituted the six months in *Jervis' Act*, for the reasonable time that is mentioned in sect. 10. The section which enables us to proceed against the warrantor is sect. 20 (6) of the Act of 1899. That provides: "Every person who in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence to a fine not exceeding 20*l.*, for the second offence to a fine not exceeding 50*l.*, and for any subsequent offence to a fine not exceeding 100*l.*, unless he proves to the satisfaction of the court, that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true." This offence is really a continuing one, and so long as the shopkeeper is entitled to rely on the warranty and keep it as a defence, so long there is a continuing offence committed. The matter of the information or complaint arose, when the retailer was entitled to set up the warranty.

Frank Mellor for the respondents.

Lord ALVERSTONE, C.J.—One cannot help feeling some regret that these proceedings must fall upon the point taken, for the reasons pointed out by Kay, L.J. in *Cook v. White* (74 L. T. Rep. 53; (1896) 1 Q. B. 284), that in the case of some articles, non-perishable, which may be kept a long time, proceedings cannot be taken against persons who have given a false warranty. It seems to me that is a matter which must be put right by the Legislature. The case stands in this way. Under sect. 20 of the Act of 1875 it is provided that in proceedings against offenders "every penalty imposed by this Act shall be recovered in England in the manner prescribed by the 11 & 12 Vict. c. 43." Therefore that does, in regard to proceedings against offenders, bring in the provisions of *Jervis' Act*. Then came the

section of the repealed Act, which provided that proceedings under sect. 20 should be in the case of perishable articles within twenty-eight days from the time of its purchase. Then, as Mr. Mellor has properly pointed out, that is extended by the Act of 1899 to both perishable and non-perishable articles. Therefore, in so far as the actual proceedings have to be taken in respect of the sale there are limits of time less than the six months. Now, in order to enable these proceedings to be taken against the persons who have given the warranty, you must find something in the Act which either directly or by implication excludes the operation of sect. 20 in regard to this particular offence. It seems to me that when you look at the amending Act of 1899 the words are not sufficient: "Every person who in respect of an article of food or drug sold by him as principal or agent gives to the purchaser a false warranty in writing shall be liable on summary conviction for the first offence to a fine not exceeding 20*l.*" Now, the words of that section creating that offence seem to me directly to correspond with the class of offence to which it was intended that the limits laid down by sect. 20 of the Act of 1875 should apply. I think that if it was intended to exclude the general limits of time which were brought in by the incorporation of the provisions of *Jervis' Act*, you would require special words to say that such proceedings may be taken within some time as any time that may be named, e.g., from the time of the purchase of the articles from the sub-purchaser, or a direction that, for the purpose of a summons under that section, the date of purchase should be taken to be the date when the false warranty was supposed to be given. I think it is impossible for us to give proper effect to sect. 20 of the Act of 1875, if we hold that these proceedings could be taken more than six months from the date of the offence—namely, the offence of giving the false warranty. Therefore, though I quite agree that the case is one which it is desirable should be met, if it is intended that the proceedings are to be taken against the person who has given the false warranty, more than six months before, I think it must be by an Act, and not by putting a construction on the Act which the plain language of it does not justify.

DARLING and CHANNELL, J.J. concurred.

Appeal dismissed.

Solicitors: *Snow, Fox, and Co.* for *H. Clare, Preston*; *Williamson, Hill, and Co.* for *Marsden and Marsden, Blackburn.*

Thursday, March 13.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, J.J.)

SCOTT (app.) v. LOWE (resp.). (a)

Metropolis—Paving apportionment—Dismissal of summons on ground of street not being a new street—Fresh apportionment—Res judicata—Metropolis Management Acts 1855-1890.

On the 9th Nov. 1898 the *H. Vestry* resolved that *R.-street* be paved as a new street, and apportioned the sum of 37*l.* 16*s.* 8*d.* on the respondent, which he refused to pay.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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On the 15th Sept. 1899 the H. Vestry summoned the respondent for that sum, but the summons was dismissed on the ground that R.-street was not a new street within the Metropolis Management Acts.

On the 13th June 1900 a resolution was passed by the H. Vestry rescinding the above apportionment, and on the 14th March 1901 the H. Borough Council resolved that R.-street be paved as a new street, and apportioned on the respondent the sum of 32l. 16s. 1d., which he refused to pay, and thereupon the present summons was issued.

The magistrate held that the adjudication of the 15th Sept. 1899 was conclusive, and he dismissed the summons.

Held, on the authority of *Reg. v. Hutchins* (44 L. T. Rep. 364) and *Wakefield Corporation v. Cooke* (86 L. T. Rep. 198), that the decision of the 15th Sept. 1899 was not conclusive and the present case should be heard on its merits.

CASE stated on a complaint preferred by the appellant against the respondent, who is the owner, within sect. 250 of the Metropolis Management Act 1855, of premises known as the Manor Farm Dairy, on the east side of a street known as Riseholme-street, for unlawfully neglecting and refusing to pay the sum of 32l. 16s. 1d., the sum apportioned on him in respect of the premises under the Metropolis Management Acts.

The following facts were proved:—

The appellant is the paving rate collector to the paving authority within the metropolitan borough of Hackney, which exercises all the powers of the Metropolitan Management Acts 1855 to 1890 within the district of the borough council.

The respondent is the owner of Manor Farm Dairy, Riseholme-street, within the district.

On the 9th Nov. 1898 the vestry of Hackney, predecessors of the Hackney Borough Council, in execution of their statutory powers resolved that Riseholme-street be paved as a new street and apportioned the expenses of paving Riseholme-street as a new street on the various frontagers abutting on the street, of whom the respondent was one. The sum of 37l. 16s. 8d. was the amount apportioned on the respondent as owner of the Manor Farm Dairy, which sum was demanded by the Hackney Vestry from the respondent on the 26th Nov. 1898, and which the respondent refused to pay.

On the 15th Sept. 1899 the Hackney Vestry summoned the respondent before one of the magistrates of the Metropolis at the North London Police-court for the sum of 37l. 16s. 8d., being the proportion alleged to be due from the respondent as the owner of the Manor Farm Dairy of the paving expenses under the apportionment made the 9th Nov. 1898.

The respondent called no evidence, and the magistrate was of opinion, on the facts proved before him by the complainants, that the Riseholme-street was not a new street within the Metropolis Management Acts, and accordingly dismissed the summons.

On the application of the complainants, the magistrates stated a special case for the High Court under the title of the *Hackney Vestry* (apps.) v. *Lowe* (resp.).

On the 5th Feb. 1900 the case came on for hearing.

The respondents then objected that a copy of the case had not been served by the appellants on the respondents personally within three days after receipt of the same from the magistrate.

The court held the objection fatal to their jurisdiction and dismissed the appeal.

Riseholme-street continued unpaved, and no work whatsoever was done upon it under the aforesaid apportionment.

On the 13th June 1900 a resolution was passed by the vestry of Hackney rescinding the aforesaid apportionment and all resolutions concerning the same.

On the 14th March 1901, the Hackney Borough Council resolved that Riseholme-street should be paved as a new street within the meaning of the Metropolis Management Act 1855 to 1890, and the surveyor apportioned a sum of 32l. 16s. 1d. upon the respondent, being the respondent's proportion of the estimated expenses of paving Riseholme-street in respect of his ownership of the Manor Farm Dairy. The dimension and cost of the paving to be done under the new apportionment differed very slightly from those under the preceding apportionment, and the apportionment was in respect of the same property in the same street.

The sum of 32l. 16s. 1d. was duly demanded by the appellants of the respondent. The respondent refused to pay the same.

On the 26th Oct. 1901 the appellant summoned the respondent for default in paying the sum of 32l. 16s. 1d.

The respondent at the hearing took a preliminary objection that the magistrate had no jurisdiction to hear the summons, and that the matter was *res judicata*, and concluded by the finding of the magistrate at the hearing on the 15th Sept. 1899, that Riseholme-street was not a new street, and that the slight alteration in the cost of the work, could not effect the substantial identity of the appellant's demand with that made by the Hackney Vestry on the former apportionment of the 9th Nov. 1898.

The appellant contended that the summons was in respect of a new apportionment and a new demand for a different sum from that adjudicated upon on the 15th Sept. 1899, and he tendered evidence as to the variation in the extent of area to be paved and the cost of the work. He contended that the decision of the magistrate on the summons of the Hackney Vestry on the 15th Sept. 1899, operated only as the dismissal of the summons for paving expenses which the Hackney Vestry had then failed to show were due, and could not conclude the status of Riseholme-street nor yet the respondent's liability save on the summons on which the magistrate actually adjudicated.

The magistrate was of opinion, after the admission of both parties, that the question to be decided upon this summons was whether Riseholme-street was or was not a new street within the meaning of the Metropolis Management Acts, and inasmuch as it had been proved and found as a fact by the magistrate on the summons heard by him on the 15th Sept. 1899 that Riseholme-street was not a new street within the meaning of those Acts, and inasmuch as there was on this summons no evidence on any fresh point, that the adjudication of the 15th Sept. 1899 was conclusive, and that he had no jurisdiction to hear

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the present summons, and he therefore dismissed it.

The question for the court was whether the adjudication of the 15th Sept. 1899 was conclusive or whether the magistrate had jurisdiction to hear and determine the summons on its merits.

Bevan for the appellant.

Eldridge for the respondent.

LORD ALVERSTONE, C.J.—We do not consider that this case is distinguishable from the cases of *Reg. v. Hutchins* (44 L. T. Rep. 364; 6 Q. B. Div. 300) or *Wakefield Corporation v. Cooks* (86 L. T. Rep. 198; (1902) 1 K. B. 188). The consequence of holding the decision of the magistrate to be final would be too serious. The amount claimed in this case is not in respect of the same apportionment, and so is not in respect of the same proceeding. The only thing decided in the first case was that that apportionment was not recoverable.

DARLING and CHANNELL, JJ. concurred.

Appeal allowed.

Solicitors: *Williams; C. V. Young and Son.*

March 25 and April 15.

(Before **LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.**)

HORNSEY URBAN DISTRICT COUNCIL (apps.) v. HENNELL (resp.).(a)

Local government—Lands acquired for volunteer purposes—Land owned or occupied for Crown purposes—Apportionment of expenses for paving, &c., highway—Public Health Act 1875 (38 & 39 Vict. 55), s. 150.

Certain lands and premises were purchased by H. for the purpose of them being transferred to and used by the volunteer battalion of which he was commanding officer. They were afterwards mortgaged to the Public Works Loan Commissioners, and the money so received was used to repay the respondent and to fit up the premises, and they were held by the defendant and his successors as commanding officer under the Volunteer Act 1863.

The premises have been used ever since as the headquarters of and for the purposes of the volunteer battalion, and for no other purpose.

Held, that the premises were owned and occupied by the respondent as a servant of the Crown for the purposes of the Crown, and that he was exempt from liability to pay any expenses in respect thereof apportioned under sect. 150 of the Public Health Act 1875.

CASE stated upon the hearing of a complaint made by the appellants on the 16th Oct. 1901 for the recovery from the respondent of a sum of 409l. 10s. 9d., being the apportioned amount of expenses incurred by the appellants in sewerage, levelling, paving, metalling, flagging, channelling, and making good a certain street, called Nightingale-lane (being a street not repairable by the inhabitants at large), in the urban district of Hornsey, alleged to be payable in respect of the Elms, Priory-road, and land on the east side of Nightingale-lane, which premises abut on the street, together with interest on that sum at

the rate of 5l. per cent. per annum from the 20th Feb. 1901.

The appellants are the urban district council of Hornsey, in the county of Middlesex.

The respondent is a colonel in His Majesty's Army, and was at all material times until the month of March 1901 the commanding officer of the 1st Volunteer Battalion (Duke of Cambridge's Own) Middlesex Regiment, formerly called the 3rd Middlesex Rifle Volunteers.

By an indenture made the 15th June 1896 between the Suburban Buildings Land Company Limited and the respondent, certain premises, therein called the Elms, and hereinafter called "the premises," were granted and conveyed unto and to the use of the respondent, his heirs and assigns, for the sum of 1910l. It was not disputed that the premises were acquired by the respondent for the purpose of transferring them to and in the meantime allowing them to be used by the volunteer battalion.

In or about the month of Dec. 1896 certain portions of the premises comprising an armoury and magazine were duly appointed by the respondent as such commanding officer, and approved by the Secretary of State for War as a storehouse for arms, ammunition, and stores, in pursuance of sect. 26 of the Volunteer Act 1863, sect. 6 of the Regulation of the Forces Act 1871, and an Order in Council made under the last-mentioned section. The armoury consists of one room in the basement of the portion of the premises described as the main building. Since that time these portions of the premises have been used solely as such store-house.

In or about Feb. 1897 the Secretary of State for War, on the application of the respondent, as such commanding officer, in pursuance of sect. 5 (1) of the Military Lands Act 1892, duly approved of the sum of 2200l., repayable in thirty-five years, being borrowed by the volunteer battalion for the purposes of acquiring the freehold of the premises.

By an indenture of mortgage made the 1st April 1897 between the respondent and Robert Philpot, the Secretary of the Public Works Loan Commissioners, the respondent granted the premises and the grants made and to be made to the volunteer battalion out of moneys provided by Parliament unto Robert Philpot, as such secretary, and his successor secretaries, and his and their assigns, by way of mortgage for securing the sum of 2200l. and interest, and agreed that the premises should, subject to such mortgages, be held by him as such commanding officer and his successors under and by virtue of the terms of the Volunteer Act 1863.

The sum of 2200l. was advanced in pursuance of the mortgage by the Public Works Loan Commissioners, through the Commissioners for the Reduction of the National Debt, and was together with the sum of about 500l. which had been raised by voluntary subscriptions, applied by the respondent in repaying himself the purchase price of 1910l. for the premises, and in altering and fitting up the same for the use of the volunteer battalion.

The respondent thereupon ceased to have any interest in the premises otherwise than as such commanding officer.

The premises have since their acquisition by the respondent, been used as the headquarters of and

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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for the purposes of the volunteer battalion, and for no other purposes. No rent and no money has ever been charged or received by the volunteer battalion or its commanding officer for the use of the premises or any part thereof.

The funds of the volunteer battalion consist of the grants made to them out of moneys provided by Parliament, subscriptions from officers, and some voluntary subscriptions subscribed by other persons for specific purposes.

The upkeep of the premises is paid for entirely out of the Parliamentary grants.

The premises abut on the east side of a street known as Nightingale-lane in the district. Nightingale-lane (hereinafter called the street) was at the date of the notices hereinafter mentioned a street (not being a highway repairable by the inhabitants at large within the meaning of sect. 150 of the Public Health Act 1875).

In Dec. 1899 the appellants duly resolved that notices should be served on the respective owners and occupiers of the premises fronting, adjoining or abutting on the street under the last-mentioned section, requiring them to sewer, level, pave, metal, flag, channel, and make good the street, and on or about the 24th Jan. 1900 notice under the section was duly served on (amongst others) the respondent.

The notices were not complied with and the appellants executed the works therein mentioned themselves, and completed the same on or before the 15th Oct. 1900.

The expenses incurred by the appellants in executing the works were thereupon apportioned by their surveyor, and the sum of 409*l.* 10*s.* 9*d.* was so apportioned on the respondent in respect of the premises, and notice of such apportionment was duly served upon him, and he did not within the space of three months dispute the same.

On the 20th Feb. 1901 notice demanding payment of the said sum of 409*l.* 10*s.* 9*d.* by the respondent was duly served upon him but he refused to pay the same and the appellants commenced summary proceedings for the recovery of the sum with interest thereon at the rate of 5 per cent. per annum from the 20th Feb. 1901, which came on for hearing on the 16th Oct. 1901.

On behalf of the appellants it was contended that the respondent was the owner of the premises when the works were completed, and that he was liable accordingly to pay the appellants the share apportioned in respect of the frontage of the premises to Nightingale-lane of the expenses of executing such works.

On behalf of the respondent it was contended that the premises were owned and occupied by servants of the Crown, for the purposes of the Crown, and, consequently, that he was exempt from liability to pay any of the expenses so apportioned. The justices were of opinion that the respondent was not liable to pay the expenses so apportioned, and dismissed the summons.

The question for the opinion of the court was whether the respondent is liable to pay the share of the expenses apportioned upon him as aforesaid in respect of the frontage to Nightingale-lane of the premises.

Bray, K.C. (A. Glen with him) for the appellants.—The question here is whether the respondent is liable to pay a sum of 409*l.* 10*s.* 9*d.*, being

expenses incurred by the urban authority, the appellants, under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55). The recovery of such expenses is provided for by sect. 257 of the same Act. The respondent is the owner of the land, and this is a rate levied not on an occupier, but on an owner. The Military Lands Act 1892 (55 & 56 Vict. c. 43), s. 8, provides that if a volunteer corps holding land under this Act is disbanded, the land shall, by virtue and subject to the provisions of this section, vest in the Secretary of State from the date of disbandment subject to the repayment of any money borrowed for the purchase of the land and not already repaid, and the sums required for such repayment shall, if and so far as not provided by the sale of the land, be paid out of moneys provided by Parliament for army services. It is clear, therefore, that until disbandment this land does not vest in the Crown, and therefore the respondent is the owner and liable for the rate. The case of the *United Vestry of the Parishes of St. Margaret and St. John the Evangelist, Westminster v. Hoskins* (81 L. T. Rep. 390; (1899) 2 Q. B. 474) shows that a building consisting of an armoury, store-house, and drill-hall of a volunteer corps which is vested in the commanding officer of the corps, and is intended for the use of the corps only, is not exempt from the operation of the sanitary provisions of the Metropolis Management Act 1855, on the ground that it is occupied and used solely for the purposes of the Crown. If sect. 150 does not apply to the Crown, then for the urban sanitary authority to sewer and pave would be a trespass on the right of the Crown. The fact that it is used for Crown purposes is not sufficient:

Rayner v. Dransitt, 82 L. T. Rep. 718.

The case of *Pearson v. Assessment Committee of Holborn Union* (68 L. T. Rep. 351; (1893) 1 Q. B. 389) is not against the appellant's contention. It was held there that premises occupied by a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service were occupied by servants of the Crown for the purposes of the Crown, and were therefore exempt from rates. But there are two distinctions in that case from the present one. First, there was an express exemption in sect. 26 of the Volunteer Act 1863 (26 & 27 Vict. c. 65); secondly, the rate was to be paid by the occupier, and were not expenses recoverable from the owner, as in the present case. He also referred to

Hawley v. Steele, 37 L. T. Rep. 625; 6 Ch. Div. 521.

Sir R. Finlay (A.-G.) (*H. Sutton and G. S. Robertson* with him) for the respondent.—The land here is the property of the Crown, and it is just as much exempt from paying these expenses as it is from paying rates. The case of *Pearson v. Holborn Union* (*ubi sup.*) is directly in point. The Crown is not bound by any statute unless it is named in it or it can be assumed that it is intended by necessary implication. He referred to

Perry v. Eames, 64 L. T. Rep. 438; (1891) 1 Ch. 658.

The volunteers are just as much a part of the Crown forces as the regular army or militia. It is true that there are certain express exemptions of the Crown, but they were simply inserted *ex abundanti cautela*, and the fact that no such exemption occurs in sect. 150 is no proof that the

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Crown is subject to its provisions, and no such intention can be gathered from the language of the Act. In *Smithett v. Blythe* (1 B. & Ad. 509; 35 R. R. 358), it was held an exception in a statute of His Majesty's ships of war from tolls did not by implication render the other King's ships chargeable, and in the *Mayor of Weymouth v. Nugent* (11 L. T. Rep. 672; 6 Beat & Smith 22) stone brought for the use of His Majesty's navy was held exempt from wharfage dues created by statute upon the same principle notwithstanding the insertion of special exemptions in the Act in favour of certain Crown property. There is no distinction in principle between a rate levied on an occupier and an assessment on an owner:

Lord Advocates and Barber v. Lang, 5 Ret. 3rd series, 84.

The case of the *Westminster Vestry v. Hoskins* (*ubi sup.*) only refers to sanitary requirements, and was decided, as the judgments show, on very narrow grounds. He also cited

Coomber v. Justices of the Peace of Berks, 50 L. T. Rep. 405; 9 App. Cas. 61;

R. v. Cook, 3 Term Rep. 519.

Bray, K.C., in reply, cited

Felkin v. Herbert, 11 L. T. Rep. 173;

Lord Colchester v. Kewney, 14 L. T. Rep. 888; 16 L. T. Rep. 463; L. Rep. 1 Ex. 308; L. Rep. 2 Ex. 253.

Cur. adv. vult.

April 15.—Lord ALVERSTONE, C.J. read the following written judgment of the court:—This was an appeal by the Hornsey Urban District Council against a decision of the justices of Middlesex, sitting at the Highgate petty sessions, dismissing a complaint against the respondent to recover the sum of 409l. 10s. 9d., being the apportioned amount of expenses incurred by the appellants in sewerage, levelling, and paving a certain street called Nightingale-lane, under the provisions of sect. 150 of the Public Health Act 1895. The ground of the decision was that under the circumstances of the case the respondent, who had acquired the premises in question as colonel of a volunteer corps was not liable to pay the amount of the apportionment. In order to appreciate the point which arises upon this appeal, it is in our opinion necessary to state accurately the facts upon which the question arises. The respondent, Colonel Hennell, in His Majesty's Army, and was, up to the month of March 1901, the commanding officer of the 1st Battalion Middlesex Rifle Volunteers. In the year 1896 the respondent purchased the fee simple of certain land at Hornsey for the sum of 1910l. The land was purchased by him for the purpose of its being transferred to and used by the volunteer battalion. In the year 1897 the premises acquired were, pursuant to the provisions of the Military Lands Act 1892, mortgaged to the Public Works Loans Commissioners for the sum of 2200l. The money so received was applied to repaying the amount paid by the respondent in purchasing the premises and fitting them up for the use of the volunteer battalion. The premises abut upon Nightingale-lane. In Dec. 1899 the appellants duly served notices for the sewerage, paving, &c., of Nightingale-lane under the provisions of sect. 150 of the Public Health Act 1875. The work was subsequently executed by them. The amount apportioned was agreed to be the amount from the respondent as the legal

owner of the premises if he is not exempt from payment. The lands in question were acquired under and by virtue of sects. 24, 25, and 26 of the Volunteer Act 1863, and the mortgage, as already stated, was made under the provisions of the Military Lands Act 1892. It was contended on behalf of the appellants that, inasmuch as by virtue of sect. 3 of the Military Lands Act 1892 the land could be let in any manner consistent with the use thereof for military purposes, and that it would not vest in the Secretary of State until after the disbandment of the corps, the respondent, as legal owner, was liable to pay to apportionment, and that the case of *United Vestry of St. James and St. John the Evangelist, Westminster v. Hoskins* (31 L. T. Rep. 390; (1899) 2 Q. B. 474) was an authority in the appellants' favour binding upon us. It was contended on behalf of the Attorney-General, for the respondent, that the land being in fact purchased, owned, and occupied solely for the purpose of the volunteer corps, it must be taken to be owned and occupied for Crown purposes, and that therefore the amount of the apportionment could not be recovered, as sect. 150 was not binding upon the Crown. We are of opinion that the contention of the Crown is right, and that the appeal should be dismissed. The liability to pay the apportionment depends upon the provisions of the Public Health Act. Sect. 150, as has frequently been pointed out, contemplates a notice being given to the owner or occupier to carry out the work specified themselves, and, upon their failure to carry it out, empowers the authority to execute the works and recover the expense from the various owners. Sect. 213 provides that the expense may be treated as private improvement expenses, and recovered by means of private improvement rates spread over a series of years. Sect. 257 provides for the recovery of the apportioned amount either at once or by instalments. Sect. 327, which was relied upon by Mr. Bray, contains certain protective clauses with reference to lands vested in the Admiralty or War Office. In our opinion, for the reasons given by Lawrance, J. and Collins, J. in *Pearson v. Assessment Committee of Holborn Union* (68 L. T. Rep. 351; (1893) 1 Q. B. 395, 397), these lands were being held for military purposes, and the respondent had no use or occupation of the premises other than as colonel commanding the corps, and in discharge of his duties of such, and so in fact a mere trustee for the corps having no personal beneficial interest. This is in our opinion an ownership and occupation for and on behalf of the Crown, and the appellants must show some words which impose upon the Crown an obligation to do the work or pay the expense of it. The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is in our opinion still applicable to such a case. No doubt the insertion in many Acts of Parliament of clauses to protect the Crown or save Crown rights has given rise to the impression that this rule has to some extent been trenchanted upon, and we are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown, even though the Crown may

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not be specially named. But in our opinion the intention that the Crown shall be bound or has agreed to be bound, must clearly appear either from the language used or from the nature of the enactments, and there is in our opinion nothing of the kind in the provisions of the Public Health Act applicable to this case, which give rise to any such presumption. Nothing would be gained by considering in detail the various authorities which were cited in support of this view, but we would call attention to the judgment of Lord Tenterden in *Smithett v. Blythe* (1 B. & Ad. 509; 35 R. R. 358), in the year 1830, in which, where there was an express exemption of King's ships of war from light dues, other vessels of the Crown were held not to be liable, although they were not mentioned in the express exemption. In other words, it was held that the general doctrine of the immunity of the Crown applied, notwithstanding the insertion of an express exempting clause as to certain matters. Similarly, in the case of *Mayor of Weymouth v. Nugent* (6 B. & S. 35), stone brought for the use of His Majesty's navy was held exempt from wharfage duties created by statute upon the same principle, notwithstanding the exemption in favour of certain Crown property, and it was pointed out by Cockburn, C.J. that these exemptions were merely inserted *ex majore cautela* and the case of *Coomber v. Justices of Berks* (50 L. T. Rep. 405; 9 App. Cas. 61), which was a case of income tax, is strongly illustrative of the principle. It is, moreover, right to observe that in the case of *Lord Advocate and Barber v. Lang* (5 Ret. 3rd series, 84), Crown property was held exempt from any exactly similar burden. Having regard to the above authorities we cannot accept the argument that the limited exemption of certain Government lands in sect. 327 of the Public Health Act is sufficient to show that all other interests of the Crown were intended to be affected by the provisions of the Act. The limited language of the exceptions in sect. 327 appears to us to support the view that they were inserted *ex abundanti cautela* and we believe that if careful search is made there are many similar acts in which no clauses protecting Crown rights have been inserted. There is no such general practice as to lead us to the view that the original doctrine of Crown exemption has ceased to exist, or has been infringed upon or that the insertion of a particular clause is intended to show that only that class of Crown property was intended to be exempt. With reference to the case of *Vestry of Westminster v. Hoskins* (sup.), relied upon by Mr. Bray, it certainly is not an authority upon the point now raised before us, but after the argument which was addressed to us in this case, we are not prepared to say that we should have come to the same conclusion. The case of *Rayner v. Drewitt* (82 L. T. Rep. 718) does not apply, as in that case the premises were not solely used for Crown purposes. For the above reasons we are of opinion that the appeal should be dismissed.

Judgment accordingly.

Solicitors: Leonard J. Tatham; The Solicitor to the Treasury.

Supreme Court of Judicature.

COURT OF APPEAL.

April 14 and 15.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

Re SCHNADHORST; SANDKUHL v. SCHNADHORST. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Gift to children—Gift over on death coupled with a contingency—Residuary estate—Divesting clause—"Die leaving issue"—Period of defeasibility.

A testator, who died in Jan. 1900, by his will, dated in Dec. 1889, devised and bequeathed his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income in or towards the maintenance, education, and advancement of his children until the youngest who should be living should attain the age of twenty-one years or, being a daughter, should attain that age or marry.

Subject to the trusts and powers thereinbefore contained the testator directed that the trust fund and the income thereof and all accumulations of income, or so much thereof as should not have become vested or been applied pursuant to his will should be held in trust "for all my children, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue, such issue shall take his or her deceased parent's share equally as tenants in common."

Held, that there was nothing in the context of this will to prevent the rule laid down by the House of Lords in *O'Mahoney v. Burdett* (31 L. T. Rep. 705; L. Rep. 7 E. & I. App. 388) from applying; and that, therefore, the children who survived the testator would only become entitled to vested indefeasible interests if and when they should die without leaving issue.

Home v. Pillans (2 My. & K. 15; 39 R. R. 116) considered and distinguished.

Decision of Joyce, J. (84 L. T. Rep. 587) affirmed.

By his will, dated the 30th Dec. 1889, Francis Schnadhorst, after bequeathing certain legacies, devised and bequeathed all the residue of his real and personal estate to which at the time of his death he should be beneficially entitled, or of which he should have any power to dispose beneficially by will, unto his trustees thereinbefore named upon trust for conversion and investment as therein mentioned. The testator then declared that his trustees should stand possessed of the investments thereinbefore directed to be made (thereinafter called the trust fund), and of the annual income thereof upon the trusts following, that was to say, upon trust to set aside investments of the trust fund representing 1000*l.* in value, and to pay the income thereof to his wife Mary Ann Schnadhorst during her life. And

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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after her death in trust for all or any one or more exclusively of the others or other of his children at such time, and, if more than one, in such shares and with such gifts over and generally in such manner for the benefit of such children, or some or one of them, as his wife should, whether covert or sole, by will or codicil, appoint; and in default of and until and subject to any such appointment in trust for all or any children or child who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, or if more than one, in equal shares; and upon further trust to set aside out of the trust funds two sums of 2500*l.* each, or investments representing these amounts in value, for his sons Ernest Edward Schnadhorst and Frank Gladstone Schnadhorst, and to invest the interest thereof from time to time in manner thereinbefore directed, and to pay one of such sums with the accumulation of income and of the investments thereof to each of his sons who should attain the age of twenty-one years, to whom he gave and bequeathed the same accordingly; and upon further trust to set aside out of the trust fund the sum of 2500*l.*, and to pay the interest, dividends, and annual income thereof to his daughter Mary Francis Schnadhorst during her life for her sole and separate use, and so that she should not have power while under coverture to dispose thereof in the way of anticipation; and after the decease of his daughter Mary in trust for all such one or more of the children of his daughter at such times in such shares and in such manner generally as she should by deed or will appoint; and in default of such appointment, or so far as the same should not extend, in trust for the children of his daughter Mary, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, in equal shares, and, if there should be only one such child, the whole to be in trust for that one child. Then followed a trust in favour of the sisters of the testator. And upon further trust to pay the income of the residue of the trust fund to his wife during her life if she should continue his widow; but if his wife should marry again, upon trust to pay to her an annuity of 50*l.* per annum during the remainder of her life for her separate use, independently of the debts and control of any future husband; and subject to the provision aforesaid, upon trust, after the decease or second marriage of his wife, to apply the income of the trust fund in or towards the maintenance, education, and advancement of his children until the youngest who should be living should attain the age of twenty-one years, or being a daughter should attain that age or marry. Subject to the trusts and powers thereinbefore contained the testator directed that the trust fund and the income thereof and all accumulations of income, or so much thereof as should not have become vested or been applied pursuant to his will, should be held in trust

For all my children, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue, such issue shall take his or her deceased parent's share equally as tenants in common.

At the time the will was executed the testator had only three children living—Mary Frances, then aged twenty-two and unmarried; Ernest Edward, then aged nineteen; and Frank Gladstone, then aged nine. They were all living at the date of the death of the testator on the 2nd Jan. 1900, and his wife was also then living.

Ernest Edward Schnadhorst subsequently married, and had two infant sons.

Mary Frances Schnadhorst subsequently married Hans Sandkuhl.

The executors and trustees appointed by the testator renounced probate of the will and disclaimed the trusts thereby declared.

Letters of administration with the will annexed were accordingly granted to Ernest Edward Schnadhorst.

An originating summons was taken out by Hans Sandkuhl and Mary Frances Sandkuhl for the determination of the question whether, upon the true construction of the will of the testator, the children of the testator, who had survived him and being sons had attained or should attain the age of twenty-one years, or being daughters had attained or should attain that age or married, took vested indefeasible interests in the testator's residuary estate subject to the interest of the testator's widow therein during her life or widowhood; or whether they would only become entitled to such vested indefeasible interest if and when they should die without leaving issue.

The summons was adjourned into court and came on to be heard before Joyce, J. on the 19th April 1901, when his Lordship reserved judgment.

On the 4th May 1901 his Lordship delivered a written judgment in which he stated (84 L. T. Rep. 587) that the divesting clause or gift over might operate not only during the lifetime of the widow of the testator, but also after her death, there being nothing in the will to limit the contingency—viz., death leaving issue—to less than the whole life of the first taker, whether son or daughter.

The learned judge, therefore, decided that the children who survived the testator would only become entitled to vested indefeasible interests if and when they should die without leaving issue.

From that decision the plaintiffs now appealed.

Younger, K.C. (with him *A. F. Peterson*) for the appellants.—The question is whether death in this case means "death at any time." Joyce, J. held that it did on the authorities; but, I submit, he so decided with some reluctance. Upon the true construction of the will, apart from the authorities, the children of the testator take vested indefeasible interests in the case of sons on attaining the age of twenty-one years, or in the case of daughters on marrying, if they survive the period of distribution. Accordingly, the final clause of the will should be read thus; "I direct that if any of my children shall die before the age of twenty-one leaving issue, such issue shall take his or her deceased parent's share equally as tenants in common." As regards the authorities the present case is as nearly as possible on all fours with *Home v. Pillans* (2 My. & K. 15; 39 R. R. 116). The reasons given by Lord Brougham in that case are all applicable here. Joyce, J. stated in his judgment that he did not

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feel justified in relying upon *Home v. Pillans* (*ubi sup.*), because "no daughter could die leaving issue unless she first married, whereupon a share would vest in her under the original gift, though perhaps not indefeasibly." And he said that the clause could never apply, therefore, to a daughter, but only to sons. But I submit that *Home v. Pillans* (*ubi sup.*) ought not to be distinguished on that ground. There are only two periods to which the contingency of death leaving issue can be referred—namely (1) before attaining twenty-one, which is covered by *Home v. Pillans* (*ubi sup.*), and (2) before the death of the tenant for life. The latter construction would suit the plaintiffs equally well. *Monteith v. Nicholson* (2 Keen, 719; 44 R. R. 329) is also in favour of their contention. In the court below it was contended that *O'Mahoney v. Burdett* (31 L. T. Rep. 705; L. Rep. 7 E. & I. App. 388) had conclusively laid down the construction which is to be applied to wills of this nature, and that therefore the construction must be that which Joyce, J. adopted. But the words of the gift in that case were quite different from those in the present case. *Home v. Pillans* (*ubi sup.*) was not overruled in *O'Mahoney v. Burdett* (*ubi sup.*), and whatever was the decision in the latter case, I am entitled to rely upon *Home v. Pillans* (*ubi sup.*), which deals with a different class of cases and stands untouched. The case of *Bowers v. Bowers* (23 L. T. Rep. 35; L. Rep. 5 Ch. App. 244), which was referred to by Joyce, J., cannot be relied upon. [COZENS-HARDY, L.J. referred to *Da Costa v. Keir* (3 Russ. 360).]

Mickleth, K.C. (with him Cozens-Hardy), for the respondent Ernest Edward Schnadhorst, argued in support of the appeal.

Dibdin, K.C. and R. J. Parker, for the respondents, the issue of the testator's children, were not called upon to argue.

COLLINS, M.R.—This appeal has been argued with care, and the case has been presented to us on behalf of the appellants in a very captivating light; and if there were no authority on the point I am not sure that I might not have been disposed to hold that the testator intended what the appellants say that he did. But it is well-established that we cannot indulge in speculation as to what a testator intends by his will but have to see what, upon the true construction of the will and the language used, the testator must be taken to have intended. I think that the case is really determined by authority, even if apart from authority we were in favour of the appellants. The point which we have to decide is stated very clearly and shortly in the summons. [His Lordship read the summons and the clause of the will containing the gifts to the testator's children, and continued:] Counsel for the appellants have presented to us several possible constructions of the clause as to the shares of children who die leaving issue. One of them they reject, but the others were more or less pressed upon us. In support of the first contention that the period within which the gift over is to take effect, is death under twenty-one, they relied upon *Home v. Pillans* (2 My. & K. 15; 39 R. R. 116), but they are met with this difficulty there, that in *Home v. Pillans* (*ubi sup.*) the gift was to two nieces of the testator when and if they should attain twenty-one. In this case it is not

so. So far as the daughters are concerned the gift is not to them if they shall attain twenty-one, but if they shall attain that age or marry, so that the appellants cannot rely upon that case so far as the daughters are concerned. It is said, however, that we may and ought to apply it in the case of the sons, but it would be difficult on this will, where the sons and daughters are put together in one class, to apply one rule in the case of the sons and a different rule in the case of the daughters. With regard to *Home v. Pillans* (*ubi sup.*) it is not necessary to say any more upon it than to quote what was said by Lord Cairns about it in *O'Mahoney v. Burdett* (31 L. T. Rep. 705; L. Rep. 7 E. & I. App. 388, at p. 397): "The case of *Home v. Pillans* (*ubi sup.*) was a case of an entirely different kind. There was there a bequest to the testator's nieces when and if they should attain twenty-one; and, in case of the death of either niece leaving children, or a child, the testator gave the share of the niece so dying to her children or child. This was not the case of an absolute gift, with a gift over in a certain event. There was no gift over, and there was no gift at all until a niece attained twenty-one, and the child of a niece marrying and dying before twenty-one would have been wholly unprovided for if the court had not held that the words 'in case of the death of my said nieces or either of them, leaving children or a child,' pointed to a death under twenty-one." That is sufficient to dispose of the argument founded on *Home v. Pillans* (*ubi sup.*) so far as regards the first contention, and counsel for the appellants did not really press that upon us but confined themselves mainly to the second and third contentions. To begin with, they suggested that there was here as in *Home v. Pillans* (*ubi sup.*) no defeasance or gift over but a gift in the nature of an alternative gift. That is really disposed of by the passage which I have read from the speech of Lord Cairns. That case does not apply to a case where the gift is to daughters if they attain twenty-one or marry, because, if a daughter marries, the subsequent defeasance could not come into operation, as she, being married before twenty-one the event could not happen on which the defeasance is to take place. In my opinion this is not a case of a technical gift over at all. In this will there is clearly an absolute gift to children, who if sons attain twenty-one, or if daughters attain twenty-one or marry, and then there is a defeasance—that is if any of them die leaving issue his or her interest goes to that issue. That cannot be ascertained till that individual dies. That point was decided by the House of Lords in *O'Mahoney v. Burdett* (*ubi sup.*) and is thus expressed in the headnote: "A bequest to A. and if she shall die unmarried or without children, to B., is an absolute gift to A. defeasible by an executory gift over in the event of a dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary. A gift to X. for life with remainder to A., and if A. dies unmarried or without children, to B. is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children." That seems to be a clear authority that "death" in this will *primâ facie* means death at

any time. The contingency on which the defeasance takes place is if the child dies leaving issue. If, therefore, we have to construe this clause on authority, that case lays down that unless there is some context in the will to limit the meaning of the word, "death" means death at any time and not death within the life of the widow, or at any time less than the whole life of the legatee. That being the rule, what context is there here which compels us to put a different meaning on the word? Counsel for the appellants pointed out certain passages which only go to this, that there was an intention that these persons should take at some time or other; but if there were anything in that we ought to find in the language used an expression of intention that the legatee should be paid at some definite period. Upon that I may refer to a passage in the speech of Lord Hatherley in *O'Mahoney v. Burdett* (*ubi sup.*). He says, at p. 403 of L. Rep. 7 E. & I. App.: "So again, I apprehend, in another class of cases, many of which were cited before us, which have been decided since *Edwards v. Edwards* (15 Beav. 357), one of them having been before myself; in those cases where the court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the courts have laid hold of that circumstance to say 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any further trust, and, on the other hand, that a subsequent event—namely, a certain person's dying childless after that distribution has taken place should divest the property—that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise." Counsel try to get an expression of an intention from the words "to whom I give and bequeath my residuary real and personal estate as tenants in common," but that would be putting too broad a construction on the clause in question. It seems to me that we can get no context out of this will which narrows or defines the period within which the gift over is to take effect to anything less than the death of the person on whose death without issue it is to take effect. I think, therefore, that the learned judge was right in deciding as he did, and the appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion. I agree with what the learned judge in the court below has said, and I should be content to stop there, but out of respect to the earnest argument that has been addressed to us I will state my view of the case. Counsel have satisfied me that the testator has, according to the construction put upon his will by the judge, disposed of his property in a way which is very inconvenient to his children, and if his attention had been called to the consequences of it he possibly might not have

framed it as he has done, but that does not justify the court in departing from the language which he has used. The court must construe the will according to the language used and give to it its natural and proper meaning, unless there is found in the context something to limit it. Counsel have not satisfied us that there is any such context. The question here is as to what is the meaning of a gift over if any of the testator's children should die leaving issue, and adopting the words of Lord Cairns, I say that the gift over should be read according to its natural and proper meaning, that is that the words ought to mean death at any time, and this original and literal meaning ought not to be departed from unless there is a context which makes a different meaning necessary or proper. The question then is, What sort of context would render a different meaning necessary or proper? In *O'Mahoney v. Burdett* (*ubi sup.*) Lord Selborne pointed out two classes of cases in which such a context is found (1) where there is an express direction that the distribution is to take place at a particular time, and (2) where there is an indication on the face of the will that the legatees are to take in some event an absolute interest. Do we find these conditions here? What is relied on for this purpose is the form of the gift to the children. Two points are dwelt upon in argument with regard to that (1) that the direction as to the application of the income lasts only till the youngest child attains twenty-one and there being no direction as to the application of the income after that, the trustees are to pay the income as if to a tenant for life whether the event on which the gift over takes effect happens or not; (2) that the words "to whom I give and bequeath my residuary, real, and personal estate in equal shares" give the children an absolute interest. I confess that I cannot see in either of these circumstances any expression or indication by the testator of an intention that after the death of the widow and on the youngest child attaining twenty-one, there was to be a distribution. He does not say so in express terms. So far as the language of the will is concerned, it points to the contrary. The fund was not to pass away from the hands of the trustees but to continue to be held by them. Further than that the testator has made this provision up to the death of the youngest child or until he attains twenty-one, or, if a daughter, marries—the trustees have a discretion up to that time to apply the whole income to the maintenance of the children in such shares as they think fit. They have an absolute discretionary trust. They are not bound to apply any particular share for the benefit of any particular one of them and when the youngest child attains twenty-one the trust comes to an end. There is no express direction for payment or distribution, and the income will follow the ordinary course of law under which a child who takes an absolute vested interest takes the benefit of that until the event happens. I cannot attribute any effect to the words, "To whom I give and bequeath my residuary real and personal estate in equal shares" beyond that. They do not amount to a direction to divide the principal at any particular period. Still less do they amount to an indication of an intention on the part of the testator that in any particular event the objects of his bounty were to take absolute interests. The nature of the

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cases which are referred to by Lord Selborne may be illustrated by *Da Costa v. Keir* (3 Russ. 360) to which he refers, and in which the will was upon the context held to express the testator's intention that in the event of the legatee surviving the tenant for life she was to have an absolute power of disposition over the property. The present case does not, in my opinion, come within either of the two classes of cases to which Lord Selborne refers, but these two classes are not exhaustive. There may be others. In every case there may be a question what the context is, and the court has to give effect to the language of the will. We have to see if the present case falls within either of the two classes. In my judgment it does not fall within either. The only other contention was that the language closely resembles that used in *Home v. Pillans* (*ubi sup.*). It seems to me that the reasoning based on that case is not well founded. In *O'Mahoney v. Burdett* (*ubi sup.*) Lord Cairns seems to have treated *Home v. Pillans* (*ubi sup.*) as a case of alternative gifts, and not as a case of an absolute gift followed by a defeasance. If that is the foundation of *Home v. Pillans* (*ubi sup.*) the decision in that case does not apply in this case. Reading the will according to the ordinary meaning of the language used it appears to me that the testator contemplated that all the children should take vested interests at twenty-one if sons, and at twenty-one or marriage if daughters. It was pointed out that at the date of the will a daughter had attained twenty-one, and the testator must have contemplated that she might survive him, and the language of the clause as to children dying leaving issue, which applied to daughters as well as sons, must apply to this daughter who had already attained twenty-one. Therefore the testator, according to the language which he has used, must be taken to have contemplated that upon his death this particular daughter would take a vested interest in the fund, and that being so I do not think that the clause as to death leaving issue can, as regards her, be limited to death before taking a vested interest; and, if that is so, as regards her, it must be treated in the same way as regards all the children. I think I should have arrived at the same conclusion if all the children had been under twenty-one at the date of the will. I agree with the reasons given by the learned judge for coming to the conclusion that *Home v. Pillans* (*ubi sup.*) does not apply—namely, that no daughter could die leaving issue without having first married; and, secondly, that in this case according to the language of the will the gift over is not of the share which a child would have taken in any particular event, but is a gift of what is described as "his or her deceased parent's share," that is, the share which the child takes according to law.

COZENS-HARDY, L.J.—I quite agree. I cannot discover any context in this will which requires any meaning being put upon the clause in question other than that which the House of Lords has decided in *O'Mahoney v. Burdett* (*ubi sup.*) to be the meaning of clauses of this kind. I cannot find that the testator has directed that the trusts are to come to an end at any particular period, or that the clause has any meaning beyond what he has expressed or implied.

Appeal dismissed.

Solicitors for the appellants, *Swann, Green, and Co.*

Solicitors for the respondents, *E. Flux, Lead-bitter, and Neighbour.*

Wednesday, April 23.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

Re LONDON AND NORTHERN BANK LIMITED;
Ex parte HADDOCK. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Examination of witness—Presence of solicitor of witness—Refusal to undertake not to disclose evidence—Privilege as to documents—Companies Act 1862 (25 & 26 Vict. c. 89), s. 115.

At the examination of a witness, under sect. 115 of the Companies Act 1862, the registrar has the right, in a proper case, to require an undertaking from the solicitor of the witness to treat the whole matter as private; to use the information obtained from the witness's answers for the purposes of re-examination only; and to communicate such information to no other person or persons whatsoever except his counsel.

Decision of Byrne, J. affirmed.

In the course of the examination of a solicitor, upon the application of the liquidator of a company, under sect. 115 of the Companies Act 1862, the witness claimed privilege as to certain documents in his possession alleged to belong to the liquidator; and he declined to answer questions as to from whom he received the same.

Held, by Byrne, J. that the claim of privilege was properly made, and that the witness need not produce the documents.

AN action was brought by the above-named banking company against Sir George Newnes Limited, who were proprietors of a newspaper, to recover damages in respect of an alleged libel contained in a paragraph which stated in effect that the banking company was in liquidation.

Shortly afterwards the banking company passed resolutions for a voluntary winding-up.

The liquidator in the voluntary winding-up learned that subsequently to the commencement of that action certain documents belonging to the banking company had been wrongfully handed to G. H. Hoyle, the solicitor acting for Sir George Newnes Limited, by a servant or servants of the banking company: (see *Re London and Northern Bank Limited; Ex parte Archer*, 85 L. T. Rep. 698).

The liquidator obtained an order for the private examination, under sect. 115 of the Companies Act 1862, of several persons, among them being John Daniel Haddock, who had been for some time secretary of the banking company, and G. H. Hoyle.

It is provided by sect. 115 that:

The court may, after it has made an order for winding-up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company . . . And if any

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, having no lawful impediment (made known to the court at the time of its sitting, and allowed by it) the court may cause such person to be apprehended and brought before the court for examination. . . .

At the examination of Haddock before the Registrar of Joint Stock Companies, counsel on behalf of the liquidator applied that Hoyle, who was acting as the solicitor for that witness, should not be present, on the ground that he was also summoned as a witness in the matter, and Hoyle accordingly withdrew, but he left his managing clerk (who was an admitted solicitor) in the room.

Counsel for the liquidator then asked that Hoyle's managing clerk should also withdraw.

Counsel for the witness Haddock objected, when the registrar stated that he would only allow Hoyle's managing clerk to be present on condition that he treated the matter as entirely private, and only used the information obtained from questions put to the witness for the purposes of re-examination, not communicating any part of the information thus obtained to any other person or persons whatsoever except his counsel; and he required an undertaking in these terms to be given.

Counsel for Haddock objected to any such limitation being imposed, and as the registrar declined to allow the managing clerk to be present without such an undertaking, and the witness was advised to refuse to answer any questions in the absence of his solicitor, the matter was adjourned to the judge for his consideration.

In the course of the examination of the witness Hoyle, as to certain documents alleged to belong to the liquidator which he had in his possession, he was asked from whom he received the documents.

This question Hoyle declined to answer, claiming the privilege of a solicitor, and on this point he was supported by the registrar, and the matter was adjourned to the judge for his consideration.

Both questions came on together for argument before Byrne, J. on the 6th March 1902, when the following judgment was delivered:—

BYRNE, J.—In this case I am asked to overrule what has been done by the registrar in respect of a witness called to be examined under sect. 115 of the Companies Act 1862. I need not refer to the cases beyond mentioning *Re Grey's Brewery Company Limited* (50 L. T. Rep. 14; 25 Ch. Div. 400), where the nature of examinations of this kind is thoroughly dealt with, to show how much it differs from anything in the nature of a public examination. The examination is entirely private; and that this is so has many times been recognised by the courts. The only thing I will mention is the Companies (Winding-up) Rule of Nov. 1895, which provides that the depositions of a person examined under sect. 115 shall not be placed on the file of the proceedings or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the court shall so direct, and the court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes, and the furnishing of copies of and

extracts therefrom. That goes to emphasise the importance of secrecy of these proceedings, except when the seal of secrecy is removed for particular purposes. In the present case the company, which is in liquidation, has an action pending against Sir George Newnes Limited—another company—for an alleged libel, in which a very large sum of money is claimed in respect of damages. In the course of the proceedings during the examination of a witness named Archer (see *Re London and Northern Bank Limited; Ex parte Archer* (85 L. T. Rep. 698) it has transpired that certain documents belonging to the company in liquidation were in the possession of Sir George Newnes Limited, and a certain number have been handed over. Now, the liquidator was desirous of examining certain other persons, particularly with a view to discovering either about these documents, or about others for the purposes of the liquidation; and amongst other persons a gentleman was called named Haddock. Mr. Haddock appeared represented by counsel and by a solicitor. The solicitor representing him was a gentleman who was and is—as is admitted—the solicitor for Sir George Newnes Limited in the litigation which is proceeding. It was suggested that the solicitor had better withdraw, objection being taken to his presence, and accordingly he did withdraw. His managing clerk was left as representing the witness and instructing counsel. Thereupon the learned registrar, in accordance with what he informs me has been his invariable practice in similar cases, asked to have an undertaking that the matter was to be treated as entirely private, and that the information got from questions put to the witness was only to be used for the purposes of re-examination, and that no part of the information got was to be communicated to any other person or persons except his counsel. That is objected to, counsel insisting that, inasmuch as the party being examined under sect. 115 has a right to be represented by counsel and solicitor, and inasmuch as any man entitled to employ a solicitor is entitled to choose his own solicitor, therefore—so I understand the argument—he is entitled to say: “I will be represented; and I will be represented by this particular solicitor. I am entitled to have him present and no other.” I think that that is putting his rights a great deal too high. It is quite true that it is treated as a right on the part of a witness to be represented for certain purposes by counsel and solicitor. But it has never been held that he is entitled to insist at these private examinations to be represented by a particular person who is acting for a principal in hostile litigation against the liquidator, and who declines to give an undertaking that he will not communicate these matters. On the contrary, he very fairly says that he means to communicate them, and use the information for the benefit of his other clients. There is an old authority in respect of the bankruptcy jurisdiction which does throw a little light upon this matter. It is true that at that time I do not think that it was regarded as a right of the party to be represented at all by counsel and solicitor. It is the case of *Re Towsey* (9 L. T. Rep. 613). In that case the counsel for the assignee applied to the court for directions under these circumstances: A private examination was going forward relating to the estate of the bankrupt;

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the same solicitor who had appeared for the bankrupt on a previous day now appeared for the witness under examination, and was instructing his counsel. That solicitor had refused to leave the room; he therefore asked the commissioner to order him to retire. In giving judgment, Mr. Commissioner Goulburn said: "If the court appoint a private sitting and sees good reason to apprehend that the object of that meeting may be defeated by the presence of a gentleman who is solicitor both for the bankrupt and the witness, it may order him to withdraw." According to the practice in the registrar's office up to the present this is the first time, so I am told, that an objection has been made to give such an undertaking as is suggested. It has not been the practice of the registrar to order a particular solicitor or a particular solicitor's clerk to leave the room if he would give an undertaking of this kind. I think that the registrar is justified if the solicitor refuses to give such an undertaking as is asked for to direct him to leave the room. He would no doubt give the person examined an opportunity to instruct somebody else if he wished to be represented by him. I think that the learned registrar was right on this occasion. I uphold what he has done. In reference to the other matter, that was simply this: A solicitor is called and is asked certain questions. In the course of the examination he is asked, with regard to documents, "Did those come into your possession as solicitor?" and he says, "Yes, they did." Then he is asked: "Did you receive those documents of which that one produced is one in your capacity as solicitor of Sir George Newnes Limited?" Answer: "Yes." Then counsel says: "I cannot take it any further; we must have Sir George Newnes." The learned registrar held that the claim of privilege was properly made there, and that the solicitor need not produce the documents. Curiously enough, notwithstanding that observation "I cannot take it any further," the parties seem to have altered their minds, and they brought the question here. But I think that the objection was well founded. The cases which have been referred to bearing upon this that privilege cannot be claimed where there is an issue of fraud raised in which the solicitor himself is charged with being a party, appear to me to have no application to the present case. All that has happened in the present matter is that certain documents which ought to have been in the possession of one company are in the possession of the other and apparently by reason of the breach of faith of some of the servants of the one company. But up to the present there is nothing more in it. I do not see that there has been anything to deprive the solicitor of the right to claim privilege. The result is that I think the privilege was properly claimed. Then, with reference to the other matter, I think that the learned registrar was quite right, and I uphold what he did. But one thing I would add is that I should not at all object to the solicitor's managing clerk communicating with his principal, the solicitor, if his principal gave the same undertaking. The order will therefore be in this form: The registrar was entitled to require the undertaking that he did require, and to direct the managing clerk to withdraw in default of his giving it; subject to this, that if he communicates it to his principal a similar undertaking must be

given by the solicitor. I have not said anything about the special form of undertaking. That has several times been considered with reference to other cases. Of course, all other matters have to be considered too—namely, if notes are taken, the notes, though they may be carried away and used for the purpose of re-examination, must be destroyed. That is really only following out the principle which has been recognised all through in cases of this description.

From the decision upon the first question Haddock, by leave, now appealed.

Montague Lush, K.C. (with him *Muir Mackenzie*) for the appellant.—The court has a discretion to relieve the managing clerk of the appellant's solicitor of the condition imposed upon him if, in its opinion, it is proper to do so, and I submit that it is. If the managing clerk is put upon his undertaking not to use the knowledge obtained at the examination of the witness it will be prejudicial to the witness. A solicitor ought to have a perfectly free hand as the result of an examination to take what advice and to make what communication he pleases. If proceedings are subsequently taken against the witness it is important that his solicitor should be free to make what use he thinks proper of any information obtained at the examination. The witness is entitled to be represented under sect. 115 by counsel and solicitor and he is entitled to select the particular solicitor who will best protect his interests. It is impossible for the witness to be adequately protected by anybody but this particular solicitor who also acts for Sir George Newnes Limited in the libel action. Is the witness who is going to be attacked by questions in a private room, concerning his transactions with his solicitor, not to have the solicitor there who knows all about the case? If not he is obliged to employ a strange solicitor to be present on the occasion, and it places the witness in an intolerable position. So, also, if he is to have a different counsel from the one who knows the circumstances and can assist him most.

Tindal Atkinson, K.C. and *Stewart Smith, K.C.*, for the respondent the liquidator, were not called upon to argue.

Collins, M.R.—This is an appeal from a decision of Byrne, J. affirming the course taken by the Registrar of Joint Stock Companies, upon an examination under sect. 115 of the Companies Act 1862. A certain witness was directed to be examined under the section that I have just referred to. The witness attended, being accompanied by a solicitor and his managing clerk, and objection was taken in the first instance by the counsel for the liquidator (at whose instance the examination was taking place) to the solicitors being present. That seems to have been upon the ground, that the solicitor himself was a person who was going to be examined under the same procedure. That left the witness and the managing clerk present. Thereupon a question was raised as to the right of the managing clerk to be present, and the registrar imposed certain conditions upon the managing clerk as the terms upon which alone he should be allowed to be present. They were to this effect—I am reading from Byrne, J.'s judgment: "His managing clerk was left as representing the witness and instructing counsel. Thereupon the learned registrar, in accordance with what he informs me

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has been his invariable practice in similar cases, asked to have an undertaking that the matter was to be treated as entirely private, and that the information got from questions put to the witness was only to be used for the purposes of re-examination, and that no part of the information got was to be communicated to any other person or persons except his counsel." That was objected to and the result was that the examination was suspended, and the matter was adjourned to Byrne, J. to decide whether or not that was a proper condition to impose upon the managing clerk on his being allowed to be present during the examination of the witness. Accordingly the matter came before Byrne, J., and Byrne, J. ordered that George Hardman Hoyle—that was the solicitor himself—was not to be allowed to be present at such further examination; and that on any such further examination the registrar might require the managing or other clerk of George Hardman Hoyle either to withdraw from such examination or to give his undertaking to the registrar to use any information he might acquire at such examination for the purpose only of the re-examination of John Daniel Haddock—that was the witness—and not to disclose or allowed to be disclosed to anyone without the leave of the court, any information he might so acquire, and at the close of such examination to forthwith destroy all notes taken by him at such examination; but that the managing or other clerk of George Hardman Hoyle was to be at liberty to disclose such information to George Hardman Hoyle—that is to say to his principal—upon George Hardman Hoyle first giving a similar undertaking to the registrar. The ground of appeal is that that is a stipulation that ought not to be enforced upon the managing clerk. It is said that it is impossible for the witness to be adequately protected by anybody but this particular solicitor, who is the solicitor acting for Sir George Newnes Limited, in the litigation between the liquidator and them; that it is practically impossible for any other solicitor to be so conversant with all the facts necessary to protect this witness from the examination; and that, therefore, if the witness is to be protected at all, he ought to be protected by the solicitor acting for Sir George Newnes Limited, and not by a totally independent solicitor. On the other hand, the registrar made no objection, and no objection was made to the witness being protected and advised by a totally independent solicitor. No doubt it does place this particular solicitor and his managing clerk in a difficulty if they are to carry on at the same time the litigation of Sir George Newnes Limited, and to protect this witness, without allowing what they have heard in the one capacity to affect their conduct in the other. However, the right of the witness to be protected on this inquiry has absolutely no relation to the rights of Sir George Newnes Limited in this litigation; and if the two cannot be conciliated when the one solicitor is the chosen representative of the witness, why then the witness must dispense with the assistance of that solicitor. That is the net result of it. This proceeding is a private proceeding which the court sanctions in order that the liquidator may obtain the necessary information to enable him to take his course. It is all under the sanction of the court; it is a private examination. For many

reasons it is obviously most undesirable, and quite out of the question, that the opposing party in the litigation contemplated by the liquidator—and to assist him in determining his course as to which litigation this machinery is devised—should be allowed to be present at proceedings which are essentially proceedings for the purpose of informing the officer of the court and the court of what steps ought to be taken. It is not as though it were absolutely and finally a sealed book to which the opposing litigant can never get access, because there is machinery whereby the court can allow the result of this examination, if in its discretion it thinks it ought so to do, to be disclosed so far as it deems it necessary that it should be. That is to be found in the rule which is called the Companies (Winding-up) Rule of Nov. 1895, and this is the effect of it. Notwithstanding anything contained in the Companies (Winding-up) Rule the notes of the depositions of a person examined under sect. 115 of the Companies Act 1862, or under any order of the court before the court or before any officer of the court or person appointed to take such examination (other than the notes of the depositions of a person examined at a public examination, &c.) shall not be placed on the file of the proceedings or be open to the inspection of any creditor, contributory, or other person except the official receiver or liquidator unless and until the court shall so direct, and the court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies of or extracts therefrom. So that it is not as if Sir George Newnes Limited in this case are necessarily for ever shut out from learning anything that they can show might be really material to their litigation, and that they have a right to see. If they can establish those two propositions, there is machinery there by which in a proper case they could get at what was disclosed in this examination. The broad question before us here is whether in the circumstances of this case Sir George Newnes Limited—because that is really the matter—have any reason whatever to intervene or complain that the registrar has exacted as a condition of the witness being represented by this particular solicitor, that the solicitor should undertake to safeguard what is essential to this process, this machinery—namely, the privacy of this examination. As I have already said, it is not a public examination, and it is not intended to be a public examination, and the whole purpose of it might be defeated if the public—in this case, an opposing litigant—were allowed to be present. And, as I have pointed out, there is machinery which lies in the discretion of the court and which is capable of being used to prevent any unfair advantage being taken by information being disclosed to the liquidator which might be very material to the litigant against whom he contemplates, or is actually engaging in, litigation. That difficulty is provided for by the rule that I have referred to. In the proper circumstances, under proper conditions, and with proper safeguards, there is no doubt that access may be had in the words that I have just read. The point here is whether in the proceeding under the 115th section to which I have referred, *ipso facto* the solicitor who attends to protect a witness is entitled to be present and to disclose to anyone the information

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which is obtained in a private room at a private hearing before the officer of the court. It seems to me that the order of the registrar affirmed by Byrne, J. was perfectly right, and that we should not be justified in disturbing it. The order itself, which I have just read, meets any difficulty which might arise in the matter, because it says that the managing clerk must give an undertaking to the registrar to use any information that he may acquire at such examination for the purpose only of the re-examination of Haddock, and not to disclose or allow to be disclosed to anyone without the leave of the court any information he may so acquire. So the court retains a discretion over the result of the examination, and if the proper case were made I have no doubt that the court would see its way to assist the party who had a right to know what took place at an examination. For these reasons I think that this appeal must be dismissed with costs.

STIRLING, L.J.—I am of the same opinion. The Legislature, by sect. 115 of the Companies Act 1862, has conferred on the court the power of summoning persons before it who can give information concerning "the trade, dealings, estate, or effects of the company." It was established very many years ago that upon such occasions it was right that the person summoned before the court should have the assistance of counsel and solicitor if he desired it. The examinations which take place under this section have for a long period—in fact, so far as I know, from the very passing of the Act of 1862—been always treated as private in the first place. Of course, a private examination is open to abuse, and the procedure under the section ought to be carefully watched to see that the process is not abused. To secure that this shall be done, before an order is made the sanction of the Registrar of Joint Stock Companies is required. The liquidator must disclose to the registrar what object he has in seeking this information, and the registrar upon that exercises his discretion whether it is right and proper that an order for such an examination should be made. In the present case, so far as I can see, the registrar has properly exercised his discretion with reference to this examination. There has been nothing produced to show that he has acted in any way improperly or on any improper grounds, and he has satisfied himself that it is desirable that Mr. Haddock should be examined with reference to the trade, dealings, estate, or effects of the company—what in particular we do not know. Mr. Haddock was a former officer of the company, and presumably he knows something about certain of the matters which are referred to in the section. Upon appearing before the registrar Mr. Haddock was represented by counsel and solicitors who happened to be the counsel and solicitors of the company, Sir George Newnes Limited, who are at the present moment in litigation with the liquidator. Doubtless one may infer from what has taken place that the object of the examination is in some way connected with that litigation. Here again the registrar knows all the facts of the case, and he was of opinion evidently that this was a matter as to which it would not be right that Sir George Newnes Limited should be parties. They would have no right, according to the rule, to be present, and it might defeat the object of the examination if they were present.

Then he is met by this difficulty, that the counsel and solicitors who appear for the witness are the counsel and solicitors of Sir George Newnes Limited, and that they may disclose the proceedings in the examination to Sir George Newnes Limited—that is, they may for the purpose of the litigation use the information which is extracted in the course of the examination. To prevent that, which would bring about exactly the same result as if Sir George Newnes Limited were themselves parties in person, he has imposed certain undertakings upon the solicitors and counsel, and the question is whether he is justified in so doing. It seems to me in the present state of our information that he was entirely justified, for the reasons given by Byrne, J., and that we ought not to disturb the order. At the same time I think that it would be the duty of the registrar in further prosecuting this examination to take great care that it is not abused. The abuse which has been suggested is this: It appears that there is a great controversy going on between the liquidator and Sir George Newnes Limited with reference to the production of documents, and it is said that many documents have been withheld by the liquidator from discovery in the action which is now going on between the company in winding-up and Sir George Newnes Limited. I should be sorry to suppose that there was any foundation for that on the part of an officer of the court who is conducting this litigation. But no doubt there is the possibility that some difficulty may have occurred. Now, it is said on behalf of Sir George Newnes Limited that they ought to be enabled, if a document is produced or made use of in this examination, to show that in the future proceedings for discovery, so that in case a document is produced which is not embraced in any affidavit which has hitherto been made they may be able to make use of it for the purpose of getting a further and better affidavit of documents. If such a thing is possible on the part of the liquidator I should be willing enough to help them. But are they shut out from that? I cannot see that they are. At the present time we know nothing of what is going to happen in this examination of Mr. Haddock—not a single question has been asked of him, and we do not know to what precisely it is to be directed. The registrar will in the ordinary course take full notes of the evidence and that deposition will be preserved. And if it occurs to Sir George Newnes Limited, or their advisers, that they may properly ask for the disclosure of any part of it, or may desire to know what documents were produced or any documents produced in the course of it for any proper or legitimate purpose, it seems to me that it is open to them either under the leave reserved by the order itself to the solicitors, or under the jurisdiction conferred by the Winding-up Rule of Nov. 1895, to make an application to the court for the disclosure of part or the whole as they may think fit, of this deposition. Upon any such application the court will be far better able to judge of the propriety of acceding to the application than it can be at the present stage. Under these circumstances it seems to me that the order of Byrne, J. ought not to be disturbed.

COZENS-HARDY, L.J.—I agree. It must be recognised that the Legislature has put the

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liquidator, after a company has been wound-up, in a position in some respects more favourable than that of any other litigant. The court has given him power—not an absolute power, but subject to the control of the court itself—to summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem to be capable of giving information concerning the trade, dealings, estate, or effects of the company. That is a power which is not an absolute power in the liquidator. An order of the court has first to be obtained, and the examination takes place before the registrar, who himself is an officer of the court. By the rules of 1892 (the 3rd rule) it is expressly enacted that these examinations of persons summoned before the High Court under sect. 115 shall, unless the judge of the High Court shall otherwise direct, be held before the registrar in chambers—that is to say, they shall be held in a place to which the public have no right of access. Such an examination may be held, not merely with a view to future litigation, but with a view to assisting the liquidator in litigation which has been already commenced. When that is once admitted, it seems to me that it would be impossible that the court could allow the very end and object of the order which it has made for the examination of a witness to be defeated by allowing the opposite party to the litigation to be present. This information is information of a confidential nature, it is not to be put on the file, and it is not open to any member of the public or even to the witness himself, without some order of the court since the rules of 1895. Regarding this application, as I do, as in substance an application by Sir George Newnes Limited, the defendants to the libel action, to be present at the examination of this witness, I think the application is wholly wrong; and that the view taken by the registrar and by Byrne, J. is quite correct.

Appeal dismissed.

Solicitor for the appellant, *G. H. Hoyle.*

Solicitors for the respondent, *Helder, Roberts, Walton, and Thomas, for Simpson and Simpson, Leeds.*

April 28 and 29.

Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

BATH v. BATH. (a)

APPEAL FROM THE CHANCERY DIVISION.

Bankruptcy—Scheme of arrangement—Cessio bonorum—Agreement vesting “all the property” of a bankrupt—Annulment of bankruptcy—Fund in court—Payment out to wrong party.

By a scheme of arrangement dated in April 1893 and made between B., a bankrupt, and a company, it was provided that, subject to the confirmation of the court, upon payment by the company of a sum sufficient to pay B.'s debts and costs in full, an order of the court should be made vesting “all” B.'s property in the company. A schedule to the scheme contained a list of B.'s properties. The scheme was duly

approved by the court, and an order was made in July 1893 annulling the bankruptcy and vesting in the company “all the property” of B.

At the date of that order B. was entitled to a certain fund in court, the existence of which was not then known to either of the parties to the scheme, and which was not included in the list of his properties in the schedule thereto. In 1895 B. was informed of the existence of the fund in court, and thereupon made application for payment out to him. In Feb. 1896 he obtained an order upon an affidavit stating that he was absolutely entitled thereto, and that he was not aware of any right of any other person thereto, directing payment to him, in pursuance of which the fund was paid out to him.

The company, having subsequently ascertained that the fund had been paid out to B., presented a petition claiming to be entitled thereto.

Held, that there was a complete cessio bonorum; and that the fund belonged to the company.

Decision of Kekewich, J. (84 L. T. Rep. 107) affirmed.

IN Jan. 1892 John Smith Bath was duly adjudicated a bankrupt by an order of the County Court at Rochester.

By an agreement, dated the 20th April 1893 and made between J. S. Bath and the Creditors Assets Company Limited, it was agreed that in the event of an order of the court being obtained confirming (with such variations as might be consented to by J. S. Bath and the company) a scheme of arrangement of J. S. Bath's affairs set out in sched. 1 thereto, and when and as soon as the company should have provided the moneys necessary to carry out the scheme, and when and as soon as “the property set forth in sched. 2” thereto should have been duly vested in the company by an order of the court, the company should proceed to manage, develop, realise, or dispose of “the said property, as described in sched. 2” (and which was therein after called “the property”) in such manner as the company in their discretion should think fit subject to certain provisions therein set out. When the company should have been paid the full amount of the moneys due to them under the agreement and certain profits, J. S. Bath was to be entitled to a conveyance from the company for his own benefit of such part of the property as was then unrealised.

Sched. 1 provided that upon payment into court by the company of a sum sufficient to pay all J. S. Bath's debts in full, and all costs, charges, and expenses of the proceedings, the remuneration of the trustee, and the fees of the official receiver and of the Board of Trade, an order of the court should be made vesting “all” J. S. Bath's “property” in the company.

Sched. 2 contained a list of certain freehold and leasehold properties of J. S. Bath.

By an order of the County Court, dated the 11th July 1893, which stated that the company had made all the payments required by the scheme of arrangement proposed by J. S. Bath, and that the scheme was thereby approved, it was ordered that the adjudication of bankruptcy made against J. S. Bath should be annulled, and that “all the property” of J. S. Bath should thenceforth become vested in the company,

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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subject to such mortgages and equities of redemption as were then subsisting therein.

At the date of that order of the County Court, property of J. S. Bath, consisting of cash and a sum of consols, was in court to the account of the Paymaster-General to an account in this action, entitled, "The account of the shares of the infant plaintiff John Smith Bath and the infant defendant Frederick Caleb Bath as co-heirs in gavel-kind of the intestate John Bath in the proceeds of real estate taken by the South Eastern Railway Company.

This fund, to a moiety of which J. S. Bath had become absolutely entitled upon attaining the age of twenty-one years in 1879, had been paid in by the South Eastern Railway Company, under the Lands Clauses Consolidation Act 1845, for lands taken by them under their compulsory powers belonging to J. S. Bath when an infant.

At the date of the agreement of the 20th April 1893, and the vesting order of the County Court pursuant thereon, the existence of this fund in court was unknown both to the parties to the agreement and their solicitors, and it was not therefore included in sched. 2 of the agreement. No stop order was consequently ever obtained upon this fund in court.

In 1895, however, J. S. Bath was informed that this fund was in court, and, upon application by him supported by an affidavit stating that he was absolutely entitled to it, that he was not aware of any right of any other person to it, or of any claim made by any other person, and that he had not created any charge or incumbrance on it, Kekewich, J., on the 29th Feb. 1896, made an order directing payment of the fund in court to J. S. Bath, and the fund was in accordance therewith paid out to him. The same solicitor acted for J. S. Bath both in the matter of the scheme of arrangement and in the obtaining of the payment out to him of the fund in court.

The Creditors Assets Company having subsequently ascertained that the fund had been paid out to J. S. Bath, presented a petition, alleging that the true facts had been concealed from Kekewich, J. and asking that the order of the 29th Feb. 1896 might be discharged, and an order made directing the Paymaster-General and the Commissioners of the Treasury to replace to the credit of the action the fund paid out, together with all dividends accrued due thereon since payment out; for the distribution of the fund as if it was in court; and that the petitioners, the company, were entitled to payment out thereof; and that such order might be made in the matter, not only as to the fund but as to J. S. Bath and his solicitor, as to the court might seem just.

J. S. Bath, his solicitor, the Paymaster-General, and the Treasury Commissioners, were made respondents to the petition.

The first question to be determined was whether or not the fund in court was included in the agreement of the 20th April 1893, and the order of the County Court pursuant thereon, and thereby vested in the petitioners.

Upon this question it was decided by Kekewich, J. (84 L. T. Rep. 107) that the fund became under an agreement and vesting order vested in the company, and ought not to have been paid out to J. S. Bath.

The question as to the liability of the various respondents to the petition was then raised; and

upon that question it was decided by Kekewich, J. that as no stop order had been obtained on the fund the Paymaster-General had not been "guilty of default" within sect. 5 of the Court of Chancery (Funds) Act 1872 with respect to the payment out, and that the Treasury were not therefore liable to replace it. His Lordship accordingly declared that J. S. Bath and his solicitor were each liable to pay to the company the amount of the fund.

From the decision upon the first question J. S. Bath now appealed.

Warrington, K.C. (with him Muir Mackenzie) for the appellant.—*Prima facie* there was, no doubt, a complete *cessio bonorum* on the part of the debtor, which included this fund in court, and the legal interest therein was vested in the company. But the company cannot take the property for their own benefit. The agreement regulates the position of the company under the scheme, and they, as the persons to whom the property was assigned for the purpose of carrying out the scheme, merely have an interest as bare trustees in this particular part of the property. The agreement refers to "the property" throughout, a list of which was scheduled to the agreement, but it did not comprise this fund. The company cannot take this fund but only the specified property that is unrealised. The clause of the agreement that relates to unrealised property clearly refers to the schedule in which the various properties are set forth. Unrealised property is plainly confined to "the property." All the provisions relate only to "the property." That view is much strengthened by the provisions immediately preceding.

Renshaw, K.C. and Pollard for the respondents, the petitioners, were not called upon to argue.

Harman watched the case on behalf of other persons interested.

COLLINS, M.R.—This appears to me to be a tolerably clear case, and I think that the learned judge in the court below was perfectly right in the conclusion at which he arrived. A debtor in difficulties was declared a bankrupt, and he was desirous of annulling the bankruptcy. Having considerable property, which in all probability—indeed I think there is no doubt—was capable of paying 20s. in the pound, he was anxious to have the bankruptcy annulled with the assistance of a certain company called the Creditors' Assets Company Limited, who were ready for remuneration to take over the property and gradually realise it in the way more specifically dealt with in an agreement which was drawn up between the parties. By that agreement it was provided that the company should pay down a sufficient sum of money to satisfy the creditors of the bankrupt in full, and then proceed to deal with the estate which he was handing over to them in a certain prescribed manner which is set out in the agreement. The beginning of the matter was a scheme which the debtor proposed. It purports to be by the "above-named debtor who submits the following proposal for a scheme of arrangement of my affairs and the annulment of my bankruptcy upon the following terms and conditions." Then the scheme goes on thus: "All my debts to be paid in full; the proper charges and expenses"—expenses of the bankruptcy and all proceedings therein and the winding-up "all fees and per-

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contingents payable to the official receiver and the Board of Trade to be paid. Upon the payment into court by the Creditors' Assets Company Limited of a sum sufficient to answer all such payments as aforesaid, an order of the court be made vesting all my property in the said Creditors' Assets Company Limited, and the receiving order be rescinded and the bankruptcy annulled." Now, taking that document alone, which is dated the 22nd April 1893, it seems to me quite obvious that the debtor intended, and, in fact, contracted, to hand over all his assets to the Creditors' Assets Company, they, on the other hand, being under the obligation to pay all his debts in full and holding the property with a lien upon it to reimburse themselves all the payments that they had to make in the liquidation of his affairs. That being so, there can be no doubt whatever that they took over the particular piece of property which is in question in these proceedings. It appears that there was in court standing to the credit of the debtor a sum of money composed partly of cash and partly of consols. The debtor says in effect that his bankruptcy was annulled, and that particular sum of money was in court in his name. Accordingly he went and got it out of court, the court not being advised or reminded of the existence of the scheme or of the fact that the property which he sought to get out had been comprised in the scheme. Then when the persons who undertook to find the money for settling with his creditors in the bankruptcy, and who, by agreement with him, took over his property and had to deal with it in a manner specifically provided for in the agreement, found out that he had got this money out of court, they naturally came and preferred their claim before the learned judge in the court below, who held that they, and not the debtor himself, were the persons entitled to this fund in court. The point that arises is this: It is said by Mr. Warrington, who has put the case with his usual clearness, "We have no doubt a scheme which *primâ facie* embraces a complete *cessio bonorum* on the part of the debtor including this fund in court." He does not rely—he indicated it but did not press it—upon the suggestion that there was no *cessio* of this particular asset, he admitted that this property was part of the general *cessio bonorum*. But he says: "We now look to see the precise terms by which the parties intended to be governed in dealing with this particular asset; and we find they have drawn up an elaborate agreement which defines the property to be dealt with under it, and defines it in a manner so as to exclude this particular item. Therefore he says in terms: "Although assigned under the scheme as an item as to which no trust is declared in the deed and is an item which is therefore to be deemed to be in the custody of the court, the persons to whom the property is assigned for the purpose of carrying out the scheme merely have an interest as bare trustees in this particular part of the property, and, therefore, the debtor himself is entitled to have it out of court." Now, it seems to me that that proposition cannot be sustained, and for these reasons: The scheme begins with a general cession of the debtor's goods for the purposes of the scheme in bankruptcy. That gave his trustees not a mere bare trust in regard to this matter, but a trust with a lien and a right in themselves

to recoup themselves out of the fund. That being the general broad provision of the scheme, how is it narrowed so as to exclude this particular asset? It seems to me that if it is to be narrowed you must find an express provision not merely defining what the rights are over certain property, but deliberately excluding from the cession already made any right in the trustees to hold this as part of the security. When one criticises the agreement which was made contemporaneously, although it does not deal specifically with a certain part of the assets, and does not allude to or deal specifically with this particular asset, it seems to me that this is not enough to get out of the clear cession that was made of that asset, or to get out of the purposes for which that cession was made. It was made just as much for that purpose as for any other—namely, the general purpose of using the whole of the property conveyed to those persons for the purpose of reimbursing them for the sum that they paid in liquidating his debts. It seems to me, therefore, that taking the whole thing together, the terms of the cession, the date of the agreement, and the date of the cession which followed it, and the fact that this item was undoubtedly embraced in the cession, there is no such language in the agreement as to exclude and take out of the cession that which was already included in it. There being no such language, that which was part of the cession remains subject to all the trusts just as much as that part of the property which was more specifically dealt with in regard to the way in which the estate was to be managed for the purpose of realising it for the benefit of the estate and for providing adequate security for the persons who liquidated the debts. For these reasons I am of opinion that the appeal must be dismissed, and dismissed with costs.

STIRLING, L.J.—I agree.

COZENS-HARDY, L.J.—I agree.

*Appeal dismissed.*Solicitors for the appellant, *Payne, Shaw-Mackenzie, and Lake.*Solicitors for the respondents, *Ranger, Burton, and Frost; Armitage and Strouts.*

Monday, March 3.

(Before COLLINS, M.R. and ROMEE, L.J.).

SACHS v. HENDERSON. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Costs—Action founded on tort—Agreement for lease—Wrongful removal of fixtures before execution of lease—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 116.

The defendant agreed to lease a house to the plaintiff. Between the date of the agreement and the execution of the lease the defendant removed certain fixtures without the plaintiff's knowledge. The lease was afterwards executed, and the plaintiff took possession. He then found that the fixtures had been removed. In an action in the High Court against the defendant for thus removing the fixtures, the plaintiff recovered 20l. and costs.

Held, that, though the relationship between the plaintiff and the defendant arose out of the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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contract for the lease, the action for the removal of the fixtures was not an action founded on contract, but was in substance an action founded on tort within sect. 116 of the County Courts Act 1888; and that the plaintiff was therefore entitled to his costs on the High Court scale.

THIS was an appeal by the plaintiff from an order of Jelf, J. at chambers that the plaintiff's costs in the action should be taxed on the County Court scale.

In Oct. 1899 the defendant agreed to grant and the plaintiff agreed to take a lease of certain premises belonging to the defendant from the following Lady Day, at the yearly rent of 275*l.*, the lease to contain an option to the plaintiff to purchase the freehold.

In the following March the lease was executed and the plaintiff took possession.

The plaintiff then found that certain fixtures which had been on the premises in October at the date of the agreement had been removed between that date and the execution of the lease.

Thereupon he commenced the present action in the High Court claiming damages for the removal of the fixtures.

The defendant denied that there was any valid agreement for a lease and paid 20*l.* into court with a denial of liability.

This sum the plaintiff took out in satisfaction of his claim and brought in his bill for taxation.

The master was of opinion that the action was founded on contract within sect. 116 of the County Courts Act 1888, and he accordingly taxed the bill on the County Court scale.

Jelf, J. affirmed the decision of the master.

The plaintiff appealed.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides as follows:

Sect. 116. With respect to any action brought in the High Court which could have been commenced in a County Court, the following provisions shall apply: (1) If in an action founded on contract the plaintiff . . . shall recover a sum of twenty pounds or upwards, but less than fifty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court; and (2) if in an action founded on tort the plaintiff . . . shall recover a sum of ten pounds or upwards, but less than twenty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court. . . .

G. A. Scott for the plaintiff.—The action is founded on tort within sect. 116, and as the plaintiff has recovered 20*l.* he is entitled to costs on the High Court scale. Between the date of the agreement and the execution of the lease the defendant was a trustee for the plaintiff, and was bound, therefore, to take care to preserve the property:

Clarke v. Ramuz, 65 L. T. Rep. 657; (1891) 2 Q. B. 456.

Here the defendant has not merely been guilty of negligence in failing to take reasonable care of the property, he has himself carried off part of the property and converted it to his own use. It is true that in order to prove his case the plaintiff would have to rely upon his contract with the defendant in October, but the action is not therefore founded on contract within sect. 116. There are many cases in which an action has been held to be founded on tort, though the duty, the

breach of which was complained of, arose out of a contract:

Turner v. Stallibrass, 77 L. T. Rep. 482; (1898) 1 Q. B. 56.

There the action which was held to be founded on tort, was brought in respect of a breach of a duty arising out of a contract of agistment. Similar decisions have been arrived at in cases which have depended on contracts made with railway companies:

Pontifex v. Midland Railway Company, 37 L. T. Rep. 403; 3 Q. B. Div. 23;

Kelly v. Metropolitan Railway Company, 72 L. T. Rep. 551; (1895) 1 Q. B. 944.

He also contended that the action was not one which could have been commenced in a County Court, as a question of title was involved, and it would have been necessary to prove a binding agreement for a lease: and he referred to

Howorth v. Sutcliffe, 73 L. T. Rep. 277; (1895) 2 Q. B. 358.

Cleave for the defendant.—The action is founded on contract. The defendant as the freeholder of the land had an absolute right to take away any fixtures he liked, save in so far as he was bound not to do so by his contract with the plaintiff. There has been no negligence here on the part of the defendant, and there is no suggestion of any misrepresentation. He took these things away because he thought that under the terms of his agreement with the plaintiff he was entitled to do so. Whether or not he was so entitled depends entirely on the construction of the agreement.

COLLINS, M.R.—The question raised in this appeal is whether the 20*l.* which was recovered by the plaintiff was recovered in an action founded on contract or in an action founded on tort within the meaning of sect. 116 of the County Courts Act 1888. The master and the judge both held that the action was founded on contract, and that the plaintiff was consequently debarred from obtaining more than County Court costs. It seems to me, however, that upon the facts the action is substantially founded on tort. The courts have repeatedly laid down that in questions arising under this section the substance, not merely the form, of the action is what is to be looked at. Now, the defendant had agreed in October to give the plaintiff a lease of certain premises to date from the following March. The lease was accordingly granted in March, and it gave an option to the plaintiff to purchase the freehold provided that he gave notice of his desire to do so within six months. The plaintiff entered into possession and then found that several fixtures which he had seen on the premises in October had in the interval been taken away by the defendant. He afterwards brought this action for damages for the removal of the fixtures, and in that action he has recovered 20*l.* Was that action founded on contract or on tort? The question seems to me to be really answered by the decision in *Turner v. Stallibrass* (*ubi sup.*). It was there pointed out that in cases of breach of duty it is not enough to aver that the duty arises out of a contract, for the purpose of showing that the action for breach of that duty is not founded upon tort. In *Turner v. Stallibrass* (*ubi sup.*) the plaintiff sued in respect of a breach of a duty which had arisen out of a contract of bailment, yet the court held that the

action was founded upon tort. It was pointed out that in the case of most breaches of duty there has been some previous consensus existing between the parties, whether expressed or not, and that when some such relationship has been established, a breach of a duty arising from the relationship is a tort. I agree that the division drawn in English law between contract and tort is not logical, and it is not always easy to say whether a particular act is a tort or a breach of contract. The plaintiff in this case does not allege a breach of any specific stipulation in his contract with the defendant. That contract is necessary to his cause of action in order to establish a particular relationship between himself and the defendant, but that relationship being shown, the breach of the duty which arose out of it is a tort. That principle has been laid down in several cases of which the railway cases that have been referred to may be taken as examples. In those kind of cases the first thing has been to prove an agreement by which the railway company accepted someone as a passenger on their railway, and out of that agreement sprang a duty from the company to the passenger. Where the action has been in substance a claim in respect of the company's negligence or breach of a duty which is owed by the company to the passenger, it has been held to be founded on tort. So, in this case, there was a clear duty upon the defendant arising out of his contract with the plaintiff not to take away from the demised premises anything which made them valuable to the plaintiff. His breach of that duty was a wrong, and for those reasons I think that the action was not founded upon contract within sect. 116, but was founded on tort, and the appeal must therefore be allowed.

ROMER, L.J.—I am of the same opinion. The proper way to deal with these questions arising under sect. 116 is to ask in each case whether the action is in substance founded on tort or on contract. Applying that principle to the present case, the action seems to me to be clearly one that is founded on tort. The defendant was under an obligation to the plaintiff to grant him a lease of certain property with the fixtures thereon. Before the lease was actually granted he wrongfully removed some of the fixtures without letting the plaintiff know what was being done. The contract for the lease was then completed, the plaintiff being under the impression that the fixtures which had been on the property were still there. In substance it seems to me that there was a misrepresentation by the defendant causing the plaintiff to take the lease. That was a tort. On the other side it is said that what the defendant did was merely a breach of contract. But how does the matter stand? The defendant's contract was not an absolute one to preserve the fixtures, he was merely bound to take reasonable care to preserve them. Suppose he had been guilty of negligence in that respect so that some of the fixtures were lost; it is obvious that the plaintiff's claim against him for negligence would be an action of tort. But now the defendant contends that as he has done a deliberately wrongful act he is somehow in a better position than if he had been merely negligent. That argument cannot be right. The action to my mind was clearly founded on tort.

Appeal allowed.

Solicitors for the plaintiff, *St. Barbe Sladen and Wing.*
Solicitors for the defendant, *Guscotte, Wadham, and Co.*

Wednesday, March 19.

(Before COLLINS, M.R., ROMER, and
MATHEW, L.JJ.)

Re UNEEDA TRADE MARK. (a)

APPEAL FROM THE CHANCERY DIVISION.

Trade mark — Registration — Invented word — "Uneeda" — Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 64 — Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50), s. 10.

The word "Uneeda," being merely a putting together of three of the commonest of common English words, and a misspelling of the first of them without a change in the sound, is not "an invented word" within sect. 10 of the Patents, Designs, and Trade Marks Act 1888, and therefore cannot be registered under the Patents, Designs, and Trade Marks Act 1883.

Judgment of Cozens-Hardy, J. (84 L. T. Rep. 259; (1901) 1 Ch. 550) affirmed.

THIS was an appeal by the National Biscuit Company of Jersey City, in the United States of America, from a refusal by Cozens-Hardy, J. to allow the registration under the Patents, Designs, and Trade Marks Act 1883 of the word "Uneeda" as applied to biscuits or to the class of goods in which biscuits are contained.

Registration of the word had been refused upon the ground that the word was not "an invented word" with sect. 10 of the Patents, Designs, and Trade Marks Act 1888, and this refusal to register was affirmed by Cozens-Hardy, J., who said that this was merely a putting together of three of the commonest of common English words and a misspelling of the first of them without change in the sound, and that the word was therefore not an "invented word" within sect. 10 of the Act of 1888.

The judgment of Cozens-Hardy, J. is reported 84 L. T. Rep. 259; (1901) 1 Ch. 550.

The applicants appealed.

Moulton, K.C. and E. F. Lever for the applicants.—This is an invented word. The word is suitable for registration, and the courts ought to look favourably upon applications to register words as trade marks, unless the proposed trade mark is such that its use as a trade mark would deprive the community of the right which they possess to employ that word for the purpose of describing the character or quality of goods. See the judgment of Lord Herschell in the *Solio* case:

Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs, and Trade Marks, 79 L. T. Rep. 195; (1898) A. C. 571.

The registration of this word would not deprive anyone of the free use of the words "you need a." This word is not a mere misspelling of words which might be used in ordinary conversation as descriptive of goods, such as the word "Phiteesi" as applied to boots.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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Re GREAT NORTHERN AND CITY RAILWAY COMPANY.

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The *Attorney-General* (Sir R. Finlay, K.C.) and *R. J. Parker*, for the Comptroller-General, were not called upon.

COLLINS, M.R.—I have nothing to add to the reasons given by Cozens-Hardy, J. in the court below, which I adopt absolutely. The appeal must be dismissed.

ROMER, L.J.—I agree. I think that the courts have administered the law as to trade marks in rather a harsh way, but the word "Unedea" which the applicants now desire to register is, in my opinion, obviously objectionable as a trade mark, as it is simply founded on three ordinary English words.

MATHEW, L.J.—I am of the same opinion. There is no element of invention about this word "Unedea."

Appeal dismissed.

Solicitors for the applicants, *Burn and Berridge*.

Solicitor for the Comptroller-General, *Solicitor to the Board of Trade*.

Tuesday, March 25.

(Before **COLLINS, M.R.**, **ROMER** and **MATHEW, L.J.J.**)

Re GREAT NORTHERN AND CITY RAILWAY COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Appeal from order of judge at chambers—Practice and procedure—Question of compensation under the Lands Clauses Act 1845 (8 & 9 Vict. c. 18)—Order for trial of question in High Court—Regulation of Railways Act 1868 (31 & 32 Vict. c. 119), s. 41—Supreme Court of Judicature Procedure Act 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 4

Where an order has been made by a judge at chambers, under sect. 41 of the Regulation of Railways Act 1868, for the trial in the High Court of a question of compensation under the Lands Clauses Act 1845, an appeal against such an order lies to the Divisional Court, not to the Court of Appeal.

THIS was an appeal by a landowner from an order of Bucknill, J. at chambers directing a question of compensation under the Lands Clauses Act 1845 to be tried in the High Court.

Before any warrant had been issued to the sheriff under the Lands Clauses Act 1845, to assess the amount of compensation payable to the landowner by the railway company who were taking his land, the company applied to the judge at chambers under sect. 41 of the Regulation of Railways Act 1868 for an order that the question of compensation should be tried in the High Court.

Bucknill, J. made an order accordingly.

The landowner appealed to the Court of Appeal.

Dankwerts, K.C. (*George Cave* with him) on behalf of the railway company raised a preliminary objection. The appeal is wrongly brought to this court. It should have been brought to the Divisional Court. The only matters of practice and procedure in which, under sect. 1 of the Supreme Court of Judicature Procedure Act 1894,

an appeal lies to this court direct from the judge at chambers, are those in connection with a cause or matter in the High Court:

Watson v. Pettis, 79 L. T. Rep. 330; (1899) 1 Q. B. 54.

C. C. Scott for the landowner.—The matter on which this appeal is brought is in the High Court. It has been in the High Court since the judge at chambers made the order that the question of compensation should be tried in the High Court. In *Watson v. Pettis* (*ubi sup.*), there was nothing in the High Court because the application to the judge at chambers was refused. The procedure here adopted is the same as that which was followed in another case:

Re Donisthorpe and Manchester, Sheffield, and Lincolnshire Railway Company, 76 L. T. Rep. 371; (1897) 1 Q. B. 671,

He referred also to

Re East London Railway Company; Oliver's claim, 63 L. T. Rep. 147; 24 Q. B. Div. 507.

COLLINS, M.R.—The preliminary objection that has been raised seems to me to be fatal to this appeal. The matter is concluded by the decision of the Court of Appeal, given after consultation with the other members of the court, in *Watson v. Pettis* (*ubi sup.*). In that case an appeal was brought to the Court of Appeal from a refusal by a judge at chambers to grant a writ of prohibition to a County Court judge to restrain him from proceeding in a certain matter. A preliminary objection was raised that the appeal ought to have been brought to the Divisional Court instead of to the Court of Appeal. The Court of Appeal upheld the objection on the ground that the practice and procedure mentioned in sect. 1, sub-sect. 4, of the Supreme Court of Judicature Procedure Act 1894 cover matters of practice and procedure in connection with a cause or matter in the High Court and not a matter in which a County Court judge is sought to be prohibited from exceeding his jurisdiction in his court. That ground of decision is exactly applicable to the present case. When the application was made to the judge at chambers there was no proceeding in the High Court. On behalf of the appellant it was sought to distinguish the decision in *Watson v. Pettis* (*ubi sup.*) from the present case on the ground that in that case the application to the judge at chambers was refused, whereas in the present case, by the making of the order by Bucknill, J., the matter was brought into the High Court. But the question now is whether the order of Bucknill, J. ought to have been made or not. This case comes precisely within the class of cases in which, as *Watson v. Pettis* (*ubi sup.*) shows, an appeal lies to the Divisional Court and not to the Court of Appeal. The appeal must be dismissed.

ROMER, L.J.—I agree.

MATHEW, L.J.—I agree.

Appeal dismissed.

Solicitors for the landowner, *George Brown, Son, and Vardy*.

Solicitors for the railway company, *le Brasseur and Oakley*.

Wednesday, April 9.

(Before WILLIAMS, ROMER, and MATHEW, L.JJ.)

ELLIOTT v. GARRETT. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Interrogatories—Defamation—Plea of privilege—Information to enable plaintiff to prove malice—Order XXXI.

A borough councillor brought an action for slander against another councillor of the borough. The defendant pleaded that the words were spoken only to other borough councillors in answer to inquiries made by them in respect of a matter in which he and they had a common interest, and that the words were spoken *bonâ fide* and without malice, and in the honest discharge of the defendant's duty as a councillor, and that the occasion was privileged.

Held, that the plaintiff was entitled to interrogate the defendant as to what information he had which induced him to believe that the words spoken by him were true, and as to what steps the defendant had taken, before speaking, to ascertain whether the words were true or not.

THIS was an appeal by the plaintiff from a refusal of Bucknill, J. at chambers to allow a certain interrogatory to be administered to the defendant.

The action was for slander.

The plaintiff had been a vestryman of Islington, and in 1901 he and the defendant were members of the council of the borough of Islington.

By his statement of claim the plaintiff alleged that on the 3rd Nov. 1901, at which time he was a candidate for the office of mayor of Islington, the defendant spoke and published of the plaintiff certain words which were set out in the statement of claim; and that these words meant that the plaintiff had committed an offence under the Public Bodies Corrupt Practices Act 1889, and that he had received a bribe and had been guilty of gross misconduct in his office of vestryman, and was not a fit and proper person to be mayor of Islington or to hold office as a member of any public body.

By his statement of defence the defendant said that if he spoke and published the words complained of, which he denied, he spoke and published them only to certain named councillors of the borough in answer to inquiries made by them in matters in which he and they had a common interest; and that it was his duty to speak and publish the words complained of; and that he spoke the words, if at all, *bonâ fide* and without malice towards the plaintiff, and in the honest discharge of his duty as a councillor, and with the honest desire to protect, as was his duty, the interests of the councillors and the ratepayers of the borough of Islington; and that the occasion was privileged.

The plaintiff applied for leave to administer interrogatories to the defendant, one of these interrogatories being as follows:

What information, if any, had you that induced you to believe that the said words were true; or what steps, if any, had you taken before speaking the said words to ascertain whether they were true or not?

Bucknill, J. at chambers refused to allow this interrogatory.

The plaintiff appealed.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

Witt, K.C. (Poley with him) for the plaintiff.—

By his plea of privilege the defendant has raised an issue of malice, and the burden of proving malice is thrown on the plaintiff. The object of this interrogatory is to assist the plaintiff in proving his case. Direct authority that such an interrogatory as this should be allowed may be found in a decision of a divisional court consisting of Mathew and Collins, JJ.:

Martin v. Trustees of British Museum, 10 Times L. Rep. 215.

Hugh Fraser for the defendant.—The case just referred to is distinguishable from the present case. The defence there was that the book complained of as libellous was kept in the library of the British Museum in pursuance of certain statutory requirements and rules. Here the defence is only an ordinary plea of privilege. The true principle to be applied is to be found in

Hennessy v. Wright, 24 Q. B. Div. 445 n.

There also the defendant pleaded privilege, and the Court of Appeal refused to allow the plaintiff to interrogate him as to the names of his informants. This is a fishing interrogatory. In effect, the plaintiff is seeking to ask the defendant what are the grounds on which he is going to rely in support of his plea of *bona fides*. The plaintiff does not ask questions with reference to any specific fact on which he relies:

Parnell v. Walter, 62 L. T. Rep. 75; 24 Q. B. Div. 441.

Attempts have before now been made to administer interrogatories of a similar kind to this, but it has been the regular practice at chambers to refuse to allow them. In refusing to allow this interrogatory, Bucknill, J. has not committed any error on a question of principle, nor has any substantial injustice been done, and in such circumstances no appeal ought to have been brought to this court:

Peck v. Ray, 70 L. T. Rep. 769; (1894) 3 Ch. 282.

WILLIAMS, L.J.—It seems to me that this case is a perfectly clear one, and that our decision will not in any way conflict with any of the reported cases that have been cited. I think that the interrogatory ought to be allowed. The objections raised by the defendant to this interrogatory being allowed are based upon the allegation that it is not relevant. To my mind, the interrogatory is obviously relevant to a distinct issue that has been raised in the pleadings. The defendant has pleaded privilege. Of necessity he alleges the words complained of were uttered by him, if at all, *bonâ fide*, and in the belief that they were true. The question of malice on the part of the defendant has thus been raised. It was argued that this interrogatory will not enable the plaintiff to prove that the statement made by the defendant was made maliciously, but, in my opinion, the interrogatory is one which, if answered in one way, may go far to support the plaintiff's case. It is said the interrogatory is a fishing one. It seems to me to be nothing of the sort. The plaintiff is only seeking by means of it to get evidence, which necessarily lies in the defendant's knowledge, in support of a plain and definite case. The case of *Martin v. Trustees of the British Museum* (*ubi sup.*), a case which I entirely agree with, really covers the present case. As to

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the cases cited by the defendant they do not seem to me to touch the present case. In *Parnell v. Waller* (*ubi sup.*) the interrogatories which the court refused to allow went to damages and nothing else. In *Hennessy v. Wright* (*ubi sup.*) Lord Esher, M.R., in terms affirmed the doctrine which was the basis of the decision in *Martin v. Trustees of British Museum* (*ubi sup.*) and then went on to point out why, in the case before him, the particular interrogatory which was the subject of the appeal ought not to be allowed, the reason being that it was only directed to ascertain the state of mind of the defendant's informants. As to the defendant's contention that it is the practice in chambers to refuse to allow any such interrogatory as that which the plaintiff now desires to administer, I very much doubt if such a practice really exists.

ROMER, L.J.—I am of the same opinion.

MATHEW, L.J.—I am of the same opinion. It seems to me idle to talk of principles in a case of this sort. Each case depends on its own facts. I do not believe that there is any such practice at chambers as is alleged to exist, by which interrogatories such as this one are not allowed to be put. In fact, the cases cited seem to show that no such practice exists. The main issue in this action is malice. The defendant has pleaded privilege; he says that he has not spoken the words maliciously because he was acting on information which was reasonably sufficient to justify him in making the statements complained of. That being so, I think the plaintiff is entitled to interrogate the defendant, and ask what information he had, and who gave him the information. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Samuel Price and Sons*.

Solicitors for the defendant, *Tatham, Oblein, and Nash*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 19, 20, and 24.

(Before JOYCE, J.)

EASTON v. ISTD. (a)

Ancient lights—Conservatory—Sloping glazed roof—Window—Agreement allowing window to overlook—Prescription Act 1832 (2 & 3 Will. 4, c. 71), s. 3.

By an agreement in writing, made in 1873, and signed by B., the plaintiff's predecessor in title, E., agreed to pay the defendant 1s. a year for allowing the window in his conservatory to open on and overlook the defendant's property.

The conservatory had a sloping roof, which was glazed as also was the vertical side facing the defendant's property to within a few feet of the ground. Portions of the glazed side were movable, and when open overhung the defendant's property. The sloping roof did not open.

The annual payments under the agreement were made until 1888, when the vertical side was bricked in, leaving the glazed roof in its original position so as to form a skylight to what became

a corridor to the hotel against which the conservatory was erected.

In 1901 the defendant obstructed the access of light to the glazed roof of the corridor. In an action by the plaintiff for an injunction restraining the defendant from obstructing the light:

Held, that the word "window" in the agreement applied to the sloping glazed roof as much as to the fixed and glazed portions of the vertical side, and that a window was not the less a window because it was not capable of being opened or because it was not fixed in a vertical plane.

Held, also, that inasmuch as the skylight received light over the defendant's property it overlooked the property in the sense of the term used in the agreement, and that the right to light had therefore been enjoyed by consent or agreement within the meaning of sect. 3 of the Prescription Act 1832. Plaintiff's action therefore was dismissed.

THE parties to this action were next-door neighbours in the Commercial-road, Portsmouth, the plaintiff being the owner of the Golden Fleece Hotel, and the defendant the owner and occupier of the adjacent premises.

The action was in respect of the obstruction, or alleged obstruction, by the defendant, of the access of light over the yard at the back of his premises to a window or skylight over a passage or corridor in the hotel and on the northern side thereof.

The window, or skylight in question was inclined at an angle of somewhat less than 45 degrees to the plane of the horizon and somewhat more than 45 degrees to the vertical plane. Its northern or lower side was practically on the line of boundary between the respective properties of the plaintiff and the defendant, and if and so far as it could be said to have overlooked anything, it overlooked the property of the defendant.

The plaintiff's complaint was in respect of a wall erected by the defendant along, or close to the aforesaid line of boundary and obstructing the access of light over the defendant's property to the window or skylight in question.

By par. 2 of the statement of claim the plaintiff alleged that "the skylight was an ancient light and the free and unobstructed access thereto of light had been enjoyed, as of right, for twenty years and upwards prior to the commencement of the action without interruption."

The defendant by his defence did not admit that the skylight in the passage on the plaintiff's premises was an ancient light or that the free and unobstructed access thereto of light had been enjoyed as of right for twenty years and upwards prior to the commencement of the action without interruption.

It appeared that the window or skylight in question originally formed the sloping top of a conservatory, or corridor used as a conservatory, erected by the plaintiff's father in 1873 on the northern side of the hotel and abutting on the defendant's property. This top was all glazed as also was the whole of the vertical side adjoining the defendant's property to within a few feet of the ground, such side being practically on the line of boundary between the two properties. It appeared from the evidence that portions of the glazed side, amounting to less than one-half, were movable, being suspended upon a bar or hinges at the top, and opening from the bottom so as when

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

open to overhang the defendant's property. The sloping roof did not open.

It further appeared that, with respect to the construction of the conservatory, or corridor, an arrangement, evidenced by writing, was entered into between the then holders of the respective properties. It was in the handwriting of and signed by the plaintiff's father, the then owner of the plaintiff's property, and was dated the 13th June 1873, and was as follows: "I hereby agree to pay to Mr. Isted, of 43, Commercial-road, Landport, the sum of 1s. per year as acknowledgment for allowing the window in my conservatory adjoining to open on to and to overlook his property, and do also agree to close the same when required to do so."

The annual payments under the agreement were continued down to the year 1888, when the vertical side of the conservatory facing the defendant's property was bricked in leaving the sloping glazed roof in its original position and so as to form a skylight to the roof of what became a corridor to the hotel.

In the year 1901 the defendant built a brick wall at the rear of his premises and carried the same to such a height as to obstruct the access of light to the glazed roof of the corridor, and the plaintiff who was the successor in title of his father to the hotel, brought an action to restrain the defendant from obstructing his access of light to the skylight.

Hughes, K.C. and *Ward Coldridge* for the plaintiff.—The agreement of 1873 relates only to the vertical side windows of the conservatory, and not to the sloping roof. The ordinary meaning of window does not include a glass roof. When the vertical side windows were bricked in in 1888 the payments under the agreement ceased, which shows that the parties thought that the agreement only related to the vertical side windows.

Kenyon Parker for the defendant.—I rely on the agreement. The right to light has been enjoyed by consent or agreement within the meaning of sect. 3 of the Prescription Act. He referred to:

Bewley v. Atkinson, 41 L. T. Rep. 603; 13 Ch. Div. 283;

Barter v. Bower, 33 L. T. Rep. 41.

Hughes, K.C. in reply.

Cur. adv. vult.

March 24.—*JOYCE, J.*, after stating the facts substantially as above, continued: The plaintiff's window or skylight having been in existence ever since 1873 is what is called an ancient light, unless the access of light thereto over the defendant's property was enjoyed by some agreement expressly made or given for that purpose. [His Lordship then referred to the agreement, and continued:] Now it is not contended before me, nor in my opinion could it have been contended with success, that this arrangement was limited to the movable sashes in the northern and vertical side of the conservatory. It certainly extended and applied to the whole of the glazed portion of this side. But it is obvious, I think, that the object of this arrangement was to preclude the acquisition by the owner of the plaintiff's property of a statutory right to light over that of the defendant. It is suggested, however, that although while the arrangement continued and the annual

payment of 1s. was duly made, as it was until 1888, no right was being acquired in respect of the glazed portion of the side, still such right was during this time being acquired in respect of the glazed portions of the sloping top (when I say "glazed portion" I mean the portion that consists of glass and framework), notwithstanding the existence of the arrangement and the continuance of the payment. In my opinion it is almost impossible that this should have been intended by the parties to the arrangement, and I think the agreement very well bears the construction of what I think must have been the intention of the parties. The sloping top received rays of light across, and in that sense overlooked the defendant's property in the same manner as, though to a less degree than, the fixed portions of the side, and it is in respect of the obstruction by the defendant of these very rays of light that the action is brought. If the written agreement applied as it did to the fixed and glazed portions of the side, it equally, in my opinion, applied to the glazed portions of the sloping top. A window is not the less a window because it is not fixed in a vertical plane. I think the glazed top was just as much a window as the fixed portions of the vertical side, and inasmuch as it received light over the defendant's property, I think it overlooked the property in the sense in which that term is used in the agreement. It appears to me that down to the year 1888 the right to the access of light over the defendant's property from the window or skylight in question, was enjoyed by some consent or agreement expressly made for that purpose by the defendant in writing. It was known, therefore, that the plaintiff had not enjoyed the access of light in question for the statutory term of twenty years, and in my opinion the action must be dismissed. I hesitated somewhat about the costs, because the precise point was not raised very early in the trial, but the pleadings here are in respect of a right to ancient lights being disturbed, and I see no reason why the plaintiff should not pay the costs as well. Therefore the action will be dismissed with costs.

Solicitors for the plaintiff, *James, Mellor, and Coleman*, for *Hobbs and Brutton*, Portsmouth.

Solicitors for the defendant, *A. W. Mills*, for *Cousins and Burbidge*, Portsmouth.

April 9 and 19.

(Before *JOYCE, J.*)

ANDERSON v. BERKLEY. (a)

Will—Construction—Bequest to testator's son's wife nominatim—Not lawfully married—Misdescription—Valid bequest.

A testator bequeathed a sum of 5000l. upon trust to pay the income thereof to his son F. during his life, and after his death to pay such income to his (i.e., his son's) wife L. during her life. F. and L. were not lawfully married, although they represented themselves and were reputed as being so. P. had written to the testator informing him that he had married L., but the testator had not seen or had any direct communi-

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

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cation with *L.* There was no question of fraud in obtaining the bequest.

Held, that the bequest was to a legatee named with an additional description which was not satisfied, and that as the name described the object of the gift with sufficient certainty, the additional description which was untrue would be rejected, and that the bequest was valid.

Turner v. Brittain (3 N. R. 21) followed.

THE testator G. Berkley who died on the 20th Dec. 1893 by his will dated the 22nd Nov. 1892 bequeathed to his son Francis the sum of 1000*l.* absolutely, and he bequeathed to his trustees the sum of 5000*l.* upon trust to invest the same and to pay the income to arise therefrom to his son Francis during his life and from and after his death to pay such income to his wife Letitia during her life if she should survive him, and after the death of the survivor of his son Francis and Letitia his wife upon trust for all the children of his son Francis, who, being sons, attained the age of twenty-one years, or being daughters attained that age or married, in equal shares, and if there should be only one such child the whole to be put in trust for that one child, and in case there should be no child of his said son Francis in whom the said sum of 5000*l.* or the investments representing the same should be absolutely vested under the trusts aforesaid upon trust for such of the testators, other children as should be living at the death of the survivor of his said son Francis and Letitia his wife, or such default of children as aforesaid, whichever event should last happen, and, if more than one, in equal shares.

The testator's son Francis was at the date of the will in New Zealand. In or about Nov. 1888 he wrote from Dunedin to some members of his family in England including the testator, stating that he had married Letitia Lilian Cumberland, and on the evidence there was no doubt that she was then living with the testator's son Francis as his wife, and continued to do so until up to the date of his death in Sept. 1899.

The parties were reputed to be and were treated as lawfully married. The testator never saw or had any direct communication with the lady.

There was one child of the union between the testator's son Francis and Letitia who was born on the 20th May 1894 subsequently to the date of the testator's will. In registering the birth of this child (a daughter) the date and place of their marriage was stated to be "Jan. 19th 1880 London, England."

The testator's son Francis and Letitia had in 1894 mortgaged their interest in the sum of 5000*l.* bequeathed to them by the testator's will, which had subsequently been transferred to the plaintiff.

Soon after the death of Francis the trustees received information that he had never been lawfully married to Letitia, and they refused to continue to pay the interest on the sum of 5000*l.* to the plaintiff as the transferee of the mortgage of Letitia's life interest.

The plaintiff accordingly brought an action against the trustees, Letitia Cumberland, and two of the other children of the testator, asking for a declaration that the defendant Letitia Cumberland became entitled at the death of

Francis Berkley to the dividends and income of the sum of 5000*l.* and for other relief.

The trustees by their defence submitted that the question whether Letitia took any interest under the testator's will should be decided as a preliminary point of law, which now came on to be decided.

Hughes, K.C. and *Jessel* for the plaintiff.—The gift to the lady described as my son's wife Letitia is good. She was reputed as the wife of Francis. There is no question of fraud here in obtaining the bequest, and it is not necessary to inquire what the testator's motive was in making the bequest. They referred to

Giles v. Giles, 1 Keen, 685;

Wilkinson v. Joughin, 14 L. T. Rep. 394; L. Rep. 2 Eq. 319;

Melhuish v. Milton, 35 L. T. Rep. 82; 3 Ch. Div. 27;

Allen v. M'Pherson, 1 H. L. C. 191;

Turner v. Brittain, 3 N. R. 21;

Re Pette, 27 Beav. 576.

[*JOYCE*, J. referred to *Re Bodington* (50 L. T. Rep. 761; 25 Ch. Div. 685).]

Hamilton, K.C. for two of the children of the testator entitled under the gift over.—The gift to Letitia, the wife of Francis, fails because there was no wife answering the description. There is no case where a legacy to a person described as the wife of another person has been held valid where the object of the bounty was not personally known to the testator. The testator had never seen Letitia or even corresponded with her directly. The only motive here was to provide for the testator's son's wife, and Letitia was not his son's wife:

Re Davenport, 1 Smale & Gif. 186.

In all the cases cited on behalf of the plaintiff the object of the bounty was known to the testator. The testator not having known the person the motive fails. [*JOYCE*, J.—The question is did he intend to benefit his son's wife, or did he intend to benefit the person described as his son's wife Letitia?] The principle on which the court acts in all these cases is stated in *Doe v. Rouse* (5 C. B. 422). The case of *Kennell v. Abbott* (4 Ves. 802) is explained in *Allen v. M'Pherson* (*ubi sup.*).

Jessel in reply.—There is no foundation for the proposition that the cases cited by us in opening depended on the fact that the testator knew the object of his bounty. In the construction of a gift of this kind the question of the intimacy of the donor and donee cannot be imported.

Whinney for the trustees.

Cur. adv. vult.

April 19.—*JOYCE*, J.—His Lordship, after stating the facts substantially as above, continued:—If entitled to conjecture upon the subject, it is possible and probable that what induced the testator to confer any benefit by his will upon this lady was the belief that she was the wife of his son. It is not, however, a legacy to anyone under the simple description of "the wife of my son Francis" without any reference to a particular individual. If it had been, any person claiming must have shown that she really sustained that character. The bequest is to my son's wife Letitia if she shall survive him—i.e., to a legatee named with an additional description which is not satisfied, inasmuch as there was not any lawful

wife of the testator's son Francis in the strict legal sense of the term, though perhaps in a secondary sense Letitia Cumberland might be called his wife. This is not a case of a competition between rival claimants to a gift where one part only of the description fits one claimant, and the other part of the description only fits the other, as in *Garland v. Beverley* (38 L. T. Rep. 911; 9 Ch. Div. 213), where the various considerations applicable to such a case will be found. The simple question here is whether in the circumstances the lady can take under the gift, or whether it fails and goes to the persons entitled under the gift over. There is no question of any fraud by the legatee in the obtaining of the bequest. It is not like the cases of *Kennell v. Abbott* (4 Ves. 802), or *Wilkinson v. Joughin* (14 L. T. Rep. 394; L. Rep. 2 Eq. 319), where a gift to a supposed husband or wife of a testatrix or testator not being actually such was held to fail by reason of a fraud practised on the testatrix or testator by the legatee. The question is whether, according to the true construction of the will, the gift is in effect conditional upon Letitia's being the lawful wife of the testator's son Francis. In *Re Bodington* (50 L. T. Rep. 761; 25 Ch. Div. 685) Lord Selborne, L.C. held that upon the true construction of the will in that case the bequest of an annuity to the testator's wife was expressly conditional upon her being and remaining his lawful widow. There are not any such words of condition here. The legacy is intended for some person of whom the name, with a description, is given for the purpose of ascertaining and identifying the individual. We have here a compound designation consisting of the name Letitia—there is no doubt to whom that refers—and the description, "wife of my son Francis." It is a rule however, that where the description is made up of more than one part, and one part is true but the other false, then if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected and will not vitiate the gift: *Jarman on Wills*, 5th edit., p. 742, cited and approved by Lord Lindley in *Coven v. Truefitt* (81 L. T. Rep. 104, at p. 106; (1899) 2 Ch. 309, at p. 311). And as Lord Cottenham says in *Rishton v. Cobb* (5 My. & Cr. 145, at p. 151), the rule that where the identity of the legatee is certain, the gift will not be avoided by an inaccuracy in the description, would be destroyed if the court permitted itself to speculate without proof upon what may have been the object of the testator in giving the legacy. It is impossible to say what the testator in the present case would have done if he had positively known the precise facts in reference to the relation between his son and this lady. I hold, therefore, that the gift to "my son's wife Letitia if she shall survive him" does not fail, and my decision is in accordance with that of Lord Romilly in *Turner v. Brittain* (3 N. R. 21), which is, I think, the nearest case to the present that is to be found in the books.

Solicitors for the plaintiff, *M'Diarmid and Hill*, for *Manley*, Hull.

Solicitors for the persons entitled under the gift over and the trustees, *Markby, Stewart, and Co.*

Wednesday, Feb. 26.

(Before EADY, J.)

Re BOZZELLI'S SETTLEMENT; HUSSEY HUNT v. BOZZELLI. (a)

Marriage with deceased husband's brother—Validity—Lex domicilii—General consent of Christendom—Settlement—Power of appointment in favour of husband and children.

By a settlement made on the marriage of an English lady with an Italian domiciled in Italy certain funds were vested in English trustees upon trust for the wife, husband, and children of the marriage, with a proviso enabling the lady if she survived the husband and married again, to appoint one-third of the trust funds in favour of her second husband and her children by him. The ceremony took place in Italy, and children were born of the marriage.

The husband died domiciled in Italy, and the lady, who continued to reside there, intermarried with his brother in accordance with the law of Italy, and had children by him. She then desired to exercise her power of appointment in favour of her second husband and the children of her second marriage; and a summons was taken out by the trustees of the settlement for determination of the question whether the power was exercisable in respect of her marriage with her deceased husband's brother, which was invalid according to the law of England.

Held, that it was, as the marriage with her deceased husband's brother was valid according to the law of her domicile, and not incestuous according to the general consent of Christendom.

By a settlement in English form, dated the 15th Nov. 1871, made on the marriage of Edith M. Bozzelli, then Edith M. Jones, spinster, an English lady, with Edward Bozzelli, an Italian domiciled in Italy, certain funds, the property of the wife, were vested in English trustees upon trusts for the wife, husband, and children of the marriage, with a proviso empowering the wife, in case she survived her husband and married again, to appoint by deed or will one-third of the trust funds in favour of her second husband and her children by him.

The marriage between Mr. and Mrs. Bozzelli took place in Italy on the 16th Nov. 1871, and three children were born of their union.

On the 29th Nov. 1879 Mr. Bozzelli died domiciled in Italy, and after his death Mrs. Bozzelli continued to reside there with her children.

On the 11th Dec. 1880 Mrs. Bozzelli intermarried with Michael Bozzelli, her deceased husband's brother, who was also an Italian domiciled in Italy. Their marriage was valid according to the law of Italy, and there was issue of their marriage.

Mrs. Bozzelli now desired to exercise the power given to her by the settlement made on her marriage with her first husband, of appointing one-third of the settled property in favour of her second husband and her children by him.

This was a summons taken out by the trustees of the settlement for the determination of the question whether that power was exercisable in respect of her marriage with the brother of her

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

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deceased husband which was invalid according to the law of England.

F. McMullan for the trustees.

Austen-Cartmell for the children of the first marriage.—An English court will not hold that the power of appointment is valid in relation to a marriage between a widow and her deceased husband's brother which is expressly declared by 25 Hen. 8, c. 22, s. 3, to be prohibited by God's law, and is invalidated by 5 & 6 Will. 4, c. 54, s. 2. Such a marriage cannot be recognised by the English courts:

Hyde v. Hyde, 14 L. T. Rep. 188; L. Rep. 1 P. & D. 130;

Brook v. Brook, 9 H. L. C. 193;

Sottomayor v. De Barros, 37 L. T. Rep. 415; 3 P. Div. 1.

The case of *Cooper v. Cooper* (59 L. T. Rep. 1; 13 App. Cas. 88) shows that the law of her domicile when she made the marriage settlement ought to be regarded on the determination of the question as to the operation of any execution by her of a power given by it, and the law of England does not legalise a union of a widow with her deceased husband's brother. He also referred to

Dicey's Conflict of Laws, p. 645.

T. J. C. Tomlin for Mrs. Bozzelli, her second husband, and the children of her second marriage.—The second marriage, being valid according to the *lex domicilii* of both husband and wife, is treated by the English courts as valid for all purposes, since it is not regarded as incestuous by Christian nations:

Storey's Conflict of Laws, pp. 187-8.

EADY, J.—The general principle is that the law of domicile governs the capacity to enter into the marriage contract. Here it is admitted that the domicile of both parties to the marriage in question was Italian. It was objected that the marriage was void by virtue of the statute 5 & 6 Will. 4, c. 54, s. 2, which enacted that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, should be absolutely null and void to all intents and purposes whatsoever. The leading authority on the point is *Brook v. Brook* (*ubi sup.*). There lawfully domiciled British subjects went abroad to Denmark, where by the law the marriage of a man with his deceased wife's sister is valid, and were there duly, according to the law of Denmark, married. Lord Campbell in giving judgment said: "A marriage between a man and the sister of his deceased wife's, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native born English subjects, who had abandoned their English domicile and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be or would be held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country

in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined." There Lord Campbell treats the law of domicile as governing the validity of marriage even in the case of a man and his deceased wife's sister. Then Lord Cranworth says: "It was contended that according to the argument of the respondent such a marriage even between two Danes celebrated in Denmark must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country we must consider them as living in incestuous intercourse, and that if any questions were to arise here as to the succession to their property we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void, merely because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our law which makes the marriage void, and not the law of God; and our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction. The authorities showing that the general rule which gives validity to marriages contracted according to the laws of the place where they are contracted is subject to the qualification I have mentioned—namely, that such marriages are not contrary to the laws of the land to which the parties contracting them belong, have been referred to not only by my noble and learned friend but in the able opinion of Sir Cresswell Cresswell, delivered in the court below, as also in the judgment of the Vice-Chancellor. I abstain, therefore, from going in to them in detail. . . . I cannot, however, refrain from expressing my dissent from that part of Sir Cresswell Cresswell's able opinion in which he repudiates a part of what is said by Story, J. as to marriages which are to be held void on the ground of incest. That very learned writer, after stating that marriages valid where they are contracted are, in general, to be held valid everywhere proceeds thus: 'The most prominent if not the only known exception to the rule are marriages involving polygamy or incest; those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the law of their own countries.' And then he adds that: 'As to the first exception, Christianity is understood to prohibit polygamy and incest, and therefore no Christian country would recognise polygamy or incestuous marriages, but when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous.' The case of a polygamous marriage came before the court in *Hyde v. Hyde* (14 L. T. Rep. 188; L. Rep. 1 P. & D. 130). There both the man and woman were single, and competent to contract marriage, and the marriage was contracted in a country where polygamy was lawful between a man and woman professing a faith which allows polygamy, and although the marriage was valid by the *lex loci* the English matrimonial court would not recognise it as a valid marriage. It was held that marriage as understood in Christendom was the voluntary union for life of one man and one woman to the

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exclusion of all others, and that such a marriage was not understood in Christendom. I have to deal with a marriage valid by the law of the domicile of the parties, and also by the laws of many Christian countries, and one which is not incestuous according to the common consent of Christendom. *Sottomayor v. de Barros (ubi sup.)* was the case of a union between first cousins. There the marriage celebrated in England between Portuguese subjects domiciled in Portugal was declared void because by the law of Portugal marriage between first cousins is illegal as being incestuous. This is an instance of the way in which the law of domicile applies to the question of the validity of a marriage. Cotton, L.J. says: "It is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile." In the case before me I have to deal with a marriage valid according to the law of the domicile of the parties, and not incestuous according to the common consent of Christendom, and in my view the marriage is a valid marriage, and the lady is entitled to exercise the power of appointment in favour of her second husband and her children by him.

Solicitors: *Attles, Johnson, and Ward*, for *Hunt, Currey, Nicholson, and Co.*, Lewes.

KING'S BENCH DIVISION.

Thursday, Feb. 27.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

JONES AND OTHERS (apps.) v. DAVIES (resp.). (a)
Fishery—Lease of land including stream—No reservation of fishery rights to landlord—Passing of fishery rights under lease to tenant—Right of landlord to prosecute for taking fish—Larceny Act 1861 (24 & 25 Vict. c. 96), s. 24.

By a lease of land, whether agricultural or other land, through which a river flows, the right of fishing in the river, unless expressly reserved to the lessor in the lease, passes to the tenant, and the lessor cannot prosecute persons for unlawfully taking fish in the river.

CASE stated by justices in and for the county of Denbigh.

At a petty sessions in and for the petty sessional division Uwchale, in the county of Denbigh, on the 26th Aug. 1901, an information was preferred by Richard Davies (the informant and present respondent) against Robert Jones and four other persons (the defendants and present appellants), alleging that the defendants on the 13th July 1901, at the parish of Pentrevoelas, in the county of Denbigh, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully and wilfully did take fish called trout, then being found in a certain stream of water there wherein Colonel Wynne Finch then had a private right of fishery, and not running through or being in any land adjoining or belonging to the dwelling-house of any person being the owner of the water or having the right of fishing therein contrary to the form of the statute in such case made and provided.

The justices, after hearing the evidence and

the parties, adjudged that each of the defendants for his offence should pay the sum of 5s., and to the informant 3s. 1d. for costs.

The following facts were proved by the informant's evidence:

That the informant had been a gamekeeper in the employ of Colonel Wynne Finch for over twenty-one years, and that Colonel Finch claimed a right of fishery in the river Cadnant which flows through a certain farm called Maesmerddyn, belonging to Colonel Finch, and in the occupation of one David Jones, in whose employ all the defendants were on the date in question; that the defendants (except Hugh Jones) caught with their hands certain trout in the river; that the defendant Hugh Jones did not fish at all, but took part by carrying fish caught and the coats of the other defendants; that Colonel Finch had given David Jones, the tenant of the farm, permission to fish in certain waters on the farm, but not those by which the defendants were seen.

It was contended on behalf of the defendants that Colonel Wynne Finch was not the owner of the fishery rights, and the agreement signed by Colonel Wynne Finch's agent and David Jones, the tenant of the farm, was produced and admitted by the informant, from which it appeared that the game rights were reserved to Colonel Wynne Finch, but no mention was made of the fishery rights, and it was submitted on behalf of the defendants that the informant's statement of opinion that the fishery right belonged to the landlord was no evidence of the fact.

The defendant's solicitor, after the close of the case for the prosecution, having addressed the court, desired to call Hugh Jones, one of the defendants, but on the advice of their clerk the justices declined to hear him, the five defendants having been summoned jointly, and no application having been made to the court at the commencement of the hearing.

The defendant's solicitor stated he was the only witness he proposed to call, although he had subpoenaed David Jones, the tenant of the farm whose agreement of tenancy had been admitted by the informant on behalf of the prosecution. The landlord's agreement of tenancy was proved by the defendants' solicitor in cross-examination of the informant.

The question for the opinion of the court was whether upon the facts of the case above stated the decision of the justices was erroneous in point of law.

Sect. 24 of the Larceny Act 1861 (24 & 25 Vict. c. 96), provides:

Whoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour; and whoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justices shall seem meet; Provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset;

(a) Reported by W. W. ORR, Esq., Barrister at-Law.

K.B. Div.]

JONES AND OTHERS (apps.) v. DAVIES (resp.).

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but whosoever shall by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset unlawfully and wilfully take or destroy, any fish in any such water as first-mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds, and if in any such water as last-mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds as to the justice shall seem meet.

B. M. Montgomery for the appellants.—The conviction, which was under sect. 24 of the Larceny Act 1861, was wrong upon four grounds. First, there was no evidence of the private right of fishery in Colonel Finch as laid in the information; on the contrary, the evidence showed that the right of fishery was in the tenant of the farm, in whose employment all the appellants were, and not in the landlord. Secondly, there was no evidence of *mens rea* on the part of the appellants, and no evidence that the appellants in taking the fish had any intention of doing any wrong. Thirdly, the facts as proved disclosed a *bonâ fide* claim of right, which ousted the jurisdiction of the magistrates; and fourthly, the evidence of one of the appellants was improperly rejected. The fishing rights passed to the tenant under the lease. The law is thus stated in Paterson's Fishery Laws, p. 67: "In the ordinary case of a lease of lands including waters or streams, the right of fishery is necessarily implied as part of the general right to the soil and water, unless the lessor specially reserve it. If, therefore, there is no special reservation of the right of fishery, the tenant and not the landlord will be the party entitled to the fishery. Properly speaking, the right cannot be reserved by the lease; but, what is practically the same thing, the reservation is construed as a re-grant by the tenant to the landlord." That correctly states the law on the subject, and is borne out by the case which is there cited as an authority for it, the case of *Ewart v. Graham* (33 L. T. Rep. O. S. 349; 7 H. L. Cas. 331). *Halse v. Alder* (38 J. P. 407), also shows that the right of fishery is in the tenant under the lease, and it also shows that as there was no evidence of any *mens rea* on the part of the appellants, the conviction under sect. 24 of the Larceny Act was wrong.

Ellis Griffith for the respondent.—The real point is whether in the case of an agricultural tenancy, where there are no words of any kind in the lease as to the fishing, the right to fish remains in the landlord, or passes to the tenant under the lease. Upon this point there is no direct authority. [Lord ALVERSTONE, C.J.—How could the landlord go on to the lands and fish, unless the right was given to him or reserved to him by the lease?] He could do so in the same way as he could go on to the land to dig for minerals. Although I can find no authority to show that the passage cited from Paterson's Fishery Laws is not good law, yet there is no authority to show that it is good law. The fishery rights are still in the landlord; and there is no case which goes so far as to say that where a lease of land for agricultural purposes says nothing about the right of fishing such right passes to the tenant. The text-books are against this contention, but there is no authority to support the statements in the text-books. The right view to take of this tenancy is that the tenancy was for agricultural purposes, and that the tenant had no

rights over this stream except for agricultural purposes, and therefore no fishing rights. A guilty intention is not necessary to constitute an offence under this section, and the fact that the appellants acted under the *bonâ fide* belief that they had a right to take the fish is no defence:

Hudson v. Macrea, 9 L. T. Rep. 678; 4 B. & S. 585.

He referred to

Moore v. Earl of Plymouth, 7 Taunt. 614;

Halse v. Alder (*ubi sup.*)

Lord ALVERSTONE, C.J.—The appellants in this case were convicted under sect. 24 of the Larceny Act 1861, of unlawfully and wilfully taking fish in a certain stream, which fish were alleged to be in a fishery belonging to Col. Wynne Finch. There was no evidence of any previous grant or of any reservation of this fishery. I think the law on the point is correctly stated in Paterson's Fishery Laws in the passage that has been read—namely, that the right of fishery goes to the tenant under the lease, and for the very good reason given by Paterson that the lessor could not, without express power being reserved, come on the lands or to the banks of the stream to exercise the rights of fishing. That being so, it seems to me that there is an end of the case, and I think it right to say that these men seem to have been fishing with the leave and licence of the tenant. It is, however, enough to say that there was no evidence of any unlawful taking of the fish on which to convict the appellants. This conviction must therefore be quashed.

DARLING, J.—The evidence in this case showed that the right of fishing was in the tenant of the farm. There was no evidence to show that it was in Colonel Wynne Finch, and therefore on that ground the summons must have failed. The evidence also went to show, that the appellants thought that they were not doing any wrong. The presumption was that they were not doing anything unlawful, and there was no evidence to rebut that presumption.

CHANNELL, J.—I also think that the right of fishing in this stream was in the tenant of the farm; but, supposing there is a doubt about that, it clearly was not in the landlord. By an ordinary lease of land the soil and banks of a river clearly pass to the tenant, and that prevents the landlord going there for the purpose of fishing unless there were a reservation in the lease permitting him to go there, and therefore that prevents the landlord from taking the fish. The right to take the fish depends entirely on the possession of the soil, and therefore it is quite clear that it is not the fishery of the landlord, because he has no right to go there at all unless he reserves it.

Appeal allowed. Conviction quashed.

Solicitors for the appellants, *Lloyd-George, Roberts, and Co.*, for *Lloyd-George and George, Criccieth*.

Solicitors for the respondent, *Paterson, Snow, Bloxham, and Kinder*, for *James and Humphreys, Llanrwst*.

K.B. Div.] PARKER (app) v. MAYOR, ALDERMEN, & BURGESSES OF BOURNEMOUTH. [K.B. Div.]

Friday, Feb. 28.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PARKER (app.) v. MAYOR, ALDERMEN, AND BURGESSES OF BOURNEMOUTH. (a)

Bye-laws—Power to make bye-laws for regulating sale of articles on beach—Bye-law forbidding sale except under agreement—Validity—Local Government Board's Provisional Orders Confirmation (No. 10) Act 1890 (53 & 54 Vict. c. clxxix.), s. 1, and schedule.

Under statutory powers enabling a corporation to make bye-laws for regulating the selling or hawking of any article on their beach and foreshore, the corporation made a bye-law that: "A person shall not on the said beach or foreshore sell or hawk or offer or expose for sale any article, commodity, or thing, except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall by notice affixed or set up thereon from time to time appoint for the purpose."

Held, that the bye-law was unreasonable and bad on the ground that it gave the corporation power to make any agreement they chose without reference to the question of the reasonableness or unreasonableness of such agreement, and that it reserved to them a right to refuse to give a licence to any particular person.

CASE stated by justices of the peace for the county borough of Bournemouth in the county of Southampton.

At a petty sessions held at Bournemouth on the 6th Sept. 1901, an information was preferred by the mayor, aldermen, and burgesses of Bournemouth (the respondents) against Henry Parker of Poole in the county of Dorset, hawker (the appellant) charging the appellant "that he, on the 5th Aug. 1901 within the borough of Bournemouth, did unlawfully sell, hawk, offer, and expose for sale upon the beach and foreshore then in the possession and occupation of the corporation of the said borough certain articles and things—to wit, cockles and winkles—otherwise than in pursuance of an agreement with the said corporation."

This information was heard and determined by the justices, and upon such hearing they convicted the appellant.

The information was laid under No. 3 of the Bye-laws made by the corporation of Bournemouth "for the regulation of the beach and foreshore under the powers given by the Local Government Board's Provisional Orders Confirmation (No. 10) Act 1890 (53 & 54 Vict. c. clxxix.)," which in the schedule provided with regard to Bournemouth:

The commissioners may from time to time make bye-laws for all or any of the following purposes (that is to say): For regulating the erection or placing on the beach and foreshore within the district for the time being in their possession or occupation of any booth, tent, shed, stand, stall, show, exhibition, swing, roundabout, or other similar erection . . . and generally for regulating the user of the said beach and foreshore or any part thereof. For regulating the selling and hawking of any article, commodity, or thing on the said beach and foreshore. For the preservation of order and good conduct among persons frequenting the said beach and foreshore.

Bye-law No. 3 was "for regulating the selling and hawking of any article, commodity, or thing on the said beach and foreshore," and provided:

A person shall not on the said beach or foreshore sell or hawk, or offer, or expose for sale any article, commodity, or thing except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall by notice affixed or set up thereon from time to time appoint for the purpose.

For the respondents the beach keeper in the employment of the respondents and a police constable gave evidence.

The beach keeper stated that he was in the employment of the corporation, and that his duty was to take charge of the beach near the pier; that on Monday the 5th Aug. last (being a bank holiday) he had a portion of the beach allotted for stalls about 300 yards west of the pier; that about noon, after regulating the stalls, he saw the appellant near the refreshment rooms on the beach east of the pier, and that he had a barrow on which were cockles and winkles; that he asked the appellant to remove his barrow to the proper place along the shore where the other stalls were; that the appellant said he would remain where he was, and that he would give his name and address, and that the beach keeper could summon him; that he (the beach keeper) saw him in the evening with his barrow in the same position as the morning, and that he saw him selling cockles there. He further stated that there was a place set apart for stalls; that no notice was put up, but he thought they all knew it; that several persons close to where the appellant was standing had corporation licences; and that he should not have objected if the appellant had had a licence; that a difference was made on bank holiday, and freer access was allowed on other days, and that no one was allowed to stand between the refreshment rooms and the pier where the appellant was. The constable gave similar evidence.

The appellant stated that he was a fish hawker, and that he had carried on the same business for some four or five times each year for twenty years on the same spot on the beach as he did on the day in question, and that he was selling winkles and cockles on that day, and that he had applied for a licence to the Bournemouth Corporation, but was refused.

Another witness stated that he had for twenty-five years sold on the same spot where the appellant was charged with selling on, and that he had never applied for a licence.

It was contended for the appellant (1) that the bye-law was bad as being beyond the powers conferred upon the respondents and was unreasonable, and that the bye-law, if good, could not be enforced unless and until some part or parts of the beach and foreshore had been apportioned by the respondents for the purpose of persons selling or hawking, or offering or exposing for sale any article, commodity, or thing, and notice thereof had been affixed or set up on the beach and foreshore, as provided by the bye-law; (2) that the information did not disclose any offence; (3) that there being no evidence that any part of the beach or foreshore had in fact been set aside by the respondents, or that notice of such setting aside had been affixed and set up, the appellant could not be convicted under the bye-law; and (4) that the appellant had in good faith claimed a right to

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

K.B.] *REX v. ARCHBISHOP OF CANTERBURY; Re GORE; Ex parte COBHAM, &c.* (No. 2). [K.B.]

do the act complained of, and that therefore, the justices had no jurisdiction.

The justices overruled the appellant's contentions, and held that the bye-law was reasonable and valid; that the offence was sufficiently set out in the information, which disclosed an offence—namely, a breach of the third bye-law; that the appellant did, as alleged in the information, sell, hawk, offer, and expose for sale upon the beach and foreshore certain articles and things otherwise than in pursuance of an agreement with the corporation, and that the claim of right set up by the appellant was unreasonable, and such as could not exist in law.

They therefore convicted the appellant, and imposed a fine of 2s. 6d. and 14s. costs, and in default of distress fourteen days imprisonment.

The question for the opinion of the court was whether the justices came to a correct determination and decision in point of law.

S. H. Emanuel for the appellant.—The point is as to the right to sell and hawk articles on the beach, and raises the question as to the validity of bye-law No. 3, which was made under sect. 1 of the provisional order 1890. The bye-law is invalid, as it gives the corporation power to make any agreement they please—reasonable or unreasonable. The bye-law was made under a power for regulating the sale on the beach, and not for prohibiting it altogether, and until the corporation have put up a notice they cannot prevent the appellant from selling on any part of the beach. If the view of the corporation were correct the bye-law would be one for prohibiting the sale altogether, and not merely for regulating it. The corporation never set up any notice at all, and never set apart any part of the foreshore as mentioned in the bye-law, so that the appellant was summoned for that which is not an offence under the bye-law, unless and until there has been a place set apart by notice. The bye-law is *ultra vires* and bad, and the conviction under it ought to be quashed.

Clavell Salter for the respondents.—A very similar bye-law was considered in *Gray v. Silvester* (61 J. P. 724), and was held to be valid. [Lord ALVERSTONE, C.J.—That is a very different case. There seems to be nothing there as to the making of an agreement.] The provision requiring an agreement is nothing more than a provision for the regulation of the sale. The corporation had power under the provisional order to regulate the selling of any article on the beach, and under that power they would be entitled to make a bye-law regulating not only the places where the selling might be carried on, but also the persons who might be allowed to sell, so that the requiring an agreement from such persons would be in accordance with the powers conferred upon the corporation. [CHANNELL, J.—The bye-law does not merely regulate the sale; it says that a person who has not made an agreement with the corporation shall not sell. It does not say what the agreement is; if the agreement were set out in the bye-law, and were unreasonable then the bye-law would be invalid, and it would seem to be equally so if it required an agreement, and left it to the corporation to say what the agreement should be.] It must be assumed that any agreement required by the corporation, who are owners of the beach, would be reasonable, and

therefore the bye-law is not rendered invalid by that provision requiring an agreement.

Lord ALVERSTONE, C.J.—We are clearly of opinion that this conviction cannot be supported. The appellant was summoned because he sold cockles on the beach without having an agreement with the corporation. I express no opinion as to the last point raised by counsel for the appellant, whether, before any person could be summoned under the bye-law, a part of the beach or foreshore must be marked out by the corporation by a notice affixed thereon. The appellant was not summoned under that part of the bye-law; he was summoned for selling otherwise than in pursuance of an agreement with the corporation. I think that the bye-law under which the appellant was summoned is bad for the reason that it withdraws altogether from those who may have to interpret it and consider its validity any question as to whether the agreement referred to in it is a reasonable agreement or not. It puts it in the power of the corporation to make any agreement they like; and the question which we have to consider is whether a bye-law which reserves to the corporation the right to refuse any particular person is on the face of it a good bye-law. I think it is not. The corporation can, of course, deal with the matter by altering the bye-law. I think that this bye-law was not warranted by the Provisional Order, and that this conviction ought therefore to be quashed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

Appeal allowed. Conviction quashed.

Solicitors for the appellant, *Speechly, Mumford, Rodgers, and Craig*, for Lamport and Bassitt, Southampton.

Solicitors for the respondents, *Lovell, Son, and Pitfield*, for J. and W. H. Druitt, Bournemouth.

Feb. 14 and March 3.

(Before Lord ALVERSTONE, C.J., WRIGHT and RIDLEY, JJ.)

REX v. ARCHBISHOP OF CANTERBURY; Re GORE; Ex parte COBHAM AND GARBETT (No. 2). (a)

Crown—Costs—Mandamus—Prerogative writ of—Right and liability of Crown to costs—Jurisdiction of court to give costs to or against Crown on argument of rule for mandamus.

The court has no jurisdiction to give costs either to or against the Crown, when the Crown appears upon the argument of a rule for a prerogative writ of mandamus.

The rule of the common law that the Crown "never paid nor received costs" has not been altered with regard to the prerogative writ of mandamus, either by the Act 1 Will. 4, c. 21, s. 6, or by the existing rules of the Supreme Court.

APPLICATION as to costs on the discharge of two rules for a *mandamus*, the question being whether the court had jurisdiction to order the applicants for the rules to pay costs to the Crown, where the Crown had appeared and had successfully shown cause against the rules.

Two rules *nisi* had been obtained directed to the Archbishop of Canterbury and his Vicar-

(a) Reported by W. W. OAK, Esq., Barrister-at Law.

[K.B.] *REX v. ARCHBISHOP OF CANTERBURY; Re GORE; Ex parte COBHAM, &c.* (No. 2). [K.B.]

General, commanding them or one of them, at a court to be duly holden in the matter of the confirmation of the election of the Rev. Canon Gore, D.D., to the Bishopric of Worcester, to permit or admit to appear in due form of law Captain Cobham and Edward Henry Garbett to oppose the confirmation of the election, and to hear and determine upon such opposition and upon the articles, matters and proofs thereof.

The rules were obtained on behalf of Captain Cobham and Mr. Garbett, and notice of the same was directed to be served on the dean and chapter, but there was no similar direction to serve the Treasury on behalf of the Crown.

Although the Crown were no parties to the original rules, the law officers of the Crown appeared for the Crown on the argument of the rules and showed cause against the same, and the Archbishop of Canterbury and his Vicar-General appeared by the same counsel and also showed cause against the rules.

The rules were discharged with costs to the Archbishop: (see *Re v. Archbishop of Canterbury; Re Gore; Ex parte Cobham and Garbett, ante*, p. 79), but as it was submitted on behalf of the applicants that the Crown were not entitled to receive costs, the matter was allowed to stand over for further argument as to whether the court had jurisdiction to order the applicants to pay costs to the Crown.

Dankwerts, K.C. (*Morton Smith* with him) for the applicant Garbett. There are two questions as to the costs—first, as to the costs of the Crown; and, secondly, as to the costs of the Archbishop and Vicar-General, who appeared by the same counsel. In point of fact the Archbishop and Vicar-General have incurred very little, if any, costs, because their case had been taken up by the Crown, and the Crown, through the Treasury Solicitor, instructed the counsel who appeared for them, and therefore the costs which the applicants may have to pay to the Archbishop will go not to the Archbishop but to the Crown, if this court so directs; consequently, they stand on the same footing as the other costs of the Crown. With regard to the costs of the Crown, the Crown were no parties to the original rule, and they only came in to show cause. [Lord ALVERSTONE, C.J.—I do not think that makes any difference, because I think this rule ought to have been served on the Crown.] The broad proposition is this, that apart from an Act of Parliament, the invariable rule of the common law is that the Crown neither takes nor receives costs, and that as it is the King's prerogative not to pay costs to a subject, so it is beneath his dignity to receive them.

3 Blackstone's Commentaries, p. 400;

Chitty's Prerogatives of the Crown, p. 310, s. 8 (Costs);

West on Extents, p. 227;

Manning's Practice of the Exchequer, p. 69;

Fowler's Exchequer Practice, vol. 2, pp. 312-313.

[Lord ALVERSTONE, C.J.—The whole question is whether the modern practice has altered the general principle.] The practice has been so uniform and so consistent, that apart from an Act of Parliament it cannot be altered:

Re v. Miles, 7 T. R. 367;

Re v. Corum, 1 Anstr. 50;

Lord Advocate v. Lord Douglas, 9 C. & F. 173;

Smith v. Earl of Stair, 2 H. L. Cas. 807.

[Lord ALVERSTONE, C.J.—Do you suggest that you could not have claimed costs against the Crown if the rule had been made absolute?] Yes; it is mutual. The Crown neither pays nor receives costs. In *Lord Advocate v. Hamilton* (1 Macq. 46, at p. 55) Lord Brougham said that "according to an inflexible rule, we cannot give costs against the Crown." In *Moore v. Smith* (1 E. & E. 597) it was held that costs could be given to the Crown; but that depended on statute—namely, sect. 6 of the Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43)—and that is clearly shown by comparing it with the previous case of *Reg. v. Beadle* (29 L. T. Rep. O. S. 76; 7 E. & B. 492), where the court quashed a conviction on the ground that the Court of Quarter Sessions had no jurisdiction to award costs against the Crown, as they had done. Lord Campbell, C.J., speaking of the costs, said that the party "has them not by common law; and there is no enactment giving them to him." The judgment of Lord Cranworth, L.C., in *Kane v. Reynolds* (24 L. T. Rep. O. S. 137; 4 De G. M. & G. 565, at p. 571), is to the same effect. In *Reg. v. Burial Board of Bishop Wearmouth* (5 Q. B. Div. 67, at p. 72) Sir G. Jessel, M.R. discharged a rule for a *mandamus* with costs against the Crown, but afterwards, upon the mistake being pointed out to the court and on further argument, the court held that they had no power to give costs against the Crown. In *Mews v. The Queen* (48 L. T. Rep. 1; 8 App. Cas. 339) an order was made *per incuriam* in the court below that costs should be paid to the Crown, and they were so paid. The House of Lords reversed the decision, and ordered the Crown to pay the costs; but there is a note signed by Lord Blackburn (8 App. Cas. 353 n), that that was done solely because the Crown had in the court below received costs, and the note expressly says that the case is not to be cited as a precedent. That is a clear admission of the principle, which is also recognised by the House of Lords in *Justices of Middlesex v. The Queen* (51 L. T. Rep. at p. 520; 53 L. J. at p. 517, Q. B.). The only statute which gives costs in *mandamus* is 9 Anne, c. 20, which only deals with costs where the rule is made absolute and where there is a return. He also referred to

Pringle v. Secretary of State for India, 40 Ch. Div.

288; s.o. *Re Bombay Civil Fund Act 1832; Ex parte Pringle*, 60 L. T. Rep. 796;

Re Mills' Estate, 55 L. T. Rep. 465; 34 Ch. Div. 24;

Viner's Abr., vol. 6, tit. "Costs," p. 322;

Crown Office Rules (1886), No. 63;

The Preamble to the Crown Suits Act 1855 (18 & 19 Vict. c. 90).

Bramwell Davis, K.C. and *B. Whitehead* for the applicant Cobham.

Henry Sutton for the Crown.—The case of *Moore v. Smith* (*ubi sup.*) was decided on sect. 6 of the Summary Jurisdiction Act 1857, and it is contended that the doctrine applied to that section applies equally to the section relating to *mandamus*. Under the words in that section it was held that the Crown were entitled to receive, and were bound to pay, costs under it, whether they were represented directly or indirectly; and no doubt that depends on the statute. The statute on which the case depends is not the statute of Anne, but 1 Will. 4, c. 21 (an Act to improve the proceedings in prohibitions and on writs of *mandamus*), s. 6. That section provided:

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"In all cases of application for any writ of *mandamus* whatsoever, the costs of such application, whether the writ shall be granted or refused . . . shall be in the discretion of the court, and the court is hereby authorised to order and direct by whom and to whom the same shall be paid." The words of this section are no less general than the words of the section under which *Moore v. Smith* (*ubi sup.*) was decided. Sect. 6 of 1 Will. 4, c. 21, was repealed by the Statute Law Revision Act of 1881 (44 & 45 Vict. c. 59), but sect. 6 of the repealing Act provided that "The enactments relating to the making of rules of court contained in the Supreme Court of Judicature Act 1875, and the Acts amending it, shall extend and apply to all matters with respect to which rules of procedure or general orders might have been made under any enactment repealed by this Act, and to all proceedings by or against the Crown." Under sect. 6 of the Act 1 Will. 4, c. 21, costs were given both in favour of and against the Crown. In *Reg. v. Commissioners of Taxes* (8 L. T. Rep. O. S. 155; 9 Q. B. 637) and in *Idian's* case also in 1846 (unreported) costs were paid to the Crown, as I have found by inquiry at the Crown Office, though it does not appear in the report, and that was a case of *mandamus* under that Act. [WRIGHT, J.—I have no doubt there are many cases in which the Crown took its costs when nobody denied their right. Lord ALVERSTONE, C.J.—Have you any reported case where under the *Mandamus* Act the Crown got its costs?] No; I know of none where the question has ever been raised; but the words of sect. 6 are as wide as the words of sect. 6 of 20 & 21 Vict. c. 43. Since the Act of 1881 the rules came into force, and the Rules of the Supreme Court 1883 were applied by Order LXVIII. to a certain part of the Crown procedure, including *mandamus*, and by rule 2 certain orders were made to apply to all civil proceedings on the Crown side including *mandamus*, and amongst these Order LXV. as to costs. Order LXV. r. 1, provides that "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the court or judge." Nothing could be wider than that rule. Then Order 300 of the Crown Office Rules 1886 says: "Order LXV. of the Rules of the Supreme Court (costs) shall, as far as it is applicable, apply to all civil proceedings on the Crown side"; and Order 301 applies the same order to all criminal proceedings on the Crown side. The general effect of these orders and rules is to give the court discretion in all cases. In *Reg. on the prosecution of the Bolton Union v. Local Government Board*, in 1878 (unreported), in *Reg. v. Staines Local Board* (69 L. T. Rep. 714), and in *Reg. v. Secretary of State for War* (64 L. T. Rep. 764; (1891) 2 Q. B. 326), the Crown got their costs when successful on a writ of *mandamus*. [Lord ALVERSTONE, C.J.—Is there any reported case where costs have been given to or against the Crown where the point has been raised and argued? My brother Wright and I have said that it has been done both ways when the case was not argued.] I have no reported case where the point has been raised and argued.

Danckwerts, K.C. referred to sect. 299 of the Public Health Act 1875, which gives the Local

Government Board costs in certain cases, but was not called on to reply.

Lord ALVERSTONE, C.J.—We think the Crown are not entitled to their costs, but we should like to go through and consider the authorities and give our reasons, because the matter has been brought to our attention in a formal manner. But we are all of opinion that the archbishop is entitled to his costs, and we will give our reasons for deciding that the Crown are not entitled to their costs on another day. There will be one set of costs payable to the archbishop, and no costs of this argument.

Cur. adv. vult.

March 3.—Lord ALVERSTONE, C.J. read the following written judgment of the court (Lord Alverstone, C.J., Wright and Ridley JJ.), prepared by Wright, J.:—In this case rules *nisi* were granted at the instance of the prosecutors Cobham and Garbett, calling on the Archbishop of Canterbury and his Vicar-General to show cause why a prerogative writ of *mandamus* should not issue commanding him to hear opponents of the confirmation of Canon Gore as bishop-elect of the diocese of Worcester. Notice of the rules was directed to be served on the dean and chapter. There was no similar direction to serve the Treasury on behalf of the Crown, but the application affected the rights of the Crown, and, in our opinion, the Attorney-General had a clear right to oppose the motion. Cause was shown before us by the law officers appearing on behalf of the Crown without objection raised, and by counsel on behalf of the archbishop and Vicar-General, and after argument the rules were discharged, costs being allowed to the archbishop. The only question remaining to be considered is whether we have jurisdiction to order the prosecutors to pay costs to the Crown. We have not been referred to any case, nor have we been able to discover any, in which the ancient doctrine that in matters at common law the Crown "never paid nor received costs," as it is laid down by Lord Campbell in *Reg. v. Beadle* (7 El. & Bl. 492), in accordance with *Reg. v. Miles* (7 T. R. 367, in 1797), and see *Lord-Advocate v. Lord Douglas* (9 Cl. & Fin. 173, in 1842), and *Smith v. Earl of Stair* (2 H. L. Cas. at p. 809, in 1849), has been expressly questioned in relation to the prerogative writ of *mandamus*. There certainly have been some instances in which the doctrine has been disregarded, whether from inadvertence or otherwise we do not know; but in the only reported cases in which it has been considered it has been admitted at the Bar, whether in favour of or against the Crown; and we think that neither the Act 1 Will. 4, c. 21, s. 6, nor the existing rules of the Supreme Court, have altered the law as affecting the present case. We must not be understood as expressing any opinion either in relation to matters other than the prerogative writ of *mandamus*, or even as to that writ when it is applied for by or against the officers of executive departments of the public service in relation to their statutory or other duties. On the one hand, the fact that statutes have been passed providing for payment of costs to the Crown in relation to Crown specialties (33 Hen. 8, c. 39), and by or to the Crown upon petitions of right (23 & 24 Vict. c. 34), or upon revenue suits (18 & 19 Vict. c. 90; and 22 & 23 Vict. c. 21), proceedings in relation to customs

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(40 & 41 Vict. c. 13, s. 5), and upon proceedings by the Commissioners of the Admiralty (27 & 28 Vict. c. 57, s. 11; 28 & 29 Vict. c. 124, s. 2; and 31 & 32 Vict. c. 78, s. 5), is of some weight as an indication that express legislation was necessary in order to exclude the rule of the common law. On the other hand, as incidental to departmental administration there must often be litigation which does not directly affect any prerogative of the Crown, and as to which no good reason can be assigned for the denial of costs to the successful party. And the case of *Moore v. Smith* (32 L. T. Rep. O. S. 314; 1 E. & E. 597, in 1859), supports this view. The question does not arise in this case, but it may be worthy of consideration whether the Statute Law Revision and Civil Procedure Act of 1881 (44 & 45 Vict. c. 59), s. 6, gives power to make rules of the Supreme Court in relation "to proceedings by or against the Crown." The words are *prima facie* wide enough to include power to make provision for costs, but it may be that the decision in *Re Mill's Estate* (55 L. T. Rep. 465; 34 Ch. Div. 24), shows that the terms of this section cannot be construed so widely as to enable rules to be made binding the Crown to pay costs in all cases. We agree with the Court of Queen's Bench in *Reg. v. Beadle* (*ubi sup.*), that it is very desirable that such provision should be made, and, if effectual and proper provision cannot be made by rules for enforcing payment of costs by the Crown, the matter is one very proper for the consideration of the Legislature. In the Crown Suits Act and the Petition of Right Act a special procedure is provided, but in the Customs and Admiralty Acts a simple declaration of liability was regarded as sufficient. In the present case, for the reasons which we have given, we cannot make any order for payment of costs to the Crown.

Judgment accordingly.

Solicitor for the applicant Garbett, *R. Todd*.

Solicitors for the applicant Cobham, *Wainwright and Co.*

Solicitor for the Crown, *The Treasury Solicitor*.

March 4 and 5.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

NEWBRIDGE RHONDDA BREWERY COMPANY v. EVANS (a)

Inland Revenue—Beer — War tax — Conditional contract of sale—Incidence of tax — Customs Consolidation Act 1876 (39 & 40 Vict. c. 36), s. 20 — Finance Act 1900 (63 Vict. c. 7), s. 8.

By sect. 20 of the Customs Consolidation Act 1876, as applied by sect. 8 of the Finance Act 1900, the new excise duty on beer imposed by the latter Act may be added to the contract price of the beer where the contract or agreement for the sale or delivery of the beer duty paid was made before the passing of the Act.

An agreement under which the purchaser is bound to buy his beer from a certain brewer, provided the latter is willing to sell it to him duty paid, at a certain price is not a contract for the sale or delivery of the beer within sect. 20. The contract for sale in such case is made only when

the order for the delivery of beer is given to the brewer in pursuance of the conditional agreement, and, if such order was given after the passing of the Finance Act 1900, the brewer is not entitled under sect. 8 to add the new duty to the price payable by the purchaser though the conditional agreement was made before it.

THIS was an appeal from the judgment of the learned County Court judge of Glamorganshire dismissing the action.

The claim of the plaintiffs was that the defendant should pay them 20l. 13s. for balance of goods sold and delivered from June 1900 to April 1901 inclusive, or, in the alternative, that he should pay them the same amount for the war tax paid by the plaintiffs for the defendant by his request or as otherwise payable by the defendant—namely, 826 barrels of beer at 6d. per barrel.

The plaintiffs were brewers, and the defendant was the tenant of a "tied" house let by them to him. The defendant's public-house was known as the Turburville Arms, and was held by him for a term of fourteen years, under a lease dated the 18th May 1899, at a rent of 150l. a year.

The material covenants of the lease for the purposes of this case were as follows:—

The tenant will not during the said term hereby, granted convert the said messuage or public-house into a private dwelling-house, but will keep the said messuage open as a licensed inn, tavern, or public-house, and will use his best endeavours to preserve and extend the trade and connection thereof, and will not carry on or suffer to be carried on upon any part of the said premises any trade or business other than the trade or business of an innkeeper or publican. . . . And also that the lessee shall and will from time to time and at all times during this demise and as often as occasion shall require purchase of and from the Newbridge Rhondda Brewery Company Limited, their successors and assigns, all the ale, beer, and porter, and other malt liquors (except spirits) that shall be drawn, sold, or disposed of on or upon the said demised premises, whether the same shall be consumed on the premises or not, and if the said company shall deal in and be willing to supply the same of a quality equal to that supplied by them to their customers and at the prices set forth in the schedule hereto; and also that the lessee shall not deal or contract with any person or persons for ale, beer, porter, or other malt liquors (except spirits) to be so sold or drawn in or upon the said demised premises or any part thereof without the consent in writing of the lessors, and in case of any breach of the covenant lastly hereinbefore expressed on the part of the lessee the lessee shall and will pay to the said company the sum of 1l. a barrel.

By the schedule of prices, the price of "fresh beer brewed by the successors or assigns" was fixed at 30s. a barrel.

By sect. 6 of the Finance Act 1900 (63 Vict. c. 7) an additional tax of 1s. per barrel was put upon fresh beer.

On the 24th May 1900 the plaintiffs sent to the defendant the following notice:

We beg to inform you that, in consequence of the Government imposing upon brewers an extra duty of 1s. per barrel towards defraying part of the exceptional expenditure now going on in South Africa this company have decided to bear a part of such extra beer duty, and will therefore debit your account at the rate of 6d. per barrel as a war tax on and after the 1st June next, although entitled to charge the extra duty as and from the 6th March, in accordance with the Finance Bill. We trust you will see the fairness of this arrangement,

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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and hope the Government will soon see their way clear to take off this special duty, when matters will revert back to the ordinary prices.

The facts as found by the County Court judge were as follows:—

The plaintiffs supplied 826 barrels of beer to the defendant from the 1st June 1900 to the end of April 1901 inclusive.

These barrels of beer were supplied from time to time in pursuance of specific orders given by the defendant to the plaintiffs on each occasion for varying quantities.

In respect of these barrels defendant had paid the scheduled price of 30s. per barrel, but the plaintiffs claimed in addition that the defendant should pay 6d. per barrel, being a proportion of the tax imposed on beer by the Finance Act 1900.

The learned County Court judge held on these facts that there was a fresh contract in respect of each order; that all the lease did was to fix the price; and that the contract did not come within the purview of sect. 20 of the Customs Consolidation Act 1876, which is applied by sect. 8 of the Finance Act 1900 to the extra beer duty imposed by sect. 6 of that Act.

Customs Consolidation Act 1876 (39 & 40 Vict. c. 36):

Sect. 20. In the event of any increase, decrease, or repeal of duties of customs chargeable upon any goods or commodities after the making of any contract or agreement for the sale or delivery of such goods duty paid, it shall be lawful for the seller in case such increase shall accrue before the clearance and delivery from the warehouse of such goods at such increased duty and after payment thereof to add so much money to the contract price as will be equivalent to such increase of duty, and he shall be entitled to be paid and to sue for and recover the same.

Finance Act 1900 (63 Vict. c. 7):

Sect. 8. Section 20 of the Customs Consolidation Act 1876 (which has reference to the effect of changes of duty on existing contracts) shall apply to the imposition of new duties as well as to the increases, decreases, or repeals, and as so amended shall apply to duties of excise as well as duties of customs, with the substitution in the case of excise duty on beer of the time of the charge of the duty for the time of the clearance and delivery from the warehouse.

A. T. Lawrence, K.C. (Loehnis with him) for the appellants.—The point taken by the learned County Court judge against us is that the contract for the sale of the beer was not made before the passing of the Finance Act 1900. He held that the contract for the sale was made when the order was given for the delivery of so many barrels. The whole question, then, is, Does this lease constitute a contract for the sale of this beer? The County Court judge says all it does is to fix the price of the beer, but that the contract of sale is made when each order for delivery is given. [CHANNELL, J.—The lease does not fix even the price. You are not bound by it to supply beer at 30s. a barrel. If for any other reason—say increase of cost of production—you found you could not profitably supply fresh beer under say 32s. per barrel, you could say to the defendant: "You must either take it at that price or not at all." The contract only applies as long as you are willing to supply the beer at the price mentioned in the lease.] That, no doubt, is true.

If we refuse to supply the beer at 30s. a barrel, we evade the contract by condition subsequent, but the fact that we can by condition subsequent evade the contract does not prevent this being a contract until we do so evade it. I submit that the true view of this lease is that it is a contract between the parties for the letting of the house and the supply of beer for consumption in that house. And the tenant not merely agrees to take the house, but he agrees to purchase from the brewery company all the ale, beer, and porter that shall be drawn, sold, or disposed of upon the premises. Now, the word "purchase" connotes sale—there cannot be such a thing as a purchase without a sale—and when the lessee covenants with the lessor to purchase, there is necessarily a corresponding promise on the part of the covenantee to sell. [CHANNELL, J.—There would be if the lease did not say the contrary, but this lease does say the contrary.] I think, if these words "willing to supply" are looked at closely, it will be seen that what they point at is the possibility of the lessors' ceasing to deal in the commodity. The schedule includes not merely their own beer, but a variety of malt liquors brewed by others. This is, I submit, a contract for the "sale or delivery"—the words of the section are in the alternative—of beer, and the contract was made before the Act; ergo, it comes within the provisions of sect. 20 of the Act of 1876 as applied by sect. 8 of the Act of 1900.

Sankey for the respondent.—Before stating my contention on the construction of the sections referred to, I wish to point out that sect. 20 of the Customs Consolidation Act 1876 is repealed by sect. 10 (4) of the Finance Act 1901, and I think the words of the substituted enactment throw some light on the meaning of sect. 20. The substituted words are as follows: "Where any new customs import duty or new excise duty is imposed or where any customs import duty or new excise duty is increased and any goods in respect of which the duty is payable are delivered after the day on which the new or increased duty takes effect in pursuance of a contract"—not under a contract for their sale—"made before that day," &c. Now, if the words of sect. 20 had been "in pursuance of a contract made before the Act was passed," I should have nothing to say. But the words of sect. 20 are "the making of any contract or agreement for the sale or delivery of" beer duty paid. The County Court judge has found that here the contract for the sale or delivery of the beer was made only when the orders to deliver it were given, and these were given, not before, but after the Act of 1900 was passed. All that the lease amounted to was an agreement that, as long as the lessors were willing to sell beer at 30s. a barrel, the lessee was bound to buy his beer from them. That was not a contract for the sale of beer. It was merely a contract as to the price at which the beer was to be sold. [CHANNELL, J.—It was not even that. It was merely an agreement giving the lessors the right to supply the beer at a certain price if they chose to do so.] Yes; I am putting the case against me higher than I should. All I wish to insist upon is that there was no contract to sell the beer. Until the order for beer was actually given there was no contract of sale. The certain evidence of that is that the

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appellants could not prove the sale by putting in the lease.

Lawrence, K.C. in reply.

Lord ALVESTONE, C.J.—In this case we think that the County Court judge has come to a right conclusion, and substantially we agree with the ground which he has taken. The claim of the appellants is that under sect. 20 of the Act of 1876, which is attracted to the new duty under the Act of 1900 by sect. 8 of the Finance Act 1900, the brewer is entitled to throw the whole *ls.*, and therefore the *6d.* which he claimed in this case, upon the publican. We think that sect. 20 of the Act of 1876 was meant to apply to the case in which there was a mutual obligation, fixed prior to the imposition of the duty contemplated by that section, to sell on the one hand and to purchase on the other. Now, in this case the contract in the lease is that the tenant shall purchase from the plaintiffs all the ale, beer, and porter which shall be drawn or sold or disposed of, whether the same shall be consumed on the premises or not, if the company shall deal in and be willing to supply the same at a quality equal to that supplied by them to their customers, and at the prices set forth in the schedule. Therefore we think that, there being that right on the part of the brewery company to say that they will not supply at those prices if they choose to do so, it is impossible to say that that was one of the contracts which came within sect. 20 of the Act of 1876. I was for a time rather impressed with the argument of Mr. Lawrence that the brewer in this case was merely a conduit pipe for enabling the Revenue to collect from the publican the duty of *ls.* I think that is not the true view; I think that that really depends upon the same question of whether there was or was not a contract under which one was bound to receive and the other bound to deliver at that price, and that it was to that class of obligation that the statute of 1876 was intended to apply. For these reasons we think the appeal must be dismissed.

DARLING, J.—I agree.

CHANNELL, J.—I agree. If the appellants had sued on implied contract they might possibly have succeeded.

Lawrence, K.C.—They wished to raise this point.

Appeal dismissed.

Solicitors for the appellants, *Godden, Son, and Holme, for Davies and Co., Pontypridd.*

Solicitors for the respondent, *Wrentmore and Son, for Edward Williams and Co., Pontypridd.*

KING'S BENCH DIVISION, IN BANKRUPTCY.

Tuesday, Feb. 18.

(Before WRIGHT, J.)

Re WEIBKING; Ex parte THE TRUSTEE v. NORTH LONDON GROUNDS COMPANY LIMITED. (a)

Bankruptcy—Building agreement—Builder's plant "to be deemed annexed to the freehold"—Bankruptcy of builder—Order and disposition—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44, sub-s. 3.

The bankrupt was a builder, and had entered into

a building agreement with the respondent company to erect houses on land of which they were the freeholders.

The agreement provided that all plant and materials upon the premises "were to be deemed to be annexed to the freehold."

A receiving order having been made against the builder followed by adjudication in bankruptcy: Held, that the loose plant and materials on the land at the date of the receiving order were in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, the freeholders, under such circumstances that he was the reputed owner thereof, and passed to the trustee in bankruptcy.

Re Ginger; Ex parte London and Universal Bank (76 L. T. Rep. 808) applied.

THIS was a motion by the trustee in the bankruptcy of J. J. Weibking for a declaration that certain plant and materials on land of which the respondent company were the freeholders, were property to which the trustee was entitled as being, at the commencement of the bankruptcy, in the order and disposition of the bankrupt under such circumstances that the bankrupt was the reputed owner thereof.

This case came first before the court on the 27th Jan., and is reported on another point: (*Re Weibking; Ex parte The Trustee v. Hartley*, 86 L. T. Rep. 24). It was then adjourned in order that the present respondents might be made parties.

On the 23rd July 1901 the bankrupt entered into a building agreement with the North London Grounds Company Limited to erect fifty houses on land of which they were the freeholders.

This agreement provided (*inter alia*) as follows:

Clause 16. That Weibking was to be deemed tenant at will to the freeholders of the land until the leases therein agreed to be granted on completion of the houses should have been granted.

Clause 17. That all builders' erections, building materials, and plant on the said land could be taken possession of by the lessor in the event of the tenant making default in erecting any of the houses, &c., and thereupon the agreement was to cease, but without prejudice to the freeholder's right of action for rent, &c., or in respect of any breach by the tenant.

Clause 18. That all materials and plant brought upon the said premises were to be deemed to be annexed to the freehold, the tenant, however, being given the option of purchasing the freehold.

On the 17th Aug. 1901 a receiving order was made against the bankrupt on his own petition followed by adjudication.

The trustee in bankruptcy disclaimed the building agreement.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44, sub-s. (iii.), provides as follows:

The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise the following particulars: All goods being at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof.

H. Reed, K.C., Muir Mackenzie, and A. A. Hudson for the trustee in bankruptcy.—The freeholders had a legal right to these chattels under the building agreement (*Reeves v. Barlow*, 50

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.

IN BANK.]

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L. T. Rep. 782; 12 Q. B. Div. 438), but that agreement did not operate to vest them in the freeholders for all purposes, although as between them and the builders they were to be deemed to be annexed to the freehold. They were at the commencement of the bankruptcy, so far as those dealing with the bankrupt could tell, in the possession of the bankrupt in his trade or business with the consent of the true owners, the freeholders, and they vest by virtue of sect. 44 of the Bankruptcy Act in the trustee. The fact that the freeholders had to leave them in the possession of the bankrupt for the purpose of erecting the houses according to the building agreement makes no difference if his possession was by the consent of the true owners under such circumstances as to raise the reputation of ownership:

Re Ginger; Ex parte London and Universal Bank, 76 L. T. Rep. 808; (1897) 2 Q. B. 461.

Beddall and S. E. Earle for the North London Grounds Company Limited.—The case of *Re Ginger (ubi sup.)* was a case under the Bills of Sale Act, and has no application. Here, by virtue of clause 18 in the building agreement, the chattels became annexed to the freehold, and the Bills of Sale Acts do not apply:

Brown v. Bateman, 15 L. T. Rep. 658; L. Rep. 2 C. P. 272;

Ex parte Newitt; Re Garrud, 44 L. T. Rep. 5; 16 Ch. Div. 522;

Blake v. Izard, 16 W. R. 108.

The order and disposition clause does not apply, because the freeholders are not to be deemed the true holders until they exercise their right of entry, for until then the builder has the use of the chattels for the purposes of carrying out the building agreement. The trustee in bankruptcy can only take subject to the rights of the freeholders under the building agreement:

Ex parte Newitt; Re Garrud (ubi sup.).

WRIGHT, J.—In my opinion this case is governed by the principle of *Re Ginger (ubi sup.)*. In the present case the freeholders had a clause in the building agreement which annexed to the freehold unconditionally all materials and plant brought on to the premises, and therefore in a general sense they were the true owners of the materials and plant. Then by the same instrument which gave them the ownership of the chattels they consented to their remaining in the possession of the builder as if the builder were the true owner. That being so, according to the principle laid down in *Re Ginger (ubi sup.)*, the assent given at the time of making the instrument operates as an assent for the purposes of the doctrine of reputed ownership. That being so, I think the trustee has made out his case. Of course my judgment does not apply to any plant or materials that had been built into and become part of the houses at the date of the act of bankruptcy. It only applies to the plant and materials which were loose on the premises at that date.

Solicitors: *Braby and Macdonald; Croft and Mortimer.*

Monday, April 21.

(Before WRIGHT, J.)

Re JUKES; *Ex parte* THE OFFICIAL RECEIVER v. WHITFIELD. (a)

Bankruptcy—Act of bankruptcy—Assignment of whole property for past debt—Knowledge by assignees of existence of other creditors—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 4, sub-r. 1 (b), 49.

Sect. 49 of the Bankruptcy Act 1883 does not protect a creditor who takes over the whole of a debtor's property in consideration of a past debt, with knowledge of the existence of other creditors.

Snears v. Goddard (74 L. T. Rep. 128; (1896) 1 Q. B. 496) distinguished.

THIS was a motion by the official receiver, the trustee in the bankruptcy, for a declaration that the transfer or delivery by the bankrupt to the respondent of certain cabs, horses, and harness, was fraudulent and void and an act of bankruptcy under sect. 4, sub-sect. 1 (b), of the Bankruptcy Act 1883.

The bankrupt was a cab proprietor, and was the owner of a number of cabs, horses, and harness.

The respondent was also a cab proprietor, and the bankrupt had from time to time purchased horses from him, and early in Aug. 1901 the bankrupt was indebted to the respondent to the amount of 151l. 5s.

At that date the bankrupt was being pressed by the petitioning creditors, who declined to supply him further with corn. The respondent, who was aware of the existence of other creditors, about the 5th Aug. arranged with the bankrupt to take his whole stock of cabs, horses, and harness in satisfaction of his debt. It was further arranged that this stock should be sold and that the balance after satisfying the debt should be handed to the bankrupt.

The receiving order was made on the 10th Oct. and was followed by adjudication in bankruptcy.

The liabilities amounted to about 300l., and the assets estimated by the bankrupt at 10l. realised nothing.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides as follows:

Sect. 4, sub-sect. 1 (b). A debtor commits an act of bankruptcy: If in England or elsewhere he make a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof.

Sect. 49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy,

(a) Any payment by the bankrupt to any of his creditors. (b) Any payment or delivery to the bankrupt. (c) Any conveyance or assignment by the bankrupt for valuable consideration. (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration. Provided that both the following conditions are complied with, namely: (1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; (2) the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction

(a) Reported by J. ANWYL THOBALD, Esq., Barrister-at-Law.

PRIV. CO.] E. & S. AFRICAN TELEGRAPH CO. v. CAPE TOWN TRAMWAY COMPANIES. [PRIV. CO.]

was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

Carrington in support of the motion stated the facts. He referred to

Re Rayment; Ex parte The Trustees, 80 L. T. Rep. 807;

Re Sharp; Ex parte Grundy, 83 L. T. Rep. 416.

G. A. Scott for the respondent argued that the transaction was protected by sect. 49 of the Bankruptcy Act 1883. He cited

Shears v. Goddard, 74 L. T. Rep. 128; (1896) 1 Q. B. 406.

Carrington in reply.—The case of *Shears v. Goddard* (*ubi sup.*) has no application where a creditor takes over the whole stock of a trader in consideration of a past debt, especially where, as was the case here, there were other creditors pressing the debtor. Moreover, such a transaction cannot be said to be in the ordinary course of business, and whether or not it was carried out in good faith depends to a great extent on whether it was in the ordinary course of business.

WRIGHT, J.—I do not think that the facts of this case are quite within any decision. It is clear that the bankrupt committed an act of bankruptcy by parting with the whole of his property for a past debt, and I have to decide whether or not this case is governed by *Shears v. Goddard* (*ubi sup.*). Now, I do not think I shall be deciding anything against *Shears v. Goddard* if I hold that sect. 49 of the Bankruptcy Act 1883 does not protect a creditor who takes over the whole of the debtor's property in consideration of a past debt with knowledge of the existence of other creditors. In *Shears v. Goddard* it did not seem that the purchaser knew that he was taking over all the property, or that any fraud on the Bankruptcy Acts was in contemplation. Here the respondent must have known that the debtor was committing an act of bankruptcy by parting with all his property, and he cannot therefore be said to have acted in good faith within sect. 49, and I hold that this transaction is not protected by that section.

Solicitors: G. B. Howard and Sons; Alfred White and Co.

Judicial Committee of the Privy Council.

Feb. 26, 27, 28, and April 18.

(Present: The Right Hons. Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, and LINDLEY.)

EASTERN AND SOUTH AFRICAN TELEGRAPH COMPANY v. CAPE TOWN TRAMWAY COMPANIES. (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.

Damage by electricity—Negligence—"Leak"—Statutory powers—Right of action.

The respondent companies were incorporated by Acts of Parliament, and authorised to work lines of tramway by electric power. Each statute contained a provision that the company "specially undertakes that, in the event of any electric

leak taking place and any damage being caused thereby by electrolysis or otherwise, it will make good . . . all costs, damages, and expenses; and provided that nothing in this Act contained shall entitle the company to use the rails as a part of its system of conductors for the return electric current without the consent of the council." A short section of the tramway lines was not included in the lines authorised by the Acts, but the road authority had granted permission to lay tramway lines on that section. Consent was obtained for the use of the rails for the return electric current, but it was found that without any negligence there was necessarily an escape of electricity from the rails into the earth, which affected a telegraph cable belonging to the appellant company, and interfered with the transmission of messages. The appellants were put to considerable expense in devising means to counteract it.

Held (affirming the judgment of the court below) that, there being no tangible or sensible injury to person or property, the respondents were not liable at common law for the affection of the peculiar apparatus of the appellants, within the principle of *Fletcher v. Rylands* (19 L. T. Rep. 220; L. Rep. 3 H. L. 330), although the principle of that case does obtain in the Roman law; secondly, that the necessary escape of the electricity from the rails was not a "leak" within the meaning of the statute so as to make the respondents liable for the resulting damage to the appellants.

THIS was an appeal from a judgment of the Supreme Court of the colony of the Cape of Good Hope in an action in which the appellants were plaintiffs and the respondents were defendants.

The case is reported in 17 Sup. Ct. Rep. 95.

This action was brought by the appellants, who maintained and worked a submarine cable landing in Cape Town, against the respondents, who maintained and worked a system of electric tramways in Cape Town and its suburbs, for damages for disturbance of the appellants' cable messages caused by the working of the respondents' tramways, and for an injunction to restrain the respondents from working their tramways in such a manner as to interfere with the appellants' cable messages.

The appellants were a limited company incorporated under the English Companies Acts and carried on the business of transmitting telegraphic messages by submarine cable between Cape Town and Europe. One of the appellant company's cables, after leaving Loanda on the West Coast of Africa and passing through the waters of Table Bay, reaches a cable hut on the shore near the Central Jetty, Cape Town, whence communication is established by land wires with an office in the Standard Bank Building, Cape Town, where the messages are received and recorded and whence they are also dispatched.

The respondents the Metropolitan Tramway Company Limited were a joint stock company incorporated under the provisions of Act 22 of 1895 of the colony of the Cape of Good Hope for the purpose of constructing and working tramways. In June 1897 the Metropolitan Tramway Company Limited, under the powers given by sect. 35 of Act 22 of 1895 and by sect. 5 of Act 23 of 1895,

(a) Reported by O. E. MALDEN, Esq., Barrister-at-Law. Vol. LXXXVI., 2221.

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purchased and took an assignment of all the rights and powers of a company named the Cape Town and Green Point Tramway Company Limited, which was a joint stock company incorporated under Act 33 of 1861, whose powers were extended by Act 19 of 1879 and Act 23 of 1895.

The respondents the Southern Suburbs of Cape Town Tramway Company Limited and the City Tramway Company Limited were joint stock companies incorporated respectively under the provisions of Act 29 of 1896 and of Act 24 of 1881 for the purpose of constructing and working tramways.

A short piece of tramway line between the Toll Bar and Mowbray Cemetery was constructed and maintained without express statutory authority, but with the consent of the authority in whom the roads were vested, in the following manner:

The respondents the City Tramway Company Limited under the provisions of Act 24 of 1881 constructed a tramway line from Adderly-street, Cape Town, to the Toll Bar. Subsequently in 1884 and 1895 the Divisional Council, in whom by the Act of 1889 the divisional roads are vested, gave permission to the company to extend their line to Mowbray Cemetery so as to make connection with the tram lines of the Southern Suburbs of Cape Town Tramway Company Limited.

All the tramways referred to in the preceding paragraphs belonging to the several respondents formed one continuous system, and were worked by the respondents conjointly under the style of the Cape Town Tramways Companies Limited.

Since Aug. 1896 the respondents had employed electricity as a motive power for propelling their tramcars, and for the purpose of obtaining the necessary electrical power the respondents jointly had erected a generating station situated within the municipality of Cape Town. The electric current was conveyed from the generating station by means of overhead insulated wires running parallel to the tram lines; each tramcar carried an arm or trolley, the end of which slid along the overhead wires and formed electrical connection therewith; the electric current passed from the overhead wires through the arm and through the electric motor carried by the car and returned to the generating station partly through the tram rails and partly through the earth, the rails not being insulated from the earth. The respondents obtained the consent of the Divisional Council as well as that of the municipalities in their several districts to the use of the tram rails for the return current on all sections of their lines.

The appellants' cable was made up of an inner core of copper surrounded by an insulating substance, such as gutta-percha, which was surrounded and protected by a sheathing of uninsulated iron wire. In transmitting a message by cable, a series of very small electric currents of short duration are sent along the copper core of the cable from the distant transmitting station to the receiving station in Cape Town, where they cause by induction other currents to pass through exceedingly delicate recording instruments and return to the transmitting station partly through the iron sheathing of the cable and partly through the earth or sea.

It was alleged by the appellants that a portion of the tramway return current returning to the generating station through the earth flowed for some distance along the iron sheathing of the

cable which was a good conductor of electricity. This tramway return current was constantly varying in magnitude as the cars were started and stopped, thus causing variations in that portion of the current which was travelling along the sheathing, and consequently inducing currents in the copper core of the cable which induced currents in the core of the cable, affected the recording instruments at the receiving office at Cape Town, and rendered it difficult to read some of the cable messages received in Cape Town.

This action was commenced by summons in the Supreme Court of the colony of the Cape of Good Hope on the 15th April 1899.

The appellants in their declaration claimed from the respondents the sum of 50,000*l.*, which sum included 20,000*l.* as damages for loss of business, 10,000*l.* as expenses already incurred, and 20,000*l.* as estimated further necessary expenditure.

The respondents constructed all their tramways pursuant to powers given them by the Acts 22 of 1895, 23 of 1895, 29 of 1896, and 24 of 1881. The short length of line between Toll Bar and Mowbray, although not constructed in pursuance of statutory powers, was constructed in accordance with the provisions of the said Acts.

Sect. 4, sub-sect. (d), of Act 22 of 1895, omitting immaterial words, is as follows:

The company—i.e., the respondents—shall, subject to the provisions of this Act, have the right to "erect, maintain, and work all necessary power and stations . . . subject to the approval and in accordance with any resolution or standing order of the council . . . Provided that . . . the company specially undertakes that, in the event of any electric leak taking place and any damage being thereby caused at any time by electrolysis or otherwise, it will reimburse and make good to the council or other body or person all costs, damages, and expenses to which the council or other body or person may be put by reason thereof; and provided further that nothing in this Act contained shall entitle the company to use the rails of any of the said lines of tramway as a part of its system of conductors for the return electrical current without the consent of the council first had and obtained.

The corresponding sections of the other Acts under which the tramways were constructed do not materially differ from the above section.

It was admitted that the whole of the tram lines in question, with the exception of the short length above mentioned, were constructed and worked as constructed with the consent of the council or authority having control over the roads mentioned in the other Acts.

The respondents contended, and the judges unanimously upheld the contention, that the disturbance caused to the appellants' cable was not caused by an "electric leak," and that, even if it had been caused by a leak, the damage which the appellants alleged that they had suffered was not damage caused by electrolysis or otherwise within the meaning of the words of the Acts above referred to.

The section of line between the Toll Bar and Mowbray Cemetery was constructed with the permission of the Divisional Council, in whom were vested the divisional roads.

With respect to this short section of the respondents' tram lines the respondents submitted that there was no evidence to prove that any portion of the disturbance to the cable of

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which the appellants complained could be attributed to the working of the tramcars over this section, and they further submitted that, if there was some disturbance due to the working over this section, there was no injury to any legal right which was vested in the appellants according to the law of Cape Colony. The respondents constructed and worked the short section of line in precisely the same manner as they constructed and worked the lines authorised by the said Acts, and they submitted that in constructing and working the said section of line they had not infringed any legal right of the appellants known to the common law of the colony of the Cape of Good Hope.

Evidence was given on commission in this country prior to trial by both the appellants and the respondents, which was mainly directed, so far as the respondents were concerned, to proving that at the date of and long before the alleged disturbance by the respondents' currents to the appellants' receiving instruments there was a complete and well-known and very inexpensive remedy for such disturbance which the appellants might have applied at once had they been so minded—viz., to lay a twin-core shore-end cable from the shore out to sea, and to connect the two conductors of this twin-core cable to the core and to the sheathing of the main cable respectively at a point outside the area of disturbance in the manner described by the witnesses. Further evidence to the same effect was given at the trial.

The respondents submitted that the appellants should have laid a twin-core cable as described above as soon as the working of the cable was disturbed.

The appellants performed many experiments in order to try to cure the disturbance in some other way. These experiments extended over a period of time from Aug. 1896, when the disturbance was first felt, to Nov. 1898. The earlier experiments were entirely unsuccessful and the later experiments only partially successful.

The appellants claimed from the respondents the expenditure incurred in carrying out these experiments and also damages for loss of business due to the disturbance caused by the tramways during the above-mentioned period of time.

The action was tried before the Supreme Court of the colony of the Cape of Good Hope, and was heard before De Villiers, C.J., Buchanan and Lawrence, JJ.

Their Lordships delivered judgment on the 13th March 1900, holding unanimously that in respect of all the tramways, except the section between the Toll Bar and Mowbray Cemetery, the respondents were protected by the provisions of the Acts authorising them to construct and maintain the tramways; that the disturbance caused to the appellants' cable was not damage within the meaning of the respondents' undertakings mentioned in the Acts of 1895 and 1896; and holding in respect of the section of tramway line between the Toll Bar and Mowbray Cemetery that the construction and working of this section in a proper manner and without negligence was not an infringement of any legal right of the appellants.

Bousfield, K.C., A. J. Walter, and Sinclair, for the appellants, argued that the respondents were liable on the principle of *Fletcher v. Rylands* (19

L. T. Rep. 220; L. Rep. 3 H. L. 330), at all events so far as regards that section of the line as to which they had no statutory powers to use electricity. They cited

National Telephone Company v. Baker, 68 L. T. Rep. 283; (1893) 2 Ch. 186;

Reed v. De Beers Consolidated Mines, 9 Juta Cape Reports, 333;

Richmond Hill Steamship Company v. Trinity-House, 74 L. T. Rep. 380; (1896) 1 Q. B. 493; affirmed on appeal, 75 L. T. Rep. 8; (1896) 2 Q. B. 134;

Anderson v. Anderson, 72 L. T. Rep. 313; (1895) 1 Q. B. 749;

Skinner v. Shew, (1893) 1 Ch. 413.

The principle of *Fletcher v. Rylands* obtains in Roman-Dutch law:

Victoria Mining Company v. De Beers Mining Company, 1 Cape App. Cas. 300;

Van Leeuwen, pp. 492, 494, edit. 1820.

Further, this escape of electricity was "a leak" within the meaning of the statutes.

Cohen, K.C., Moulton, K.C., and J. C. Graham, for the respondents, maintained that the principle of *Fletcher v. Rylands* was not established in Roman-Dutch law, and there was no common law liability. The appellants cannot at common law claim protection for peculiarly delicate instruments from the ordinary use of their land by the respondents. These electric currents are extraordinarily sensitive. "A leak" means an accidental escape, not a natural dispersion, and this damage was not caused "by electrolysis or otherwise" within the meaning of the statute which protects the respondents. They cited

Robinson v. Kilvert, 61 L. T. Rep. 60; 41 Ch. Div. 88;

Cumberland Telephone Company v. United Electric Railway Company, 42 Federal Rep. U. S. 273.

Bousfield, K.C., in reply, referred to

Cooke v. Forbes, 17 L. T. Rep. 371; L. Rep. 5 Eq. 166.

At the conclusion of the arguments their Lordships took time to consider their judgment.

April 18.—Their Lordships' judgment was delivered by

LORD ROBERTSON.—The question raised by this appeal is whether the respondents are liable in damages for certain disturbances in the working of the appellants' submarine telegraph cable at Cape Town. That such disturbances did take place; that they were caused by electricity which had been stored by the respondents and used in propelling their tramcars in Cape Town and its suburbs, but from time to time had left the tramway system and found its way to the appellants' cable in the sea near Cape Town; and that pecuniary losses resulted; are matters beyond dispute. In order to the adequate understanding of the question thus raised it is not necessary to enter into minute or highly technical descriptions. It may conduce to clearness in the discussion of the legal questions which result if, leaving over in the meantime the mode in which the electricity left the respondents' system, it be in the first place stated how the electricity injured the appellants. At some point, then, in Table Bay, this electricity, having escaped and being at large, was attracted by the appellants' cable, entered the sheathing of the cable and by the sheathing

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as a conductor, found its way back to the tramway central station whence it had started, and thus completed its circuit. While travelling along the sheathing of the appellants' cable, the current varied very frequently and at irregular intervals, in accordance with the starting and stopping of the tramway cars. It was this irregularity and jerking which did the mischief; and, but for this, the current might have used the sheathing as a conductor without any injury. As things were, the current in the sheathing induced similar irregular currents in the conducting wire of the cable, with the result that the signals were interfered with, and as recorded were confused and unreadable. None of the apparatus was damaged; but the working of the apparatus was so interfered with as to take away its utility for the time of the interruption. In order to complete the description of the nature of the injury it is necessary to add that the difficulty has now been completely got over by laying what is called a twin-core cable for several miles out, the two wires rectifying one another's action. Now that this has been done, the electricity from the tramways can pass along the sheathing without any harm being done. The cost of this remedial measure forms a large part of the claim in the suit, much of the rest representing experimental and tentative measures. Into this, however, it is unnecessary further to enter, as the quantum of damage is not raised in this appeal, but only the question of liability. Turning now to the mode of escape of the electricity from the tramways, there is again no controversy; and for present purposes a succinct statement is sufficient. The respondents' tramway runs along the shore of the sea, and their tramcars are run by the tolerably familiar system of overhead trolley. All that is necessary to take note of is that the electricity which is used is generated at a power station erected by the respondents for that purpose, and that the conductor, which is provided for the return of the current, after driving the tramcars, consists of the tramway rails. Now, when uninsulated (and safety requires that this should be their condition), the rails are so far from being (even comparatively speaking) a perfect conductor that necessarily and as a matter of course a considerable proportion of the electricity, instead of going directly back to the station, leaves the rails; and some portion of the escaped current it was which reached the appellants' cable. Upon these facts the appellants' main contention is that on the principle of *Fletcher v. Rylands* (19 L. T. Rep. 220; L. Rep. 3 H. L. 330) the respondents are liable for the interruption of the appellants' business, and must recoup them for the protective measures necessarily taken to prevent a recurrence of such interruption. To this the respondents have a twofold answer: (1) They say that they are protected as regards all but a small portion of their tramway system by certain provisions which occur in each of the series of colonial statutes incorporating their constituent companies; and (2) as regards the part of their line not so protected by statute they maintain that *Fletcher v. Rylands* does not apply to the facts. Two other contentions have been advanced on the latter branch of the case (the first of which received more countenance in the Supreme Court than support at their Lordships' Bar)—viz., (1)

that the law of *Fletcher v. Rylands* has no place in the Roman-Dutch law; and (2) that it was not established that any escape of electricity injurious to the appellants took place from that section of the tramway to which none of the statutes apply. Before proceeding to discuss the interesting and important questions thus raised, a few facts and dates may conveniently be noted. The appellants' cable had been in operation for years before the respondents' tramways were made. The tramcars began to be worked in Aug. 1896, and the disturbances on the appellants' apparatus were felt at once, and continuously thereafter during the days and hours when the tramcars were running. Communications took place between the parties, and both seem to have frankly co-operated in ascertaining the cause of injury and devising remedies. After this had been done, with the result already stated, the present suit was instituted on the 15th April 1899, in order to determine the question of liability. On the 13th March 1900 the Supreme Court of the Colony gave judgment for the respondents, and the present appeal is against that judgment. In considering the merits of the appeal, it is best first to take the question of common law. That the facts about the section of tramway line not constructed under statutory authority—viz., that from the city boundary to Mowbray, do raise this question is in their Lordships' judgment sufficiently clear. It is true that the crucial test of this particular section being worked alone is wanting; although at one time during the disturbances of the cable this section and the short section home to the station house were worked alone. But no effective answer was made to the record of journeys which was commented on by Mr. Bouasfield; and this record attests that the disturbances on this section were at least as great as on any other. Now, Mr. Jacob, the respondents' principal witness, is very emphatic in stating (and, indeed this is of the essence of the respondents' case), that the disturbances on the cable are not dependent on the quantity of the current escaping, but on the rate of alteration and the rate of variation, and Mr. Jacob's evidence, when directly applied to the separate influence of one section entirely supports the appellants' case. The question of common law is thus raised directly (as well as indirectly in relation to the just construction of the statutory provisions). Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Fletcher v. Rylands* of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable, when uncontrolled, of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Fletcher v. Rylands*, the principle would apply. But this is only one half of the question, and it remains to be seen if the injury postulated is present. Was there such resulting injury as to found a claim on the principle of *Fletcher v. Rylands*? Now, in the present case neither person nor property was injured (unless the in-

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genious suggestion of Mr. Bousfield could be entertained, that physical injury was done to the paper which was smudged by the eccentric action of the recording apparatus). Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and have always constituted some interference with the ordinary use of property. Now, the kind and degree of interference with the respondents' property is pretty well illustrated by the fact that it can only take place if the cable is constructed without certain precautions, for, given the cable as it now is, there is no injury. This is referred to not because their Lordships consider that the respondents have made out that the twin cable had the general use and recognition which they ascribed to it, but as showing that it cannot be predicated of the electric escape in question that it is destructive of telegraphic communication generally, but only that it affects instruments made in a certain way. Now, if the instrument be taken as it was when the injury occurred, its nature is such that to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours. To describe this as a delicate instrument might be inaccurate if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all. The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Fletcher v. Rylands*, which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as showing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain. While agreeing in the result with the Supreme Court on the common law branch of this case, their Lordships are not prepared to accede to some of the comments made on *Fletcher v. Rylands*. The learned judges of the Supreme court have indicated considerable reluctance to accept the doctrine of that case and

seem to regard it as more or less inconsistent with the principles of the Roman law, upon which the law of the colony is based. Their Lordships are unable to find adequate grounds for this view, and it was not maintained at the bar. It is not supported by the texts or decisions which illustrate the full recognition of the right of an owner freely to use his property for natural purposes, even although loss to his neighbour may result. Nor on the other hand does the prominence given to *culpa* in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on the civil law. The learned judges, and also Kekewich, J. in *National Telephone Company v. Baker* (68 L. T. Rep. 283; (1893) 2 Ch. 186) seem to have been inaccurately informed on this point; for, as matter of fact, not only is the principle of *Fletcher v. Rylands* fully accepted in Scotland, but it had formed part of the law of Scotland before *Fletcher v. Rylands* was decided, and *Fletcher v. Rylands* has been treated by the Scotch courts as an authoritative exposition of law common to both countries. So far then, as the respondents' liability is governed by the common law, their Lordships, on the grounds already stated, do not consider the appellants' claim to be maintainable. It remains to consider the liabilities of the respondents for the escape of electricity on those sections of their line which have been constructed under statutes. The provisions of the several statutes authorising the several sections are identical; and sect. 4, subsect. D, of Act 22 of 1895 has been taken as the text of the argument. The statutes have of course direct and express relation to electricity as the motive power. The company under those statutes have right to maintain and work all necessary power and stations, subject to the approval and in accordance with any resolution or standing order of the council of the city of Cape Town: "Provided that . . . the company specially undertakes that, in the event of any electric leak taking place and damage being thereby caused at any time by electrolysis or otherwise, it will reimburse and make good to the council or other body or person all costs, damages, and expenses to which the council or other body or person may be put by reason thereof; and provided further that nothing in this Act contained shall entitle the company to use the rails of any of the said lines of tramway as a part of its system of conductors for the return electrical current without the consent of the council first had and obtained." The consent of the council to the use of the rails for the return current was had and obtained under certain conditions of which the fourth is as follows: "4. If at any time and at any place a test be made by connecting a galvanometer or other current indicator to the insulated return and to any pipes in the vicinity, it shall always be possible to reverse the direction of any current indicated by interposing a battery of three Leclanche cells, connected in series if the direction of the current is from the return to the pipe, and by interposing one Leclanche cell if the direction of the current is from the pipe to the return. If at any time a greater leakage is discovered than would render it possible for the current to be reversed in the manner above indicated, the same shall be localised and removed as soon as practicable, and the running

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of the cars shall be stopped unless the leak is so localised and removed within twenty-four hours." The first question, then, is, Was it a leak, either in the sense of the statutory undertaking or of this condition, that sent out this electricity which reached the cable? For if so, the stipulated liability has been incurred. Their Lordships are unable to think that it was. The language of both the statutory undertaking and of the condition seems to point to some defect in apparatus, not contemplated as a condition of the working of the system. But the departure of the electricity from the rails arose from no defect, but from the necessary condition of things, if the tramcars were to run and the rails to be used as a return. The evidence shows clearly that if uninsulated (as was the case here) the rails of necessity conduct home to the central station only some of the electricity, the rest leaving the rails and going afield. Giving to the word "leak" whatever expansion may be appropriate to its extension to electricity, their Lordships do not consider the event which has occurred to fall within the undertaking and condition. The escape was, on the contrary, a natural incident of the operations legalised under the statutes. The argument of the respondents on the words "or otherwise," as limited by the preceding word "electrolysis," did not command their Lordships' assent; but it is superseded by the other grounds of judgment. Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the judgment of the Supreme Court affirmed. The appellants will pay the costs of the appeal.

Solicitors for the appellants, *Bircham and Co.*

Solicitors for the respondents, *Ashurst, Morris, Crisp, and Co.*

Supreme Court of Indicture.

COURT OF APPEAL.

March 13, 14, and 25.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

MONTGOMERY and Co. v. INDEMNITY MUTUAL MARINE ASSURANCE COMPANY LIMITED. (a)
APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—General average—Assured owner of both ship and cargo—Insurance on cargo—Sacrifice of mast—Right of assured to recover under policy—Liability of underwriter on cargo.

The fact that the assured under a policy of marine insurance on cargo is owner of the ship as well as owner of the cargo does not prevent him from recovering under the policy from the underwriters on the cargo in respect of a general average loss, as a general average act does not depend on the consideration whether there can be any contribution or not as between the respective interests.

The Brigella (69 L. T. Rep. 834; (1893) P. 189) disapproved.

A loss caused by the cutting away of the mast of a

ship, which by the master's orders is cut away for the safety of the whole adventure, but which at the time it is cut away is not hopelessly lost and might be saved, is a general average sacrifice for which underwriters of a policy on the cargo against perils of the seas are liable to contribute, and they are none the less liable because the assured are owners of both ship and cargo.

Decision of Mathew, J. (84 L. T. Rep. 57) affirmed.

THIS action was brought by the plaintiffs, the owners of the ship *Airlis* and her cargo, to recover from the defendants a general average loss under a policy of marine insurance on cargo effected by the defendants; alternatively, to recover the defendants' proportion of suing and labouring expenses to avert a total loss of the insured cargo.

The insurance was against perils of the seas and other losses of the same character, and the policy contained the ordinary sue and labour clause, and a provision that general average was payable as per foreign statement or York and Antwerp rules, if so made up.

During the voyage the ship encountered very bad weather, the main mast, which was of iron and hollow, settled down. The mast, however, was secured and remained in its position.

As the ship continued to roll, the master, fearing that the mast would break and so cause the loss of the vessel, ordered it to be cut away, and it was cut away and fell over the side.

The plaintiffs sought to recover, under their policy on the cargo, a general average loss incurred by the cutting away of the mast, as they contended that the cutting away of the mast was under the circumstances, a general average sacrifice, rendered necessary by the perils of the seas insured against.

The defendants said that the cutting away of the mast was not a general average sacrifice, and gave rise to no general average claim; that, as the plaintiffs were owners of both ship and cargo there could be no contribution to general average as between ship and cargo, and therefore the plaintiffs could not claim under the policy on the cargo, and that the sue and labour clause did not apply.

The case was heard by Mathew, J. who held 84 L. T. Rep. 57; (1901) 1 K. B. 147, that the plaintiffs were entitled to recover a general average loss, thus differing from the opinion of Barnes, J. in *The Brigella* (69 L. T. Rep. 834; (1893) P. 189).

The defendants appealed.

Scrutton, K.C. and Loehnis for the appellants.—When the master ordered the mast to be cut away he believed it to be a wreck, and it was cut away to avoid the loss of the ship. There was, therefore, no general sacrifice in this case. The plaintiffs have no claim for general average loss against the underwriters on the cargo. They are the owners of both ship and cargo, and have not as cargo owners paid, and are not liable to pay, contribution to general average. The right to general average depends on the right of contribution as between ship and cargo. Where the same person is the owner of both, there can be no claim for general average. General average assumes separate persons whose property is at stake sharing the loss of one whose property was

(a) Reported by W. O. BISS, Esq., Barrister-at-Law.

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sacrificed for the benefit of the others, and that gives him a right of contribution from the other persons. Where there is no right of contribution the loss is not a general average loss, but a particular average loss. This case is within the judgment of Barnes, J. in *The Brigella* (69 L. T. Rep. 834; (1893) P. 189). The decision of *Moran v. Jones* (7 Ell. & B. 503) was considered in *Walthev v. Mavrojani* (22 L. T. Rep. 310; L. Rep. 5 Ex. 116), and Bovill, C.J. says it was decided on the special facts of that case. A general average loss cannot be recovered under the sue and labour clause:

Aitchison v. Lohre, 41 L. T. Rep. 323; 4 App. Cas. 755.

They also referred to

Dickenson v. Jardine, 18 L. T. Rep. 717; L. Rep. 3 C. P. 639;

Simpson v. Thompson, 38 L. T. Rep. 1; 3 App. Cas. 279;

Aitwood v. Sellar and Co., 42 L. T. Rep. 644; 5 Q. B. Div. 286;

Wright v. Marwood, 45 L. T. Rep. 297; 7 Q. B. Div. 62;

Anderson, Tritton, and Co. v. Ocean Steamship Company, 52 L. T. Rep. 441; 10 App. Cas. 107;

Scensden v. Wallace, 52 L. T. Rep. 901; 10 App. Cas. 404;

Kidston v. Empire Marine Insurance Company, 15 L. T. Rep. 12; L. Rep. 2 C. P. 357;

Xenos v. Foz, 19 L. T. Rep. 84; L. Rep. 4 C. P. 665;

Balmoral Steamship Company v. Marten, 85 L. T. Rep. 389; (1901) 2 K. B. 896, 902;

Lowndes on the Law of General Average, 4th edit., pp. 22, 23;

Carver's Carriage by Sea, sect. 374 c. note (n);

Phillips on Insurance, sect. 1374;

Benecke on Marine Insurance, pp. 232, 260;

Holt's Law of Navigation (1824), p. 482;

Parson's Law of Maritime Insurance, vol. 2, p. 208 (edit. of 1869).

Carver, K.C. and *J. A. Hamilton*, K.C. for the respondents.—This is not a question of general average pure and simple. The question is what is the bearing of the doctrine of general average on this policy, what danger does the underwriter take? The cutting away of the mast was an act done for the safety of the whole adventure, the crew, cargo, and ship, and was therefore a general average sacrifice. A right of contribution is not essential to a claim to general average. The decision of Barnes, J. in *The Brigella* (*ubi sup.*) is wrong. The right to general average does not depend upon the right to contribution, and the right to recover here is not under the sue and labour clause. The obligation of the underwriters to contribute to general average is not under that clause but under the law maritime: (per Lord Blackburn in *Aitchison v. Lohre*, 41 L. T. Rep. 323, 326; 4 App. Cas. 755, 764; and *Oppenheim v. Fry*, 8 L. T. Rep. 385, 387; 3 B. & S. 873, 884). The same principle is laid down in two American cases, *Potter v. Ocean Insurance Company* (3 Sumner, 27) and *Greely v. Tremont Insurance Company* (9 Cushing, 415), and also in the text-books, *Emerigon* (Meredith's edition), c. 12, s. 39; *Phillips on Insurance*, sects. 1274, 1412; *Benecke on Marine Insurance*, p. 473. The practice of average staters has always been to adjust general average irrespective of whether or not the different interests are owned by the same

person. The dictum of Lord Campbell in *Moran v. Jones* (7 Ell. & B. 523, 533) is in favour of the respondents. They also referred to

Price v. "A1" Ships' Small Damage Insurance Association Limited, 61 L. T. Rep. 278; 22 Q. B. Div. 580;

Mousse's case, 12 Co. Rep. 63.

Scrutton in reply.

Cur. adv. vult.

March 25.—The written judgment of the court was delivered by

WILLIAMS, L.J.—This case raises a question of great importance. The circumstances of the case are such as, it is admitted, would give rise to a general average claim if the ship and cargo belonged to different owners; but it is said that there can be no general average claim, because the ship and cargo both belonged to the plaintiffs, and as there could be no contribution there was no general average loss. Mathew, J. has held that a general average act is not affected by the consideration whether there will be a contribution or not. This holding is contrary to the opinion expressed by Barnes, J. in *The Brigella* (*ubi sup.*); and we have now to consider which view is the right view. We agree with the view of Mathew, J. (now Mathew, L.J.), and, moreover, agree so entirely with the reasons he has given for the conclusion at which he has arrived that we should not feel it necessary to add a word to those reasons if it were not that we think we ought to deal particularly with the reasons expressed by Barnes, J. in his judgment in *The Brigella*, and ought to state the principles upon which we think the law of general average loss should be based. As we understand the judgment of Barnes, J., he is of opinion, first, that there cannot be a general average act, or a general average loss, unless there are separate interests in the maritime adventure, because contribution is of the essence of the maritime law of general average; and there cannot be contribution unless there is diversity of interests; and we understand him to go further and say that even if there be a general average act in a case where ship, cargo, and freight belong to one adventurer only, yet the law of contribution cannot be applied, for the right of contribution only belongs to the adventurer who had an interest at risk against an adventurer whose goods have been saved by the general average act, and that it is impossible for an adventurer to enforce by legal proceedings a claim against himself in respect of the salvage of one part of his property by the sacrifice of another. It is said that such a right, if it existed, could only be enforced by the adventurer suing himself, which is impossible. It is said, further, that the fact that the ship, freight, and cargo have been insured with different underwriters can make no difference, because the only interest which the underwriters have is a subrogated right which they must enforce, if at all, in the name of the assured, as the owner of the property sacrificed, by the general average act against the same person, as the owner of the property saved by that sacrifice. It is said that the obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not, and that the circumstance of a party being insured had no influence upon the adjustment of the general

average. It seems to us that the question whether contribution is of the essence of a general average loss or a mere incident of it must depend upon the occasion which is a condition of such an act. It is not, we think, true to say that it is only the danger to the ship, freight or cargo, which necessitates and justifies sacrifice by the master of either a portion of the cargo or a portion of the ship. This may be done in fear of death, and if it is done upon a proper occasion all must contribute to the loss. If there be one owner of ship, freight, and cargo he will bear it all. If there be several, each will contribute according to the value of his interest. The object of this maritime law seems to be to give the master of the ship absolute freedom to make what sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and in our judgment such a sacrifice is a general average act quite independently of unity or diversity of ownership. Assuming that the general average act and the general average loss can occur independently of contribution, there still remains the question whether the underwriters on a policy on cargo can be held liable to pay to an owner of ship and cargo, by reason of his insurance of cargo, the contribution which the cargo owner, if he had been another person than the shipowner, would have had to pay the shipowner in respect of the general average loss incurred by cutting away the mast. It is said that the shipowner could not have recovered against himself as cargo owner this contribution, and that, as the only liability of the underwriter on cargo is to pay as a general average loss a contribution which the cargo owner could be compelled to pay, he has no obligation to recoup the cargo owner a contribution which he has not paid and could not be compelled to pay. In other words, it is said that, as the cargo owner has suffered no loss he can therefore claim no indemnity. If this is the true view, the converse view would also seem to be true—viz., that the underwriter on a policy on the ship must pay the whole of the ship's loss by the general average sacrifice without getting the benefit of any contribution from cargo belonging to the shipowner which had the benefit of the sacrifice. But we do not think that this is the true view. We will take first the case of the shipowner who has insured his ship, and there has been a general average sacrifice and loss by cutting away the masts to avert the instant perils of the sea. We will assume there is cargo on board belonging to the shipowner. What is the liability of the underwriter on the policy on the ship? It seems to us that his liability is to pay the loss incurred by cutting away the masts less the contribution by the shipowner on account of the cargo. I see nothing in *Dickenson v. Jardine* (*ubi sup.*) to prevent this, because the shipowner has already in his pocket his own contribution as cargo owner, and his loss is ascertained to be the costs of replacing the masts less his own contribution as cargo owner. It will be observed that in *Dickenson v. Jardine* jettison was expressly covered by the policy, and the assured had not received the contributions of the other owners, and that therefore the underwriters could, upon indemnifying the assured, recover the contributions in his name, whereas in a case like the present the assured has in his pocket his own contribution, so

that there is no contribution to be recovered, and the assured's loss has been *pro tanto* reduced before he makes any claim on the underwriters. But suppose he has effected a policy on cargo. What is the liability of the underwriters of the policy on cargo? Surely they are liable to pay the loss of the shipowner by reason of the deduction made by the underwriters of the policy on the ship in respect of the shipowner's contribution as the owner of the cargo; and *mutatis mutandis* a similar result is arrived at if the general average sacrifice is by jettison of cargo, and ship and cargo have a common owner. With regard to the right of the underwriter, when the assured is owner of ship and cargo, to deduct the contribution due from the ship or cargo, as the case may be, we will quote the words of Shaw, C.J. in *Greeley v. Tremont Insurance Company* (9 Cushing, 419), who, after stating that the underwriter is liable directly to the assured for a loss in its nature a general average loss, that is, resulting from a voluntary sacrifice, without waiting to collect the contributory shares from other persons, says: "But the rule does not apply where the assured is owner of the vessel and cargo. Then, as owner of the cargo, being bound to contribute, he is deemed to have the contribution in his own hands, and therefore is clearly *pro tanto* indemnified, and cannot collect of the underwriters a sum of money to be recovered back by the underwriter himself." It seems to us that this passage is quite right and a working out of the principle on which the law of the general average is based. This view seems to us to obviate any difficulty arising from the fact that a man cannot sue himself and from the legal proposition that the only right of the underwriters in respect of collection of contributions is to sue in the name of the assured. There is nothing in this conclusion contrary to any English authority. It is true that no English case expressly decides the point. But there is a dictum of Lord Campbell in *Moran v. Jones* (*ubi sup.*), and an opinion of Blackburn, J. in *Oppenheim v. Fry* (*ubi sup.*). In the former case Lord Campbell said (7 El. & B. 533): "And, where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by each, although the whole freight which was in peril is to be received by the owner of the ship, and without insurance the whole of the loss would fall upon him." And in the latter case Blackburn, J. said (8 L. T. Rep. 387; 3 B. & S. 884): "I think it is not necessary for the decision of this case to say whether the extraordinary expenditure was general average or not, though I have a strong impression that, where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average; whether the ship and cargo and freight belong to one only or to different adventurers." Against this there is the opinion of Barnes, J. expressed in *The Brigella* (*ubi sup.*). American authority, as we have already said, is strongly in favour of the view expressed by Mathew, J., and the whole question is well discussed by Story, C.J. in his judgment in *Potter v. Ocean Insurance Company*. He says (3 Sumner, 39): "But the argument is that here there was no cargo on board, and that there can be no contribution by freight or cargo; but the whole is to be borne by the ship; and that therefore it is a particular average on the ship and not a general average. The argument proceeds upon

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the ground that what is and what is not a general average, does not depend upon the nature and objects of the thing done, or sacrifice made, for the general good; but solely upon the point whether there are in fact different contributory subjects. I do not so understand the law. As I understand it, the rule as to what constitutes a general average or not, is founded upon the consideration whether it is for the benefit of all who are or may be interested in the accomplishment of the voyage; or only for the benefit of a particular party. Suppose a person to be owner of the ship and cargo, and, of course, ultimately of the freight also, and he should insure the ship, cargo, and freight in three different policies by different offices, if a jettison should be made or a mast be cut away, or any other sacrifice be made for the common benefit of all concerned in the voyage, there can be no doubt that this would be a case of general average, and the underwriters on ship, cargo, and freight must all contribute as for a general average. What possible difference in such a case could it make that the same underwriters were underwriters in one policy on the ship, cargo, and freight; or that the owner singly had no insurance at all, or an insurance upon one only of the subjects put at hazard? Must not the loss still be treated in the contemplation of the law as a general average or in the nature of a general average? As I understand it, the phrase 'general average,' as found in our policies of insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action or design. It looks to the efficient cause of the loss, and not to the effects of it. It looks to the consideration, whether the Act is intended for the benefit of all concerned in the voyage, and not in particular to the consideration who are to contribute towards the indemnity. To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction, for it is a pure speculative inquiry. Not so when there is an insurance; for in such a case the underwriters are *pro tanto* benefited by the sacrifice or other act done, and they are in a just sense bound to contribute towards it." We have only to add generally that, in our judgment, the underwriters have throughout the adventure such inchoate property and liability to loss as to make it right, within the true principle of the law of general average, that upon the adjustment their right to contribution and their loss as underwriters, as the case may be, should be taken into consideration in the final account. Moreover, it is further worthy of observation that the view of the law which we have taken agrees with the practice of average-staters and underwriters, both before and since the decision in *The Brigella* and this practice is, in my opinion, really essential if the spirit of the law of general average is to be applied to the conditions of navigation of the present day. The appeal must be dismissed with costs.

Solicitors for the plaintiffs, *W. A. Crump and Son*.

Solicitors for the defendants, *Waltons, Johnson, Bubbs, and Whatton*.

April 19, 21, 22, and 24.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

MOFFATT AND PAIGE LIMITED v. GEORGE GILL AND SONS LIMITED AND FRANCIS MARSHALL. (a)

APPEAL FROM THE CHANCERY DIVISION.

Copyright—Book—Infringement—Commentator—Originality—Common sources of information—Injunction.

The plaintiffs were the registered proprietors of the copyright in an annotated edition of one of Shakespeare's plays, edited by T. F., and published in 1893.

In March 1900 the defendants G. and Sons published an annotated edition of the same play, edited by the defendant F. M.

The plaintiffs alleged that the book published by the defendants G. and Sons was a colourable imitation of the plaintiffs' book, and an infringement of their copyright therein in respect to general arrangement, sketches of character, literary notes, and quotations.

Held, that the plaintiffs' book was a subject-matter of copyright; that the use which the defendant F. M. had made of the plaintiffs' book was illegitimate and an infringement of their copyright therein; and that therefore they were entitled to an injunction.

Decision of Kekewich, J. (84 L. T. Rep. 452) reversed.

In Feb. 1893 the plaintiffs' predecessors published an annotated edition by Thomas Page of "As You Like It," as one of a series of Shakespeare's plays prepared for schools, and the copyright was registered in their names as proprietors at Stationers' Hall.

In 1899 the defendants George Gill and Sons Limited published an annotated edition of the same play by the defendant the Rev. Francis Marshall.

In Dec. 1899 the plaintiffs commenced an action against the defendants George Gill and Sons Limited complaining that the defendant Marshall's book was an infringement by them of the copyright in several works, and, among others, of the plaintiffs' work on "As You Like It."

That action was disposed of by a consent order dated in Jan. 1900, to which the defendant Marshall was not a party, and under which the defendants George Gill and Sons Limited paid agreed damages and agreed costs and undertook to destroy all copies in their possession in respect of which the action was brought, the plaintiffs on their part undertaking not to commence any action against the defendant Marshall in respect of the matters in question in that action.

In accordance with that order, all copies of that edition of the defendant Marshall's book in the possession of the defendants George Gill and Sons Limited were destroyed.

The defendant Marshall then prepared a second edition, which was again published by the defendants George Gill and Sons Limited.

The plaintiffs complained that the second edition, although it contained alterations, was substantially a copy of the first; and accordingly in May 1900 they commenced the present action.

The plaintiffs claimed damages, an injunction

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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to restrain the defendants from continuing the infringement, and an order for delivery up of the copies of the defendants' book in their possession.

The plaintiffs alleged that the defendants' book was a colourable imitation of their book and an infringement of their copyright therein. They delivered particulars of their allegations divided into five heads: (1) That the general arrangement of the defendants' book, including the glossary, was copied from the plaintiffs' book; (2) that sketches of character were copied; (3) that certain passages were copied, instancing a passage set out in the plaintiffs' book; (4) that literary notes and quotations were copied; and (5) that there were in the defendants' book certain other infringements of the plaintiffs' book.

The defendants denied the plaintiffs' allegations except with respect to the passage specifically referred to, which they admitted was copied from the plaintiffs' book "for convenience only."

The defendant Marshall admitted having read the plaintiffs' book, but stated that his book was the result of independent labour and research, making a legitimate use of the plaintiffs' book in common with the works of other commentators.

It was decided by Kekewich, J. (84 L. T. Rep. 452) that although the defendant Marshall had copied a particular passage from the plaintiffs' book, and although he was to a certain extent otherwise indebted to it, yet that there was no extraction of a vital part, and no *animus furandi*. Accordingly his Lordship, in the exercise of his discretion, refused to grant an injunction.

From that decision the plaintiffs now appealed.

Warrington, K.C. and Scrutton, K.C. (with them H. Lynn and R. J. E. Goffin) for the appellants. — Kekewich, J. considered himself bound by the pleadings to restrict his decision to the second edition of the defendants' book. But the learned judge should, we submit, have had regard also to the first edition, inasmuch as the second edition is substantially a copy of the first. There are, it is true, slight differences between the two editions. But in the preparation of the second edition the defendant Marshall did not entirely disregard the previous one, and it is a colourable imitation of the plaintiffs' book and an infringement of their copyright therein, the plaintiffs' book being the proper subject-matter of copyright. They referred to

Lamb v. Evans, 63 L. T. R.p. 131; (1893) 1 Ch. 218;

Wilkins v. Aikin, 17 Ves. 422; 11 R. R. 118;

Leslie v. Young and Sons, (1894) A. C. 335;

Macmillan v. Sarhe Chunda Gung, 17 Ind. L. Rep. Calcutta series, 951.

P. Oden Lawrence, K.C. and P. F. Wheeler, for the respondent Marshall, referred to

Pike v. Nicholas, 20 L. T. Rep. 906; on appeal, L. Rep. 5 Ch. App. 251;

Cary v. Longman, 1 East, 358; 6 R. R. 285;

Sayre v. Moore, 1 East, 361, note; 6 R. R. 288, note;

Tonson v. Walker, 3 Swanst. 672;

Murray v. Bogue, 1 Drew, 353;

Jarrold v. Houlston, 3 K. & J. 708;

Spiers v. Brown, 31 L. T. Rep. O. S. 16; 6 W. R. 352;

Morris v. Wright, 22 L. T. R.p. 78; L. Rep. 5 Ch. App. 279.

J. A. Hamilton, K.C. and Lincoln Reed for the respondents George Gill and Sons Limited.

Scrutton, K.C. in reply.—A person may, by publishing a reprint of a work of which the copyright has expired, with notes and illustrations from other works, create a new copyright which will be protected from piracy; and it is a piratical use of such copyright work to borrow therefrom any considerable number of these illustrations:

Black v. Murray and Son, 9 Sco. Sess. Cas., 3rd series, 341.

If a person who infringes the copyright of another avails himself of the work of that other person in fact, the intention is immaterial. It is no answer to a charge of infringement of copyright, and an application for an injunction, that the defendant did not copy the work with an *animus furandi*, but in perfect good faith and with an acknowledgment of the source. If in effect a large and vital portion of the plaintiff's work be appropriated in a form which will materially injure his copyright, the effect, not the honest intention, must be looked at:

Scott v. Stanford, 16 L. T. Rep. 51; L. Rep. 3 Eq. 718.

Whether a substantial part or not has been taken is immaterial also:

Cooper v. Stephens, 72 L. T. Rep. 390; (1895) 1 Ch. 567.

P. F. Wheeler in reply upon the further cases cited.—The case of *Black v. Murray and Son* (*ubi sup.*) is distinguishable from the present case. It was quite a different case. It is more like *Longman v. Winchester* (16 Ves. 269), which has no application to a case like that now before the court. The authority of *Spiers v. Brown* (*ubi sup.*) was cited there, and that is also distinguishable. As to *Scott v. Stanford* (*ubi sup.*), where it was said that an unacknowledged taking is more severely regarded by the court than if it be acknowledged, the defendant Marshall does acknowledge in his defence that he has taken from the plaintiffs' book. [H. Lynn. — But the acknowledgment referred to means acknowledgment in the book which infringes the copyright.]

COLLINS, M.R.—This is an appeal from the decision of Kekewich, J. refusing to restrain, at the instance of the plaintiffs, the publication of an edition of "As You Like It," of which the defendants Messrs. George Gill and Sons are the publishers, and of which Mr. Francis Marshall is the author. Now, the circumstances of the case are somewhat peculiar. The book in respect of which the plaintiffs sue as publishers is one of a class of books designed to meet a modern want in the training of young persons—boys and girls, and perhaps I should say young men and young women—for certain classes of examination which have become very common throughout the country. The book instances the reciprocal relations between teachers on the one hand and examiners on the other, and it represents the last counter-move on the part of teachers to meet the ingenuity of the examiners. How far that contest will be carried I do not know. But one has before one in the course of this case a process of evolution, with the ultimate goal of a struggle in which the fittest, I suppose, will survive—a struggle between the teachers on the one hand,

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and the examiners on the other. That is the history of the genesis of the particular production in which the copyright is now claimed and in respect of which this action is brought. Messrs. Moffatt and Paige are the plaintiffs and the publishers, and curiously enough the author is also named Page, but he spells his name differently. The book published by the plaintiffs seems to have been a successful book of its kind, and it seems to have been the last step—I ought perhaps to say, in advance—made in the preparation of books of that class. It is an annotated edition of “As You Like It,” and it has certainly some novel features as compared with those that had preceded it. I think that the ingenuity of counsel and their advisers have placed before us the whole of the series of books of the same class that had preceded that brought out by the plaintiffs. And, though one can trace the process of evolution, I think a long step was made—forward, I suppose I ought to say—by the publication of the plaintiffs’ book. The object, so far as I can see, in these publications—they are, as I have already remarked, addressed to the instruction of young persons—is to substitute the mental effort of the teacher for the mental effort of the person taught. They are designed to meet the examiners on their own ground, and, if possible, to defeat them. Now, the system involves probably an ignoring of what is really the end and what are really the means. I suppose the end, both of the examination and of the process adopted of training the teacher to meet it, is the instruction and development of the pupil’s faculty. But the methods adopted, on the one hand, by the persons who desire to test that faculty by examination, and the methods adopted on the other by the persons whose business it is to prepare the students to undergo the examination, is what is sometimes called “cramming.” The latter persons have adapted their means to the end—not the end, it may be, of mainly improving and training the intelligence of the persons whom they have to deal with, but in training them to meet that which has been put forward by the opposing party as the goal that they have to attain—namely, the successful passing of the examination. The examination is therefore substituted for the end for which the examination was framed; and the crammer’s text-book is substituted for the process which the examination was designed to carry out. Now, that is the situation in which we find ourselves, and the book that is produced to meet the exigencies created by that situation is to be judged, not perhaps so much as a literary work as a well-designed stimulant to the special faculties which are required to meet a particular emergency—namely, the successful passing of the examination. Well, in the process of evolution it has been found that what you require mainly for this purpose is a good memory on the part of the student. And if you can remove him from all effort of thought himself, from all effort of analysis, and substitute for it the efforts of another person formulated and tabulated in an easily acceptable shape calling upon memory and nothing else, you will very probably enable your pupil to pass the examination much more successfully than if you simply pointed out to him the direction in which he ought to develop his own faculties of production, adaptation, reasoning,

and so forth, and, having done so, to present himself to the examiner. The probability is that the youth who has had it all done for him, and who has exercised his memory sufficiently to be able to give out successfully what he has got from his crammer, will succeed in his examination very much better than the youth who, having a better mental training, is trying by the aid of his own faculties and his own research to put himself in a position to cope with the examiner. Therefore we must not regard these books in the light so much of their literary merit as of their success in achieving the aim desired. It seems that with regard to the plaintiffs’ book, which, as I have said, had proved a success, the step that had been taken forward in this contest was this: Earlier editors had dealt with the play of “As You Like It”; they had put in a preface dealing with the sources from which that play was taken, some of them making brief comments upon the plot and also critical notes. But the process of analysis had to be pushed further, and, as a good many people had written on the same subject, the author of the plaintiffs’ book certainly took this step in advance of the others. He analysed the different characters in the play; he took them one by one; he analysed the salient characteristics in them; and covered the wide area of previous writers, possibly introducing his own observations and his tact. In fact, under the different headings into which he had divided these characters, he grouped a series of quotations drawn from the play itself, illustrating the salient characteristics which he had marked out. He seems, so far as I can follow it from the process of evolution, to have been the first person to have conceived the idea of indoctrinating his pupils with the precise matters which would be useful in an examination. At the far end of his book he appends examination papers. That had been done before; but he was the first, so far as I have seen, who carried the analysis of the characters to anything like the extent to which the author of this book has done, and he has illustrated that analysis by a series of apt quotations placed under each special heading into which he had divided the category. That is the principal part of that portion of his work which has been most in discussion before us—namely, the characteristics of the different characters. It is said that imitation is the best compliment that you can pay to another person, and the plaintiffs having published this particular work in 1893—although the series of which it was one had begun as far back as 1887 or 1888—it did present these new features that I have dwelt upon as compared with the earlier works of different authors. It was brought out in 1893, but, curiously enough, the defendant Mr. Marshall, who had been more or less a rival competitor in the race for success in passing pupils for examination, did not bring out his work on the same subject until somewhere towards 1899 or 1900. Well, it is also a curious fact that there was a very marked resemblance between the work brought out by the defendant Mr. Marshall and the work published by the plaintiffs, so much so that an action was brought by the present plaintiffs in which they attacked, I think, four other plays brought out by Mr. Marshall, as well as the play now in question, “As You Like It.” Without getting into court, but after the first preliminaries—the issue of the

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writ, and so on—had taken place, that action was settled by a money payment made by the defendants, who were the publishers only, and not by Mr. Marshall, who is now one of the defendants. A money payment was made, and steps were taken to destroy the whole of the incriminated edition. The defendant Mr. Marshall was not, I repeat, a party to those proceedings, but his publishers were, and they gave the undertaking that I have described. What happened upon that? No sooner were the obnoxious copies destroyed than the defendants (the publishers) put it into the hands of Mr. Marshall to bring out a new and another edition which should not be an infringement of the plaintiffs' work. A new edition was accordingly brought out in a short time, and when the plaintiffs came to examine it they were of opinion that it, taken by itself, constituted an infringement of their work. The consequence was that the present action was commenced, and commenced not only against the publishers, but also against Mr. Marshall, the author. Well, we have had the assistance of counsel, and we have had a very elaborate examination of all the books involved in this controversy—that is to say, the plaintiffs' work, the first edition of Mr. Marshall's work and the subject-matter of this action—the second edition of that defendant's work. The action was brought before Kekewich, J., who, after a long hearing, came to the conclusion—on grounds which I shall have to comment upon in a moment—as the result of the proceedings before him, that he could not interfere to restrain the defendants from publishing the incriminated work. But when I say that of Kekewich, J., I think that, in all other respects, I have his authority for the opinion which I have myself formed in this case, for I am about to show that, but for one particular circumstance, Kekewich, J. would have been of opinion, and in fact was of opinion, that the present edition of the defendants' work was an infringement of the plaintiffs' copyright. Now, in order to show that, I propose to read a passage from Kekewich, J.'s judgment to show, first, what his real opinion was; and, secondly, to show what reason he had for not giving effect to that opinion. Now, this is what he says: "The history of the preparation of the first edition and the comparison of that with Mr. Page's book were properly brought out in evidence; but, notwithstanding that, I am compelled by the pleadings to restrict my decision to the second edition, and, however much I may be disposed to condemn the first, or to hold that in the preparation of the second Marshall was largely influenced by the contents of the first and his recollection of them, I do not deem myself at liberty to allow that to enter into the consideration of the issue above stated. It would have been possible for the plaintiffs, if unfettered, to have framed their pleadings otherwise, and to have treated the second edition as for all practical purposes only a reissue of the first; but they have elected for good reasons to adopt a different course, and they and I are alike bound to abide by it. I recognise the difficulty—often insuperable—of expressing a useful opinion on facts which do not exist or cannot be ascertained, or, as in this case, cannot properly be made the foundation of a judgment. Yet I think the plaintiffs are entitled

to know my opinion on the question whether, on the assumption that the first as well as the second edition is before me, the copyright has been infringed. That the first edition infringed the copyright is scarcely open to doubt. I count for nothing the consent judgment (to which Mr. Marshall was no party), but the admissions extracted from him in cross-examination"—that is, in the present action—"show that especially as regards the sketch of the character of Rosalind he not merely derived great benefit from Mr. Page's book, but practically in many particulars copied it. I accept his statement that Mr. Page's book was not before him—that is, not lying open on the table so that he could refer to it; but I also accept his statement that he had read it carefully, and that with an excellent memory he could, and did, have present to his mind Mr. Page's treatment of the subject and the language in which that treatment was expressed. When preparing the second edition he read Mr. Page's book again, in order to see what passages required to be deleted (which passages he at once struck out), and, with his memory thus refreshed, he rewrote certain characters, including Rosalind, so far as this operation rendered rewriting necessary. I think it was impossible for Mr. Marshall to compile a second edition on the same lines as the first which should not infringe the copyright. I think it was impossible for him to divorce his mind sufficiently for that purpose from the book which he knew well, and from which he had largely borrowed, especially when he had been obliged to consult it afresh and with some special care. Avoiding the use of Mr. Page's language was wholly insufficient to enable Mr. Marshall to escape the difficulty in which he had placed himself. If, therefore, I were at liberty to treat the first edition as the subject of complaint, or to regard the second as springing from it, I should not hesitate to find on this ground alone that the plaintiffs' copyright had been infringed, or to give them the full rights to which such infringement would entitle them in this court." Therefore, we have a clear opinion by the learned judge, that, but for a particular reason which he thought insuperable, his own opinion was on the admitted facts, on the genesis of the second edition, as demonstrated from the lips of the author himself, that the second edition was just in the same sense as the first an infringement of the plaintiffs' copyright. Now, that was his opinion if he had been at liberty to look at all the facts. You have the first edition which, as the learned judge says, the defendants themselves could hardly deny was nothing short of a copy, and a servile copy in many important parts, of the plaintiffs' work. And we have as the result of cross-examination the exact process of evolution described—how the defendant Mr. Marshall used the first in the preparation of the second. When we come to consider it—we have had it stated before us again—it seems to me that the learned judge was perfectly right in that view. The first edition could not be defended. That was admitted by the publishers. It was not admitted in the first proceedings by the author, because he was not a party thereto. But as a result of the examination in the present action there is a practical admission by the author himself that the first edition could not be defended. What is the process that the defendant has adopted, and by

which his second edition has been developed? He has in his possession the proofs of the first edition; he carefully re-reads those proofs, and he puts marks which, though they do not efface them from his view, do denote the fact that certain particular passages are such that he thinks cannot stand, having regard to what happened in the first trial. He marks those passages, but they are so marked as to be still obvious to the eye and capable of being read, although they are not to appear as in that edition. He has before his eye his own work, no doubt; but, in fact, so far as the matters in this case are concerned, it is practically the work of the plaintiffs because it is a copy of the plaintiffs' book. It is garbled to a certain extent, but it is nothing better than a copy. Having that before him, he makes certain notes indicating what passages cannot stand, and for which, therefore, some substitution must be found. We have heard, and we see as the result in the second edition, the changes of expression which he has made while conveying the same thing in substance—the alteration of the order of quotations while leaving the quotations there themselves, the retention of the string of quotations used, and the purpose to which they were applied, and, further, the same general system of analysis of character which had been originally in the plaintiffs' work, and had been reproduced by the defendant Mr. Marshall in the first edition of his own. That, broadly—I am not pretending to treat the matter with exactitude of detail—is the process by which the second edition was reproduced. And, as Kekewich, J. says, but for the particular barrier (which I have not endeavoured to deal with), if he were at large to take the first and second edition together, he would have had no hesitation in holding that the second edition was an infringement of the plaintiffs' copyright. That being so, and having got the opinion of the learned judge with regard to that proposition, what was the reason why he did not give effect to that view and restrain so far as was necessary the publication of the obnoxious parts. When I examine it—with the greatest possible respect to the learned judge—it seems to me that he must have really misunderstood what actually had happened in the matter. The plaintiffs in this action did what plaintiffs are very often disposed to do, that is to say, they introduced a little colouring into the statement of claim by setting out facts as to the earlier infringement by the first edition. Now, this action is not brought for that infringement of the first edition. It is brought for the infringement of the second edition, and it was a statement of a somewhat ornamental and rhetorical character which he introduced into the narrative of the genesis of the second edition what was in the first. It may have been thought to prejudice the trial of the particular issue before the court, and for that reason, and for that reason only, it was struck out. But that did not alter or wipe out of history the fact that the defendant Mr. Marshall was the author of a work which had pirated the plaintiffs' work. That fact remained exactly where it was before. The defendants the publishers had to submit to the destruction of all the copies of the first edition, and the defendant Mr. Marshall was debarred from re-issuing again the same work in the same language. Being debarred from doing that, he is equally

debarred from doing anything that is a mere colourable alteration. So that we have had it before us, and are entitled to look at the first edition and see how far in the process of evolution the first edition is the father of the second. When we examine into the matter we find how the second edition was evolved from the first, and how the defendant Mr. Marshall by the process, which he admits himself he had undergone, had practically debarred himself from writing the second work from the first work. The defendant himself, as we have heard, has been signally successful in passing this class of examination, and no doubt if that experience develops anything it develops the memory. He has shown—if we accept his own explanation of how these things were done—that he does possess a most singularly retentive memory, because we have demonstration that pages from the work of the plaintiffs have been reproduced practically verbatim in the defendants' work. Of course, I give the defendant Mr. Marshall credit for the most absolute veracity—I do not know whether the learned judge in the court below did so. It is pressed upon us that he did. But I have looked carefully through the notes that I have before me, and I cannot say that it appears on the notes that the learned judge did place the most absolute confidence in him. Certainly he did not compliment him on his veracity, and told him frankly without circumlocution to tell the truth, the whole truth, and nothing but the truth. Giving the defendant Mr. Marshall all credit for telling the truth, it is certainly demonstrated that he had a most remarkable memory. He does not do himself justice, being gifted with such a memory and being able to reproduce whole passages of a book without looking at it, if he has saturated his mind with that book. He has handicapped himself by doing that, and attempting a thing which is beyond his capacity, because the work is to a very large degree, standing by itself on its own merits, an infringement of the plaintiffs' work. I do not propose to go into a minute comparison or detail of the various passages. I am content to take the learned judge's own view from the passages which I have read. When I have displaced the only reason, as I think I have done, why the learned judge felt himself fettered in giving full effect to his strong conclusion of fact, it seems to me that I have removed the only bar to differing from the learned judge's actual judgment and giving effect to that which was really his true opinion. Now, how does the matter stand in point of law? The defendants here do not really deny that the plaintiffs' work is the subject-matter of copyright. Counsel for the defendants have addressed arguments to us, so far as it is possible for them to do, which, in my view, are only relevant to that issue. But, when pressed with that, they said that they did not go so far as to contend that the plaintiffs' work was not the subject-matter of copyright, though the arguments they addressed to us upon the appeal were more relevant to that question than to the question whether the defendants were infringing or not. So that I start with the admission that the plaintiffs' work is the subject-matter of copyright, and I have not the slightest doubt that it is. As I have already said, though the work does not perhaps range in the highest scale of literature, it has shown a very considerable amount of skill,

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and certainly the adaptation of means to an end; for, whatever we think of the end, the means seem so admirably adapted to the end that the defendant Mr. Marshall pays the highest compliment one man can pay to another—namely, the compliment of imitation. The sources from which these works were drawn were common. It was open to anybody to compile an edition of "As You Like it," and open to him to go to all the sources of criticism and to make selections from them. It was open to him to cull quotations from other books and to put them together as the author of the plaintiffs' book has done, and clearly that was subject-matter of copyright for them. He has shown skill and industry and many higher qualities. I have read the book through, and it seems to me for a book of its kind to be a very scholarly work, done in a terse and business-like manner, which presents something to be admired, or, at all events, something that the defendant Mr. Marshall did not quite succeed in achieving himself. If I may choose between the two, I prefer the directness and brevity of the plaintiffs' work to that of the defendants'. Therefore, there is no doubt whatever, as it seems to me, that the plaintiffs' work was one which was subject-matter of copyright, but, as I have said, the materials were open to the world. Now, there is some authority on this matter. The question has arisen before, and I only propose to refer to one or two passages from authorities which are binding upon the matter. I refer first of all to the case of *Jarroll v. Houlston* (3 K. & J. 708). That was a case where there was a question respecting two publications, one called *The Guide to Science* and the other called *The Reason Why*. I do not propose to read the whole of the headnote, but there are one or two propositions which are material: "But another person may originate another work in the same general form, provided he does so from his own resources and makes the work he so originates a work of his own by his own labour and industry bestowed upon it. In determining whether an injunction should be ordered, the question where the matter of the plaintiff's work is not original, is, how far an unfair or undue use has been made of the work. Instances of unfair or undue use, and the contrary, in works of this description. If, instead of searching into the common sources and obtaining your subject-matter from thence, you avail yourself of the labour of your predecessor, adopt his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use." And on p. 716 there is this passage in the judgment of Page Wood, V.C.: "The question I really have to try is whether the use that in this case has been made of the plaintiffs' book has gone beyond a fair use. Now, for trying that question several tests have been laid down. One which was originally expressed, I think, by a common law judge, and was adopted by Lord Langdale in *Lewis v. Fullerton* (2 Beav. 6), is whether you find on the part of the defendant an *animus furandi*—an intention to take for the purpose of saving himself labour. I take the illegitimate use, as opposed to the legitimate use, of another man's work on subject-matters of this description to be this: If, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in

itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources and obtaining your subject-matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use." That seems to me to cover substantially what the defendant Mr. Marshall has done in this case. There are only one or two more passages that I desire to refer to. The next is in the case of *Spiers v. Brown* (6 W. R. 352). It was a case of a suit brought by the compiler of *Spiers' School Dictionary* against a man named Brown. What I refer to is from a passage in the judgment of Page Wood, V.C. in which he mentions this: "In the instance mentioned by Sir Samuel Romilly, a work consisting of a selection from various authors, two men perhaps might make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." That anticipates the very question which was put in the course of the argument in this case as to whether you could have copyright in quotations colourably selected to emphasise or illustrate some particular idea, and that is evidently an expression of the Vice-Chancellor's opinion that that would be the subject-matter of a copyright. He puts it as an obvious instance of something that would be the subject-matter of copyright. But it does not stand there because it is a quotation from a judgment of Lord Eldon in which he refers to a passage quoted by Sir Samuel Romilly in argument, and refers to it in a way which shows that he assents to it. It is in the case of *Longman v. Winchester* (16 Ves. 269). Referring first of all to Paterson's Road Book, Lord Eldon says this: "It is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere republication of a work which the labour and skill of another person had supplied to the world." Then Lord Eldon goes on to refer to the instance mentioned by Sir Samuel Romilly which I have just mentioned—namely, that of a work consisting of a selection from various authors—"two men perhaps might make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." Then there is also the authority of the gentleman who was well known in these courts before he went to India, and who afterwards became a distinguished Indian judge, Sir Arthur Wilson, in which the very point is raised and decided in the case of *Macmillan v. Sarhe Chunda Gung* (17 Ind. L. Rep. Calcutta series, 951). In that case the matter in question was the well-known series called *The Golden Treasury*, which is a series of quotations put together by Mr. Palgrave, and the defendant had reproduced his work practically, superadding notes of his own, and the learned judge upheld, or sustained, a claim for infringement. It seems to me

that that is precisely what the defendant Mr. Marshall did in the present case. And if we required demonstration of what, on a general view, was sufficiently obvious before, I think that the particular instance to which Mr. Scrutton called our attention and the verification of the quotation manifest that in that respect the process that was suggested he had gone through he went through in many other cases. That is to say, he took absolutely what is there written down from the work of another person, including the author of the plaintiffs' book. I think that that is clear to demonstration, and that we are entitled to look upon it as throwing a light upon the method by which the other methods were arranged. It is said that in the second edition the defendant Mr. Marshall eliminated some of the most obnoxious passages. Those were chiefly the passages descriptive of what the quotations afterwards annexed were going to illustrate—little connecting links printed between the extracts. No doubt those are altered, but it seems to me that the substance of them is preserved although the order of the quotation is altered. It was put to him: "How about the quotations themselves?" It is very clear now, from the evidence, and I have certainly formed that opinion myself, after having studied the steps by which the second edition came into existence, that he annexed those quotations just as they were. No doubt he says: "I am a very well-informed man; I have given, in fact, the greater part of my attention to these works, and I have no doubt I could have evolved the whole of these quotations from researches which I could have made: I know not only where those quotations come from, but I know the authors who have named them as appropriate to the particular matters, and I could tell you who they were." But, unfortunately, he did not go through that process himself; he has adopted the work of another man who may or may not have gone through it; but, whether he did or did not, the defendant did not. He simply took what another man had done. It is admitted that the choice of quotations illustrative of particular traits and particular character, and chosen for that purpose, involves certain qualities of mind—more or less high according to the area over which those quotations extend. None the less do they exist even although the area may be a narrow one; so also the effort of getting hints from other people. Whether the author of the plaintiffs' book arrived at them by his own reading or not I do not know, but it has been done by him in the first instance; and that in my judgment does not confer upon the defendant, Mr. Marshall, the right to annex the results of that operation. I think it is a misconception on the part of the learned counsel. Perhaps I ought not to use the expression "misconception," because possibly it was his business to put the argument before the court in that way, and I am not at liberty to form any opinion at all as to his own view of it. But counsel justified annexing another man's quotations on the ground that you may follow an indication given in another book as to the place where you will find authorities; that you have the right to consult them; and that all the defendant Mr. Marshall does, being directed by a reference to a particular quotation, is to go and look to the author and see whether

the quotation corresponds with the text, and, if so, the text being common property he is at liberty to annex that quotation. I cannot admit that for a moment. He rather suggested that it was justified by the cases relating to directories, which say that though you cannot, where another man has compiled a directory, simply take his sheets and reprint them as your own, you are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and if you do that you may publish the result as your own. Certainly; but are you at liberty to apply the same principle to a series of quotations—to take the reference given by one author although he quotes such and such a passage as illustrating this particular matter—to say, "I will just go and see if that is correctly copied or not, and if it is correctly copied I propose to introduce it with any other quotation which illustrates the particular passage, and I propose to adopt that as my own work?" That leaves out the whole merit; the felicity of the quotation; its adaptability to a particular end; its illustration of a particular characteristic. All those things enter into the choice of one quotation as apart from another. That is a process which may involve gifts both of knowledge and intelligence. The aptness of quotation does not depend on the particular page or number of lines in which it is found; and that is all you find if you obey a certain direction to go to a certain place and take it. It does not entitle you to annex the skill and judgment and taste which has dictated the selection. It does appear to have been the defendant Mr. Marshall's view of his rights, as his counsel has put it forward for him, that if he once knew where to find the quotation then he had a right to annex it; and that if he once knew where to look and find the quotation, and if it corresponded with what the author had written, he has a right to take it. I cannot accede to that for a moment; and it seems to me that the law is clearly such as to entitle the plaintiff to complain if quotations selected and arranged by him are imitated and adopted by the defendant Mr. Marshall. I think that it has been abundantly shown that in the second edition of that defendant's book not only have the quotations in substance been taken, but the letterpress connecting them has also in substance been taken in a great many instances, and particularly in the character sketches. That has been done to such an extent as to put it entirely outside those trivial and casual imitations which do not amount to a breach of copyright. There has been a real annexation by the defendant of the work and labour and skill and taste of the plaintiff; and, therefore, it seems to me that this appeal must be allowed. I think that in allowing it I am giving effect to what was the true opinion of Kekewich, J. himself. The precise limits of the injunction will be explained by my brother Stirling.

STIRLING, L.J.—I am of the same opinion. The question which arises in this case is whether or not the defendant Mr. Marshall has or has not made an illegitimate use of the plaintiffs' work within the meaning of the definition which has been already read by my Lord from *Jarroll v. Houlston* (*ubi sup.*). Now, it is said that the defendant Mr. Marshall is a scholar, is a practised teacher, and has for many years taught this very

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subject of Shakespeare, one of whose plays form the subject of this book; that he has a wide knowledge of Shakespearian English; and that he was able to write the book which he has written without reference to the plaintiffs' book at all. I am quite ready to assume all that; but the question is, has he done so? I am not going in detail through the passages in the two books which have been so much referred to and commented upon. I only say that, taking the character of *Rosalind* alone, it seems to me impossible to read the first edition of the account in the plaintiffs' book of her character, and compare it with that written in the first edition by the defendant Mr. Marshall without arriving at the conclusion that the one was borrowed from the other, and that an illegitimate use was made of the plaintiffs' book for that purpose. That that is the conclusion I should arrive at on a mere comparison of the two books appears to me to be amply supported by the admissions which were made by the defendant Mr. Marshall in cross-examination before the learned judge in the court below. I arrive, therefore, at the conclusion, as I have already said, that in this portion of the book an illegitimate use was made of the plaintiffs' work by the defendant Mr. Marshall. Then the question is this: Is it altered by what he did with reference to the second edition? I think not. He has told us in his cross-examination what he did. He had the proofs of his first edition before him; he read them and he read the plaintiffs' book and carefully compared them, and he proceeded to strike out from those proofs such passages as he thought were objectionable, having regard to the book of the plaintiffs. Then a fortnight afterwards he proceeded with these materials before him—that is, with the proofs altered before him, as I have said—to rewrite his text, preserving the quotations and also a portion of the text. It seems to me that, having regard to the extraordinary memory that this gentleman possesses, he was not in a position to use in a way that would be free from objection those materials that he had. He availed himself, on his own admission, of a very considerable portion of that which appears to me he did derive from the plaintiffs' book, and he turned them to use in the second edition. On those grounds I consider that with regard to the second edition also he has infringed, and I agree with the judgment of my Lord.

COZENS-HARDY, L.J.—I so entirely agree with all that has fallen from my learned brethren that I do not think it necessary to add anything.

P. Ogden Lawrence, K.C.—As to the form of the injunction, I ask that the injunction should be in the form in *Pike v. Nicholas* (*ubi sup.*). In that case it was considered that where the whole book had not been pirated, the injunction should be to restrain the publication of the book in its present state or of any book containing the parts objected to. In the defendants' book the parts objected to would be the character sketches so far as they relate to the characters attacked. Then there should be an order for the cancellation to the satisfaction of the plaintiffs of those parts of the book, as was done in *Pike v. Nicholas* (*ubi sup.*). The plaintiffs cannot get delivery of those parts which are an infringement

of their copyright because they have not given preliminary notice under sect. 23 of the Copyright Act 1842 of a demand to that effect. The court can order cancellation, and that is quite enough for the plaintiffs, and an injunction to restrain the defendant from issuing, and damages.

Their Lordships granted an injunction restraining the defendants from further issuing their book containing such portions of the character sketches as were referred to in the plaintiffs' particulars, and an order with regard to the cancellation of those portions. The measure of damages to be ascertained by an inquiry as to damages at the plaintiffs' own risk as to costs. The costs of the inquiry to be reserved.

Appeal allowed.

Solicitor for the appellants, *Harvey Clifton*.
Solicitors for the respondents, *J. Woodhouse*, agent for *C. H. Marshall*, Huddersfield; *T. Larmartine Yates*.

Monday, Jan. 13.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

DUNLOP PNEUMATIC TYRE COMPANY v. ACTIENGESSELLSCHAFT FÜR MOTOR, &C., VORM. CUDELL AND Co. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Writ—Service—Foreign corporation—Residence within jurisdiction—Service in England—Order IX., r. 8.

A foreign corporation, manufacturers abroad of motor-cars, hired a stand at the Crystal Palace to exhibit their goods at a cycle show for a period of nine days. They had the exclusive use of the stand, which was in charge of a person whom they had sent from abroad for the purpose, whose duty it was to explain the working of the articles exhibited, to press their sale, and to obtain orders. A motor-car exhibited at the stand was fitted with tyres which the plaintiffs alleged to be an infringement of their patent. The writ in an action for the alleged infringement was served upon the servant of the foreign corporation at the stand at the Crystal Palace.

Held (dismissing the appeal), that the defendants were carrying on business and were resident within the jurisdiction, and that the writ was properly served under Order IX., r. 8.

THIS was an appeal by the defendants from an order of Channell, J. at chambers.

The plaintiffs brought this action against the defendants for an injunction to restrain them from infringing the plaintiffs' patent, and for damages for the infringement. The patent was for a pneumatic tyre.

The facts are stated in the judgment of Collins, M.R.

Danckwerts, K.C. and R. B. Acland for the appellants.—The learned judge ought to have given leave to amend the summons. It was clear that Müller was not the head officer of the defendants at the Crystal Palace, and therefore the service of the writ was bad in any case. A writ cannot be served upon a foreign corporation in this country unless the corporation is carrying on business at some fixed place of business within the jurisdiction, so that they can be considered

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

to be resident within the jurisdiction. There must be some sort of permanent occupation of some fixed and definite place of business, though that occupation may be only for a limited time. It cannot properly be said that the defendants carried on business at this stall at a show as their fixed place of business in this country for the very limited period of the show:

Newby v. Von Oppen, 26 L. T. Rep. 164; L. Rep. 7 Q. B. 293;

La Bourgogne, 80 L. T. Rep. 845; (1899) A. C. 431; *Haggin v. Comptoir d'Escompte de Paris*, 61 L. T. Rep. 748; 23 Q. B. Div. 519;

The Princesses Clementine, 75 L. T. Rep. 695; (1897) P. 18;

Badcock v. Cumberland Gap Park Company, 68 L. T. Rep. 155; (1893) 1 Ch. 362;

Mackereth v. Glasgow and South-Western Railway Company, 28 L. T. Rep. 167; L. Rep. 8 Ex. 149.

Bray, K.C. and A. J. Walter, for the respondents, were not called upon to argue.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The defendants, who are a foreign company, applied to have the writ and service thereof set aside. The defendants hired a stand at the Crystal Palace for the purpose of exhibiting their goods; they are manufacturers and sellers of motor-cars with pneumatic tyres, and they exhibited at their stand one of these cars with tyres which the plaintiffs allege to be an infringement of their patent. This action is brought in respect of that infringement, and the question is whether this foreign corporation can be brought within the jurisdiction of the courts of this country. Two points were raised—First, that the defendants, being a foreign corporation, were therefore not amenable to the jurisdiction of these courts; and, secondly, assuming that they could be made amenable to the jurisdiction, that the writ had not been served upon the right person. The ground upon which the defendants' application was made was stated in the summons to be "that at the time of the service of such writ of summons the defendants were a foreign corporation resident out of the jurisdiction of the court." It was not stated as a ground of the application that the writ was served upon a person who was not the proper officer of the corporation, within Order IX., r. 8. The application was heard by Channell, J., and he refused to make an order to set aside the service upon the ground stated in the summons, and held that the foreign corporation were carrying on business in this country; and he refused to amend the summons by adding as a ground for setting aside service that Struck and not Müller was proper person to be served, because, if that objection had been taken distinctly in the first instance, Struck might have been served. Now, as I have said, the defendants hired certain premises at the Crystal Palace for the purpose of exhibiting their goods, and they sent over to this country Struck, with his assistant Müller, to look after their interests at the National Cycle Show. It was Struck's duty to look after the exhibits and to push the sale of the defendant's goods; and, when Struck was absent, Müller performed those duties. The writ in this matter was served upon Müller. The learned judge refused to allow the defendants to amend their summons by stating as a ground of objection that service was effected upon the wrong person. The defendant could

not be entitled to rely upon that objection without an amendment, and they ask us to permit them now to amend their summons so as to raise that point. The learned judge has refused, as a matter of discretion, to allow that amendment for the purpose of raising a merely technical point, and I think that, in the circumstances, it would be wrong for us to overrule the exercise of his discretion. We come then to the rule by which this process is regulated. Order IX., r. 8, provides that, "in the absence of any statutory provision regulating the service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, . . ." It seems to me that Struck clearly came within the term "head officer" in that rule. He was a person sent over by the defendants to do that which, if the defendants had been an ordinary individual, that individual would have done himself. Struck had to do everything incidental to carrying on that part of the defendants' business, which consisted in showing and vending their goods at the Crystal Palace. The defendants hired a special place for that purpose; they occupied it exclusively with their goods; and they employed their own servant to occupy himself exclusively in conducting that part of their business at that place. In those circumstances I think that Struck was clearly the proper officer upon whom to serve the writ, assuming that the defendants were within the jurisdiction so as to be liable to be served with a writ. It is necessary then to consider the facts in order to see whether this corporation can be said to have been resident within the jurisdiction so as to be liable to be served with a writ within the jurisdiction. If this corporation was resident within the jurisdiction, then it could be served with a writ in the manner prescribed by Order IX., r. 8. It is, therefore, necessary to ascertain whether this foreign corporation was, or was not, resident in England when the writ in this action was served upon it. It has been held over and over again in the cases, from *Newby v. Von Oppen* (26 L. T. Rep. 164; L. Rep. 7 Q. B. 293) down to *La Bourgogne* (80 L. T. Rep. 845; (1899) A. C. 431), that the real test of residence is whether the corporation is conducting its business at some defined place in this country. If it is doing so, that is the way in which a corporation existing for business purposes can be said to reside in this country. If a trading corporation carries on its business, by its own agents, in a particular place, then it is resident in that place. No doubt in some of the cases difficulties have arisen upon the question whether the business which was being carried on for the benefit of the foreign corporation was being carried on by the corporation at a definite place so as to justify the statement that it was resident in that place. That question sometimes must be, and was in some of those cases, rather a nice question of fact. That difficulty does not arise in the present case, for this corporation has not resorted to the assistance of some person who carries on an independent business in this country, and the difficult question is not raised as to how far a foreign corporation which utilises the services and premises of a person, who carries on an independent business of his own, for the purposes of having its business conducted, can be said to be itself residing and carrying on business

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in this country. That question was considered in this court in the case of *La Bourgogne (ubi sup.)*. In that case a French company availed itself of the services of a broker, who had other business and was agent for other steamship companies, and we came to the conclusion that the French company was resident and carrying on business in this country. That question does not, however, arise in this case, for, as I have pointed out, this foreign company has hired for its own exclusive use certain premises and has not resorted to the agency of some person having an independent business in this country, but has sent over its own servant to conduct its business exclusively on the premises which it has hired exclusively for its own purposes. The only real difficulty which arises in this case arises from the fact that these premises were taken and required and occupied for the time of the duration of the exhibition at the Crystal Palace, and for that time only, a period of nine days. It has been argued on behalf of the appellants that on the question of residence time is an essential element. I agree that time is an element; residence is to be inferred from a number of facts, and time cannot be excluded. It was conceded that, if it were clearly proved that this foreign corporation had announced its intention of carrying on its own trade in England for a period of nine days, the mere fact that the period was limited to nine days would not of itself make it impossible that there should be residence during those nine days. That is not such a short period as to be a negligible quantity; it is a substantial period of time, and may in certain circumstances be a very substantial period of time. In this particular case the period of nine days during the exhibition, the purpose of which was to gather together from all parts of the country a large number of people interested in this particular class of wares to see these things, and to invite their custom and secure their orders, might well be a period during which as much business could be done as during an ordinary period of nine months in an ordinary town. It seems to me, therefore, that we cannot, upon the ground that nine days is too short a period from which to infer a residence, say that this corporation, which fulfilled in all other respects the conditions necessary to constitute residence by a corporation, ought to be held not to have resided in this country because the period was only nine days. In my opinion, there are here all the elements necessary to constitute residence; exclusive possession of the premises acquired for the purpose of carrying on the business of the corporation exclusively, and business carried on by the corporation there by its own servant and not through the medium of another person having an independent business of his own, a servant sent specially for the purpose and exclusively employed in that business. It was further contended that the appellants could not be said to be carrying on business so as to be resident in this country unless they were carrying on the whole of their business here; that they were manufacturers and manufactured abroad; and that, inasmuch as they did not manufacture upon these premises at the Crystal Palace, they cannot be said to have been resident there. That contention scarcely requires to be answered. I agree that the appellants did not carry on their whole trade at the Crystal Palace; but the selling

of their manufactures is a very substantial part of their trade, and everything incident to the vending of their manufactures was done here in the only way in which it could be done, by affording inspection, information, prices, and every opportunity of examination, and by taking orders. The mere fact that they were manufacturers elsewhere appears to me not to touch the question at all. In my opinion the learned judge was perfectly right in his decision, and this appeal must be dismissed.

ROMER, L.J.—I agree. The result of the authorities appears to me to be that, if for a substantial period a foreign corporation carries on business at a fixed place of business in this country, hired or taken by or on behalf of the corporation, then during that period the corporation is resident here for the purpose of being served with a writ. In my opinion, the facts of this case clearly bring the appellants within that statement of the law. I think that upon this short ground this appeal fails on the main ground upon which it was based. I also think that, in the particular circumstances of the case, leave to amend ought not to be given.

MATHEW, L.J.—I am of the same opinion. I agree that the technical point was properly decided by the learned judge, and that there is no reason why we should differ from him as to the exercise of his discretion. With regard to the main point, can anyone doubt that, if this corporation were an English company, it must be held to have been carrying on its business at this place in the Crystal Palace? It was a place hired by the foreign corporation, and intended to be used exclusively by the corporation for the purposes of its business, and the corporation carried on business there. That appears to me to satisfy the necessary conditions for residence, as stated in many of the cases. A corporation can only figuratively be said to reside anywhere. The criterion of residence is a fixed place used by the corporation exclusively for the purposes of the business which it is carrying on. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Cruesemann and Rouse*.

Solicitors for the respondents, *J. B. and F. Purchase*.

Tuesday, Jan. 21.

(Before COLLINS, M.B., ROMER and MATHEW, L.JJ.)

MICHAEL v. HART AND CO. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Stock Exchange—Broker and client—Wrongful closing of client's account—Measure of damages.

The defendants, who were stockbrokers, having agreed with their client, the plaintiff, to carry over certain shares on his behalf to the next settlement, wrongfully closed his account some time before that settlement. The plaintiff insisted upon the performance of the contract, and after the date of the settlement sued the defendants for damages for their breach of contract. The defendants contended that the damages ought to

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

be assessed upon the prices obtainable at the time when the account was closed, in which case the damages would be only nominal.

Held (dismissing the appeal), that, as the plaintiff had a right to insist upon the contract being performed at the date of the settlement, the defendants were not entitled to have the damages assessed upon the prices obtainable at the time when the account was closed.

THIS was an appeal by the defendants from the judgment of Wills, J., upon further consideration, after the trial of the action with a jury.

The plaintiff brought this action to recover from the defendants damages for breach of a contract to carry over certain stocks and shares on behalf of the plaintiff.

In April 1901 the plaintiff employed the defendants, who were brokers on the Stock Exchange, to buy and sell certain stocks and shares for him. The plaintiff deposited with the defendants certificates of shares belonging to him in order to secure any balance which might from time to time become due from him to the defendants in respect of the transactions carried out by them for him.

The defendants bought and sold various stocks and shares on behalf of the plaintiff for the settlements at the end of April and at the middle of May.

On the 11th May 1901 the plaintiff alleged that it was agreed upon between him and the defendants that certain contracts for the purchase of stocks and shares, which had been entered into on his behalf by the defendants for the settlement in the middle of May, should be carried over to the next settlement at the end of May.

On the 16th May the defendants closed the plaintiff's account and sold against him the various stocks and shares which, as he alleged, they had agreed to carry over until the end of May, and gave notice to the plaintiff that they had done so; and claimed to be entitled to sell the deposited shares in order to pay themselves the balance which they alleged to be due to them from the plaintiff. The plaintiff insisted upon the contract being carried out by the defendants.

After the settlement at the end of May, the plaintiff brought this action and claimed a declaration that he was entitled to have an account taken upon the footing of being credited with the best prices which the stocks and shares would have realised at any time during the currency of the account terminating at the end of May settlement; and he also claimed the delivery up of the shares which had been deposited by him with the defendants as security.

The action was tried before Wills, J. with a jury, and the jury found that the defendants had wrongfully closed the plaintiff's account in breach of the agreement between them and the plaintiff to carry over until the settlement at the end of May.

Upon further consideration the learned judge held that the plaintiff was entitled to damages calculated upon the highest prices which could have been obtained for the shares at any time between the 16th May and the settling day (85 L. T. Rep. 548).

The defendants appealed.

Lawson Walton, K.C., Herbert Reed, K.C., and Kisch for the appellants.—The judgment of the

learned judge as to the measure of damages was wrong. The damages ought to be assessed upon the prices of the shares on the 16th May, the date of the breach of contract by the defendants, in which case there would be no damages. When the defendants closed the plaintiff's account and sold the shares against him, and gave him notice that they had done so, the contract was finally determined, and the damages must be assessed upon the prices of the shares at that date. There was then a final breach of the contract. If the damages are not to be assessed upon the prices obtainable on that day, they must be assessed upon the prices obtainable at the settlement at the end of May, the time to which the contracts ought to have been carried over. The right of the plaintiff was to have the shares delivered to him at the end of May, and he cannot say that his damages ought to be assessed upon the prices obtainable on some intermediate day. They cited:

Williams v. Peel River Land and Mineral Company, 55 L. T. Rep. 689;

Mansell v. British Linen Company Bank, 67 L. T. Rep. 171; (1892) 3 Ch. 159;

Shepherd v. Johnson, 2 East, 211;

McArthur v. Seaforth, 2 Taunt. 257; 11 R. R. 559;

Murray v. Hewitt, 2 Times L. Rep. 872;

Samuel v. Bowe, 8 Times L. Rep. 488;

Ellis v. Pond, 78 L. T. Rep. 125; (1878) 1 Q. B. 426.

Rufus Isaacs, K.C. and A. J. David, for the respondent, were not called upon to argue the question whether the damages must be assessed upon the prices obtainable on the 16th May.

Upon the second question the parties agreed as to the measure of damages, assuming that they were not to be assessed upon the prices obtainable on the 16th May.

COLLINS, M.R.—In this appeal from the judgment of Wills, J. the question is as to the measure of damages for breach of a contract by brokers in an action brought against them by their client. The plaintiff said that the defendants agreed to carry over certain contracts, made by them on his behalf for the purchase of shares, from the account at the middle of May to the account at the end of May, but that shortly after the middle of May they closed his account wrongfully. The defendants said that they did not agree to carry over except upon certain conditions which the plaintiff did not fulfil. The jury found a verdict for the plaintiff upon the question whether the defendants had agreed as he alleged. The defendants applied for a new trial, but their appeal was dismissed. It was agreed that the question as to the amount of the damages should be left to the learned judge, and after further consideration he gave judgment upon that question. The defendants are now appealing against that judgment. It has been contended for the defendants that the wrongful closing of the plaintiff's account was a final breach of their contract with the plaintiff; that, the account having been closed by releasing the jobbers with whom the shares had been carried over, the plaintiff was bound to treat that repudiation of their contract by the defendants as a final breach, and as the only breach upon which he could rely. In other words, the defendants say that their breach of contract was such that, having regard to the relation existing between

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broker and client, the client had no option to insist upon the performance of the agreement, and to wait until the time fixed for performance and to assess his damages at that date; and that the client was bound to treat the contract as rescinded when the account was closed, and to measure his damages at that date. I cannot accept that argument. The general rule is that, when there has been that which is called an anticipatory breach of a contract going to the whole consideration, that does not of itself rescind the contract, for both parties must agree to the rescission. The only effect of such a breach is that it gives the other party an option to treat the repudiation of the contract as a final breach, and to treat the contract as rescinded, except for the purpose of suing for the breach; but he may refuse to treat the contract as rescinded, and may hold the other party to his contract when the time for performance arrives. That seems to me to be the law as laid down by Cockburn, C.J. in *Frost v. Knight* (26 L. T. Rep. 77; L. Rep. 7 Ex. 111), where he thus states the effect of the authorities: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which could justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." That was an action for breach of promise of marriage, the defendant having broken the engagement before the time for performing his promise had arrived. *Roper v. Johnson* (28 L. T. Rep. 296; L. Rep. 8 C. P. 167) is a case more like the present case. In that case Keating, J. said: "The question in that case arises upon a contract by which the defendant agreed to deliver coals to the plaintiffs at certain specified periods at 8s. 6d. per ton. The quantity to be delivered was 3000 tons, and the deliveries were to take place in May, June, July, and Aug. 1872. There was some controversy as to the facts, but there can be no doubt that the defendant, soon after that contract was entered into, intimated his determination not to perform it; and it seems to be agreed that, at all events, that repudiation was accepted by the plaintiffs on the 3rd of July, when they brought this action for the non-performance of it. The difficulty as to the measure of damages, or rather as to the principle on which the damages are to be assessed, arises from the circumstance of the time for delivery of the coal extending over the whole of the month of August. Had the action been delayed until after the expiration of the time for the completion of

the contract, we should have entertained but little doubt; for the case would then have been distinctly within the authority of *Brown v. Muller* (27 L. T. Rep. 272; L. Rep. 7 Ex. 319), and we should have considered ourselves bound by that decision. But the difficulty here arises from the fact of the action having been brought on the 3rd July. In *Brown v. Muller* (*ubi sup.*) it was clearly decided that, where the contract is for the delivery of goods in equal proportions in a given number of months, and the action for non-delivery is not brought until after the expiration of the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and market prices on the last day of each month respectively. That was the proper measure of damages there. But here the breach occurred before the end of the period over which the contract extended; and the question is, what is the proper measure of damages in such a case?" The learned judge then went on to say that the plaintiffs were not bound, as contended by the defendant, to prove the difference between the contract price and the price at which they could have obtained a similar contract at the date of the breach, as their measure for damages; and he held that, in the absence of evidence on behalf of the defendant; that the plaintiffs could have obtained another contract which would lessen the loss, the proper measure of damages was the sum of the differences between the contract price and the market price at the different times for delivery. The point only arose because the plaintiffs, by bringing their action before the expiration of the period over which the contract extended, must be taken to have accepted the repudiation by the defendant as a final end of the contract. I need not say any more upon that point, but in the case of *Johnstone v. Milling* (55 L. T. Rep. 629; 16 Q. B. Div. 460) the law on this question was well stated by Lord Esher, M.R. In the present case the action was not brought before the expiration of the period at which the defendants ought to have performed the contract, and the plaintiff clearly insisted upon the contract being carried out. That being so, the defendants' argument that the damages are to be assessed at the date of the closing of the plaintiff's account, and that the plaintiff can only recover nominal damages and no more, cannot be accepted. We think that that argument is wrong and contrary to the grounds of the decisions in the authorities to which I have referred. There was another alternative put forward by the defendants between that contention and the decision of Wills, J. The learned judge held that the plaintiff was entitled to have the damages assessed upon the highest prices obtainable during the period between the closing of his account and the settling day at the end of May. The defendants, as an alternative, contended that the proper measure of damages was the price ruling at the date when the contract ought to have been performed if it had not been broken by the defendants. With respect to these alternative views, the parties have arrived at a compromise in case the decision of this court is adverse to the defendants upon their first contention. We are, therefore, now giving judgment upon the first point against the defendants, and for the plaintiff for damages to be assessed in accordance with the terms of

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the compromise. This appeal will, therefore, be dismissed.

ROMER, L.J.—I agree, and have nothing to add.

MATHEW, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Beyfus* and *Beyfus*.

Solicitors for the respondent, *W. H. Martin* and *Co.*

March 19 and 20.

(Before COLLINS, M.R., ROMER, and
MATHEW, L.JJ.)

SMITH AND OTHERS v. KERR AND OTHERS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Charity—Charitable trust—Voluntary association—Inn of Chancery—Clifford's-inn—Right of members to divide property.

*By a deed made in 1618 the premises known as Clifford's-inn were conveyed to certain members of the Society of Clifford's-inn, in consideration of 600*l.*, as trustees to the intent and purpose that the premises should for ever retain and keep the same usual and ancient name of Clifford's-inn, and should for ever thereafter be continued and employed as an Inn of Chancery for the furtherance of the practisers and students of the common laws of the realm, and for the good of the gentlemen of that society, and for the benefit of the Commonwealth as aforesaid, and not otherwise, nor for any other use, intent, or purpose.*

The Society of Clifford's-inn was a voluntary independent unincorporated society, governed by a council of its members and making its own regulations respecting the election or admission, rights, privileges, payments, obligations, and conduct of its members, and the management of its property; and no person had a right to claim admission as a member. The society did not, in modern times, provide any instruction or education.

Held (affirming the judgment of Cozens-Hardy, J.), that the property was not vested in the trustees as private property for the benefit of the members, but was subject to a trust for charitable purposes.

THIS was an appeal from the judgment of Cozens-Hardy, J. at the trial of the action.

The plaintiffs in this action were five of the sixteen members of the Society of Clifford's-inn, and the defendants were the remaining eleven members, including those members who were the trustees of the property of the society, and the Attorney-General.

The plaintiffs claimed (1) that the trusts of the property of the society known as Clifford's-inn might be administered under the direction of the court; (2) a declaration that the property was not subject to or affected by any charitable trust; and (3) that the rights of the parties beneficially interested in the property might be ascertained and declared.

The action was brought for the purpose of determining the question whether Clifford's-inn was private property held by the trustees for the

absolute benefit of the members of the society for the time being and capable of being disposed of by them as they might think fit, or whether it was subject to a charitable trust.

The Society of Clifford's-inn is a voluntary unincorporated society, composed of lawyers and law students, governed by a council of its members, consisting of a Principal and Rules, making its own regulations as to the election or admission, rights, privileges, payments, obligations, and conduct of its members, and as to the management of its affairs.

No person has a right to claim admission to the society, and the society cannot be compelled to elect new members.

The property in ancient times belonged to the Clifford family; from whom it derived its name.

For centuries prior to 1618 it had been held by or on behalf of a society, known as the Society of Clifford's-inn, which was one of the ancient Inns of Chancery, and occupied the property, which then consisted of a mansion-house and garden, as tenants of the Earls of Cumberland and Lords Clifford.

An indenture of feoffment dated the 29th March 1618 was made between Lord Cumberland and Lord Clifford as grantors, of the first part, Nicholas Sulyard, Principal of Clifford's-inn, and twelve other persons described as the Rules of the Society of the second part, and Richard Prescott and Richard Antrobus of the third part. The material parts are quoted in the judgment of Collins, M.R.

New trustees were from time to time appointed; and, at the time when this action was commenced, there were eight trustees in whom the property was vested for the purposes of the society.

When this action was commenced the members of the society, including the trustees, were only sixteen in number.

The society was always composed of lawyers or law students. In former times the society used to have moots and lectures upon legal subjects, which were entirely for the benefit of the members. These were held and regulated at the will of the Principal and Rules, but were long since given up. The society had no library, and did not give any education or instruction.

From time to time new buildings had been erected, and alterations made, at the expense of the society; and the enjoyment of the property had never been interfered with or controlled by anyone.

In 1880 the person, who was then entitled to the annual rentcharge of 4*l.* and the right of nomination to the set of chambers reserved by the deed of 1618, in consideration of the payment of 850*l.*, released the rentcharge, and conveyed the set of chambers to the Principal and Rules of the society upon the trusts and for the uses, intents, and purposes mentioned and declared in the deed of 1618, of and concerning the property thereby granted.

The action was tried before Cozens-Hardy, J., and the learned judge held that the property was subject to a trust for charitable purposes, and was not held for the private benefit of the members of the society (82 L. T. Rep. 795).

One of the members of the society appealed.

Neville, K.C. and Lyttelton Chubb for the appellant.—The learned judge was wrong in

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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holding that this property was held by the Society of Clifford's-inn subject to a trust for charitable purposes. The society was a voluntary independent association formed for the benefit of its members, and the property of the society belongs to the members for their own personal benefit, and is not subject to any charitable trust. Legal education, no doubt, was one of the subjects promoted by the society, but their property was not affected by any trust for that purpose:

Attorney-General v. Eastlake, 11 Hare, 205;
Carne v. Long, 2 De G. F. & J. 75;
Cocks v. Manners, 24 L. T. Rep. 869; L. Rep. 12 Eq. 574;
Re Clark's Trusts, 1 Ch. Div. 497;
Cunack v. Edwards, 75 L. T. Rep. 122; (1896) 2 Ch. 679.

No person has any right to claim admission to the society, and the courts have always refused to interfere with the internal management of the Inns of Court or Inns of Chancery:

Re v. Gray's-inn, 1 Doug. 353;
Re v. Lincoln's-inn, 4 B. & C. 855; 28 R. R. 482;
Re v. Barnard's-inn, 5 Ad. & E. 17.

Sir R. Finlay (A.-G.), Sir E. Carson (S.-G.),
E. J. Parker, and *Baildon* for the Crown.

COLLINS, M.R.—This is an appeal from the decision of Cozens-Hardy, J., as he then was. He states the point that arises for discussion in the first words of his judgment. They are these: "This action is brought to determine whether the property known as Clifford's-inn is subject to or affected by any charitable trust, or whether it is held by the trustees in whom the legal estate is vested, as private property for the individual members of the Society of Clifford's-inn for their own personal benefit, to be divided and disposed as they may think fit." He has decided that the property is affected by a charitable trust. Now, though Clifford's-inn is a very ancient foundation, we are not left to vague speculation derived from such hints as can be collected from early references to it, because we have in comparatively modern times, as a basis of the whole discussion before us, the deed of the 29th March 1618, under which Clifford's-inn acquired the property now in question. On the face of that deed, the purpose for which it was entered into is distinctly recited, and when we come to the operative part of the deed we find that the same purpose is provided for in express terms. The material parts of that deed are as follows: After naming the parties, Lord Cumberland and Lord Clifford being the two grantors, it witnesseth "that the said Right Honourable Earl and Lord Clifford having an honourable intent and care that the capital message commonly called Clifford's-inn before mentioned, with the appurtenances thereto belonging (being the ancient inheritance of the said Earl and Lord Clifford and of their ancestors), and which hath been for many years heretofore by the allowance of the said Earl and his ancestors, the Earls of Cumberland and Lords Clifford, used and employed as an Inn of Chancery for the furtherance of the study and practice of the common laws of this His Majesty's realm of England, and during all that time hath been ordered and governed by the Principal and Rules of the said house for the time being in very good sort and with great discretion both to the good of the commonwealth and to the honour of the

said Earl and Lord Clifford and their ancestors, may now, upon the humble suit and earnest desire of the said Principal and Rules and other the practisers and students of the said society be assured, estated, and settled as"—I think that means "so as"—"the same shall and may for ever hereafter continue and be employed as an Inn of Chancery for the furtherance of the practisers and students of the common laws of this realm as aforesaid; and that the Principal, Rules, and other the gentlemen of the said society may from henceforth be assured of a certain estate therein do principally for that purpose, intent, and consideration, and for and in consideration of the sum of 600*l.* to them by the said Nicholas Sulyard, Nicholas Gymbon, William Babb, Robert Clinch, John Tanner, Thomas Leyliard, Robert Dayes, James Lawrence, John Nicholls, John Rowe, David Polhill, and George Duncombe, for and on behalf of themselves, and the rest of the gentlemen of the same Society of Clifford's-inn aforesaid at or before the sealing and delivery of these presents well and truly satisfied, contented, and paid, whereof they the said Francis, Earl of Cumberland, and Henry, Lord Clifford, acknowledge the receipt and of the same and every part and parcel thereof do acquit and discharge the said Nicholas Sulyard, &c., and every of them, their and every of their heirs, executors, and administrators, by these presents. And also to settle in and to the said Nicholas Sulyard and Robert Clinch the freehold of the capital message garden, and premises aforesaid to the intent and purpose a perfect common recovery for the assurance of lands may be had recorded and executed of the said message, garden, and premises to the uses, intents, and purposes after in these presents mentioned. They the said Francis, Earl of Cumberland, and Henry, Lord Clifford, have granted, bargained, and sold, aliened, enfeoffed, and confirmed, and by these presents do, for them and their heirs, fully, clearly, and absolutely grant . . . all that the said capital message with the appurtenances, commonly called or known by the name of Clifford's-inn, situate and being near St. Dunstan's Church in Fleet-street, London, and all and singular houses, edifices, buildings, chambers, cellars, gardens, yards, walls, lanes, passages, ways, easements, profits, commodities, and appurtenances whatsoever to the said capital message belonging or in any wise appertaining or accepted, taken, used, enjoyed or accounted as part, parcel, or member thereof, and also the reversion, reversions, remainder, and remainders of the said capital message and other the premises before in these presents granted, bargained, and sold, and of any part and parcel thereof, and all the estate, right, title, use, inheritance, claim and demand of the said Earl and Lord Clifford of, in, and to the said garden and premises and every part and parcel thereof, except and reserved out of this grant, unto the said Earl and Lord Clifford, and to their heirs and assigns out of the garden, commonly called Clifford's-inn Garden, to the said capital message belonging, so much and such part of the said garden next adjoining in some part upon Serjeants'-inn, in Chancery-lane, and in some other part upon the wall between the lands belonging to or used with the capital message, commonly called the Rolls, and the said garden as

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doth contain in breadth 22ft. and in length 134ft. to be severed and inclosed out from the rest of the said garden, and from time to time to be kept and maintained by the said Earl and Lord Clifford, their heirs and assigns, and all the row of trees standing and growing in and upon the premises so excepted as aforesaid, to have and to hold the said messuage, tenement, and garden, and other all and singular the premises before in these presents mentioned, to be hereby granted, bargained, and sold and every part and parcel thereof with the appurtenances (except before excepted), and the reversion and reversions, remainder and remainders thereof and of every part and parcel thereof to the said Nicholas Sulyard and Robert Clinch, and their heirs for ever. To the only and proper use and behoof of them the said Nicholas Sulyard and Robert Clinch, and of their heirs for evermore. To the intent and purpose aforesaid, to be holden of the chief Lord and Lords of the fee and fees thereof, by the rents and services theretofore due and of right accustomed, and yielding and paying therefor yearly for ever unto the said Francis, Earl of Cumberland, and Henry, Lord Clifford, their heirs and assigns the yearly rent of four pounds. After the said recovery and recoveries, fine and fines or any or either of them shall be had, acknowledged, suffered, executed, entered, and recorded as aforesaid to the use and behoof of the said Nicholas Sulyard, &c., and of their heirs for ever, according to the intent and true meaning of this present indenture, and to the intent that the said Earl and Lord Clifford, their heirs and assigns, shall and may for ever hereafter levy, receive, perceive, and take up the said yearly rent of four pounds.

And it is further agreed by and between all the said parties to these presents and the true intent and meaning hereof and of all the said parties is that the said capital messuage now called by the name of Clifford's-inn, shall for ever hereafter retain and keep the same usual and ancient name of Clifford's-inn, and shall for ever hereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of that society and the benefit of the commonwealth as aforesaid and not otherwise, nor to any other use, intent or purpose." Then there are provisions for the trustees being continually renewed for ever. The appellant contended that Clifford's-inn was really a voluntary society of gentlemen associated simply for their own benefit, and that, as such, it was not a charitable institution, and that, that being its purpose and its practice at the time of this grant, all that this grant did was, so to speak, to facilitate and perpetuate that which they were already doing and to leave it as it was, except that it gave them a more continual existence; that, it being a mere voluntary association for the mutual benefit of the members at the time of the grant, the grant simply left it where it was; and that there was no element of charitable trust therefore in the matter. Here, again, we are not left to speculate. We have not to look for dark hints from remote times, because it so happens that we have a most authoritative contemporary record of the actual functions which Clifford's-inn and other inns of the same class were fulfilling at the very time when this grant was made. It does not rest upon that alone, although that is exceedingly important, resting as

it does upon the authority of Lord Coke, practically absolutely contemporaneous with the grant. That is preceded by another very authentic account given by Fortescue; and there is also another account (all these are cited in the judgment of Cozens-Hardy, J.) practically contemporaneous, by Stowe. Of those, I take Lord Coke's as the most directly in point, because, as I have said, it is absolutely contemporary. He says this: "For the young student, which most commonly cometh from one of the universities, for his entrance or beginning were first instituted and erected eight houses of Chancery, to learn there the elements of the law, that is to say (*inter alia*) Clifford's-inn, and each of these houses consists of forty or thereabouts." Then Lord Coke goes on, after describing the four Inns of Court and Serjeants'-inn: "All these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science that is in the world, and advanceth itself above all others, *quantum inter viburna cupressus*. In which Houses of Court and Chancery the readings and other exercises of the laws therein continually used are most excellent and behoofful for attaining to the knowledge of these laws." It seems to me, therefore, clear that at that time these Inns of Chancery were schools of learning. They were fulfilling that function, and, that being so, the question is whether they were charitable institutions. Was that a charitable purpose? It is perfectly clear that the maintenance of schools of learning is a charitable purpose. It is one of those specifically named in the statute of Elizabeth, and, if these Inns were existing at that time for the maintenance of schools of learning then they were charitable institutions. It is not necessary for us to decide that alone in this case, because it is quite enough, if that were the nature of the practice of these Inns and the purpose for which they existed, to stamp this property with a trust if it was acquired and granted for the purpose of continuing to carry out that which they were then engaged upon—namely, the maintenance of schools of learning. Therefore, I think that we have here, without any ambiguity whatever, all the elements that go to make up a grant for a charitable purpose. There was a foundation undoubtedly for the contention that there is here a society which has made rules for its own guidance, and, it may be, incidentally acquiring instruction by mutual arrangement for giving and receiving instruction among themselves, and that it might, therefore, be regarded as an institution which had no charitable purpose underlying it, and that a grant added to that would not super-add or stamp it with a charitable purpose. When, however, we look to the contemporary records to which I have referred, it is perfectly clear what the object of the society was, and what they were actually carrying out. We have had the rules of the society brought before us, which were dealt with in detail by the learned judge, who pointed out the provisions for the instruction of the young students—"tyrones," as they were called, in one of the extracts—provisions making it compulsory upon them to attend moots, and not to instruct themselves by discussion; but in some of the rules they are under penalties if they do not attend lectures and discourses coming obviously, not from themselves, but from other

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persons better fitted to instruct them. Therefore there is in the rules themselves complete demonstration of the fact that there was a system of instruction arranged, not mutual interchange of their own ideas in debate, but an obligation on them to receive and hear instruction given by competent persons. Then there are the contemporary records in which, in language of the highest possible commendation, the purposes which they serve in the advancement of learning are enlarged upon by more than one writer. Now, what is the answer to that? There is stamped on this land and property a trust for carrying out these purposes; but the appellant says that this was not a gift at all; that there was consideration given, 600*l.*, which he says was the full value of the land at that time. I do not feel at all sure about that, and there is no evidence upon it. The answer to that is clear. It does not matter where the fund comes from, or how the fund has been raised. The real question is, what is the purpose to which it is applied? The whole subject is discussed at length in the case of *Attorney-General v. Eastlake* (11 Hare, 205). The governing facts in that case are stated in the headnote, which is as follows: "The question whether funds are dedicated to a charitable use within the statute 43 Eliz. c. 4, depends not on the source from which the funds are derived, but on the purpose to which they are to be applied." Here is a public purpose for which, it may be, the members of the Inn themselves have raised a contribution. But they and the grantors joined in acquiring and granting this land for a charitable purpose just as much as if it had been granted wholly voluntarily by the grantors without any consideration received by them. It was granted for a charitable purpose. There is on the face of the grant itself a statement that that is the primary purpose, and that primary purpose is not defeated because there are incident thereto certain emoluments and advantages received by the persons who have to carry out the trust. Therefore it seems to me that this is really a simple case. We have all the elements before us which are necessary to create a charitable trust, and it was effectually created by the document to which I have referred. It has been said that there have been, and there were, other Inns which have now ceased to exist, and that when they ceased to exist this point was not taken, and that they have distributed the property in specie among themselves for their own profit and advantage. That may be the case, but as to that we know nothing of the evidence then forthcoming as to what the terms were upon which those societies existed, and, therefore, it may well be that it was not thought worth the while of those responsible for those matters to take any part in the investigation of how that property was to be dealt with. Those cases throw no light upon this case, in which these elements, as I have already said, exist clearly and beyond controversy. In my opinion, there can be no doubt whatever that this land was impressed with a charitable trust, and that the decision of Cozens-Hardy, J. was perfectly right and ought to be affirmed.

ROMEY, L.J.—I have practically nothing to add to what has been said in this case by the Master of the Rolls and by Cozens-Hardy, J. Having regard to the terms of the deed of the

29th March 1618, and to the nature, objects, and uses of this Inn of Chancery at the date of that deed, as shown by the terms of that deed, and by its records, and also having regard to the statement, made at or about the period concerning the Inns of Chancery, by Sir John Fortescue, Lord Coke, and Stowe, and to the various orders and regulations made from time to time concerning or affecting these inns, I cannot doubt that the hereditaments known as Clifford's-inn were conveyed upon trusts affecting them which were of such a public and general character as to be a charity within the provisions of the statute of Elizabeth. Indeed, I think that the trusts were for a purpose falling within the very language of that statute. One of the charitable purposes mentioned in the statute is "the maintenance of schools of learning." These trusts were for the "maintenance of schools of learning"—namely, the learning of the law. For these short reasons I agree in thinking that the appeal fails.

MATHEW, L.J. read the following judgment:—I agree with the judgment that the appeal must be dismissed. The case for the appellant, as stated by the Master of the Rolls, is that Clifford's-inn was a voluntary association formed for the benefit of the members, and for social and convivial purposes. For the Attorney-General it was contended that the association had been constituted for the promotion of the study of the law, and, therefore, that its property was impressed with a trust for what was admitted to be a charitable purpose. The history of the institution of the Inns of Court and Inns of Chancery is to be found in Drydale's *Origins*, chapter 55. They had their beginning in an ordinance and commission issued by King Edward I. at the time when the clergy were forbidden by the canons from taking part as advocates in civil suits. It then became necessary in the interests of the public to obtain the assistance of laymen who were trained lawyers, and who were competent to take the part of their clerical predecessors in conducting the business of the Court of Common Bench, which was then permanently settled at Westminster. The commission required the Chief Justice of the Common Bench to bring together from the provinces men of skill and learning, who should be placed near the court at Westminster. Under the commission and to fulfil its purpose, the Inns of Court and Inns of Chancery were established to provide for the legal education of students. The Inns of Chancery were affiliated with the Inns of Court, and afforded instruction, as Sir J. Fortescue says, "in the nature of original and judicial writs, which are the very first principles of the law." After a short stay in the Inns of Chancery the students desirous of practising at the Bar passed on to one of the four Inns of Court. Clifford's-inn was an Inn of Chancery connected with the Inner Temple. The course of study in this and the other Inns of Chancery is described, as stated by the Master of the Rolls, in Stowe, and was mainly by means of readings and moots, which the members of the governing body would seem to have provided for in turn. The true character of Clifford's-inn is plainly stated in the deed of 1618, which made no apparent change in its constitution. It was a place of learning before, and continued to be a place of learning

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afterwards. The facts that in later times different methods of acquiring a knowledge of the law were adopted does not divest Clifford's inn of its character of the trust estate, or entitle the plaintiffs to say that it has become the property of its members. The learned counsel for the appellant was driven to contend that, immediately after the deed of 1618 the governing body might have disposed of the Inn and divided the purchase money. But this would be to neglect the plain language of the deed, and to disregard the clear statement of the purpose for which it was executed by the grantors and grantees. I concur that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *George Booth.*

Solicitor for the Crown, *The Solicitor to the Treasury.*

March 21 and 22.

(Before COLLINS, M.R., ROMEE and
MATHEW, L.JJ.)

PROPERTY EXCHANGE (No. 1) LIMITED v.
WANDSWORTH CORPORATION. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Metropolis—New street—Paving expenses—New strip of land added to old street—Cost of paving new strip—Liability of frontagers—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), ss. 105, 250—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), ss. 77, 112.

An old highway, 16ft. wide, which before 1855 was a formed and made road with houses along the south side, and was repaired by the local authority, was widened in 1898 by the addition thereto of a strip of land 24ft. in width on the north side thereof, and houses were then built on that side. The local authority then resolved to pave the added part of the road as a "new street" and to apportion the expenses among the frontagers on the north side only. Upon a summons to recover the amount apportioned upon one of the frontagers, the magistrate decided that the old part of the road was an old street, and that the added part was of itself a "new street."

Held (affirming the decision of the King's Bench Division), that the part added to the old street was a "new street" within the meaning of the Metropolis Management Acts, and that the expenses of paving the added part were properly apportioned among the frontagers on that part of the street.

Richards v. Kessick (59 L. T. Rep. 318) and White v. Fulham Vestry (74 L. T. Rep. 425) approved.

APPEAL by the Property Exchange (No. 1) Limited from the decision of the Divisional Court (Lord Alverstone, C.J. and Lawrance, J.) upon a case stated by a metropolitan police magistrate.

On the 11th July 1900 a summons was issued at the instance of the Wandsworth Board of Works against the Property Exchange (No. 1) Limited to answer a claim by the board for

69l. 11s. 3d., being the sum apportioned by the board in respect of certain premises of the company, and being the proportion payable in respect of those premises towards the expense of paving a new street called Totterdown (on the north side thereof), Tooting.

The street or roadway called Totterdown had, at the time in question, buildings on both sides.

The houses on the south side were erected before 1855. The company's premises were built in 1898.

For many years prior to 1855 Totterdown was a formed road used for every description of traffic, and had been repaired by the board when repairs were necessary before and since 1855.

In 1898 Totterdown was widened from the width of 16ft. to the width of 40ft. by the addition of a strip of land on the north side. Save and except this widening, and the building of certain houses on the north side, Totterdown had not altered in any way since the houses on the south side were erected. The neighbourhood, however, had become more thickly populated.

In or about the year 1898 the lands on the north side of Totterdown were laid out for building purposes.

In 1899 the board resolved to pave Totterdown as a "new street," under sect. 105 of the Metropolis Management Act 1855, and made an apportionment of the estimated expenses upon the owners of the houses on the south side as well as on the north side. A summons for the recovery of the amount apportioned upon the owner of a house on the south side was dismissed by the magistrate on the ground that the old part of Totterdown on the south side formed an old street, and could not be treated as a new street.

In 1900 the board made another order and apportionment for the paving of the new part on the north side of the road as a "new street," and apportioned the estimated expenses among the owners and occupiers on the north side of the road only.

The company were charged in the apportionment with the sum of 69l. 11s. 3d. in respect of their premises on the north side of the road, but refused to pay that sum when it was demanded.

Upon the hearing of the summons by the board to recover that sum, it was contended on behalf of the company: (1) That upon the true construction of sect. 105 of the Metropolis Management Act 1855 and sects. 77 and 112 of the Metropolis Management Amendment Act 1862, the portion of Totterdown now proposed to be adopted by the board—that is, the northern portion, 24ft. in width—was not a new street within the meaning of the Acts; (2) that the apportionment was invalid inasmuch as it was not within the power of the board, whilst treating Totterdown in its entirety as it existed at present, to make an apportionment for the paving of it longitudinally, and that, if Totterdown was to be regarded in its entirety for the purpose of judging whether or not it was a new street, the owners of houses on both sides (including the south side) ought to bear their due proportion of the expenses; and (3) that the decisions in the cases of *Richards v. Kessick* (59 L. T. Rep. 318) and *White v. Fulham Vestry* (74 L. T. Rep. 425) did not apply, and, in so far as any principle or doctrine covering the present case might in terms appear therein, that such principle or doctrine ought not to be applied

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

in the circumstances appearing in the present case.

The magistrate found as a fact that Tottenham, before it was widened, was an old street, and that the new strip which had been added to the old street became a street by the building of the houses along the north side thereof, and he held that the added strip was of itself a "new street." The magistrate, therefore, held that the apportionment was valid, and that the company were liable to pay the amount claimed.

The question for the opinion of the court was whether the decision of the magistrate was right.

The material provisions of the Metropolis Management Acts are cited in the judgment of Collins, M.R.

The Divisional Court (Lord Alverstone, C.J. and Lawrence, J.) held that the magistrate had properly decided that the added part of the road was a "new street," and dismissed the appeal (84 L. T. Rep. 689).

The company appealed.

W. L. Richards for the appellants.—The decision of the Divisional Court was wrong, and the appellants were not liable to pay this apportionment. The apportionment was invalid, either because the frontagers on both sides of this street ought to have been charged with these paving expenses, the whole street being a "new street," or because the whole street was an old street and the paving expenses could not be charged upon the frontagers at all. There was an old street in existence and the new strip of land which was added to that old street in order to widen it became a part of, and merged in, the old street, and the whole became an old street:

Clerkenwell Vestry v. Edmondson, 86 L. T. Rep. 137; (1902) 1 K. B. 336.

In the alternative, the whole became a new street by the addition of the new strip:

Mile End Vestry v. Whitechapel Union, 34 L. T. Rep. 178; 1 Q. B. Div. 680;

Wilson v. Vestry of St. Giles, Camberwell, 65 L. T. Rep. 790; (1892) 1 Q. B. 1;

Paddington Vestry v. North Metropolitan Railway and Canal Company, (1894) 1 Q. B. 633;

Great Clacton Local Board v. Young and Sons, 71 L. T. Rep. 877; (1895) 1 Q. B. 395.

In that case the expenses ought to have been apportioned among the frontagers on both sides of the street, and this apportionment among the frontagers on the north side only was invalid. Sect. 98 of the Metropolis Management Amendment Act 1862 provided that an existing road of a less width than 40ft. should not be laid out for building as a street unless widened to 40ft., and that a road so widened should be "deemed to be a new street." That shows that the whole of this street ought to be treated as a new street. Sect. 98 was repealed by the London Building Act 1894 (57 & 58 Vict. c. cccxiii.), but sect. 9 of the latter Act provides that a new street shall not be laid out of a less width than 40ft. without the sanction of the county council, and the new part of this road being less than 40ft. in width could not be laid out as a new street without that sanction, which has not been shown to have been obtained. The cases relied on in the court below are either distinguishable or were wrongly decided. The case of *Richards v. Kessick* (59

L. T. Rep. 318) was decided under sect. 150 of the Public Health Act 1875. That section does not deal with "new streets" at all. It provides that the local authorities may charge the expenses of paving upon the frontagers "on such parts thereof as may require to be paved"; but there are no such words in sect. 105 of the Metropolis Management Act 1855, or in sect. 77 of the Metropolis Management Amendment Act 1862. In sect. 105 of the Act of 1855 the words are, "the owners of the houses forming such street," and, in sect. 77 of the Act of 1862, "the owners of the land bounding or abutting on such street." In *White v. Fulham Vestry* (74 L. T. Rep. 425) the frontagers on the old part of the street had had to pay the expenses of paving it as a "new street," and it was only just and equitable that they should not afterwards be compelled to pay part of the expenses of paving a new piece which was added to widen the road. The decision in that case was wrong so far as it decided that the added part was itself a "new street." The case of *Wakefield Sanitary Authority v. Mander* (5 C. P. Div. 248) was decided upon sect. 150 of the Public Health Act 1875.

Mattinson, K.C. and *J. C. Earle* for the respondents.—The provisions of sect. 9 of the London Building Act 1894 are only intended to secure sufficiently wide streets, and that object is attained when the whole street is widened to 40ft. That section does not in any way affect the question whether an addition to an existing street can be treated as a "new street" for the purposes of the Metropolis Management Acts. The words of sect. 98 of the Metropolis Management Amendment Act 1862, which was repealed by the London Building Act 1894, "shall be deemed to be a new street," are omitted from sect. 9 of the London Building Act, and the widening of this road took place after the passing of that Act. [They were stopped by the Court.]

COLLINS, M.R.—This appeal raises the question whether a new strip of land, which has been added to an old highway and dedicated as a highway, can be of itself a "new street" apart from and without considering the adjoining part of the highway to which it has been added and which was an old street at that time. It has been contended that in such a case the added strip of land must receive into itself the old street, and that the result is that the two together make one new street. Then it is said that, in apportioning the expenses of paving the new part, those expenses should be distributed among the frontagers on both sides of the street. In this case it has been found as a fact that the original street was an old street before 1855; and that along that old street cottages had been erected which were a factor in constituting the old highway an old street. In that state of things the new strip of land was added and dedicated as a highway, and houses were built along that side of the street. Then the local authority thought fit to pave that new part of the street, and the question now is, by whom the expenses of that paving ought to be borne. First of all, the local authority apportioned the expenses among the frontagers upon the old part of the street as well as among those upon the new part. The magistrate, however, held that that could not be done, and the appor-

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tionment was accordingly amended so as to include only the frontagers upon the new part of the street. The Divisional Court held that to be right, and that the frontagers on the north, or new, side of the street were frontagers upon a new street, which was the added strip, and that the frontagers upon the old street were not liable to pay part of the paving expenses. On this appeal the principal contention of the appellants is that the whole area of this street, the new part and the old, is one new street, so that all the frontagers upon both sides are liable to contribute to these paving expenses, although presumably the frontagers upon the old part had in one way or another paid the expenses of paving that part. The other contention of the appellants was that the new part became merged in the old street, and that there was one street only, and that an old street, and that therefore the local authority had no right to apportion the expenses among any of the frontagers. The appellants rely upon the provisions of sect. 105 of the Metropolis Management Act 1855, which enacts that, "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry . . . in which such street is situate, be desirous of having the same paved, or if such vestry deem it necessary or expedient that the same should be so paved, then such vestry shall well and sufficiently pave the same . . . and the owners of the houses forming such street shall on demand pay to such vestry the amount of the estimated expenses of providing and laying such pavement." They say that that refers only to the whole of a street, and that the apportionment is to be among the owners of the property "forming such street," that is, the whole street. That, indeed, is the definition of the persons who are to pay the expenses given in the Act of 1855. But another Act was passed in 1862, the Metropolis Management Amendment Act 1862, which, by sect. 112, provides that, "In the construction of the recited Acts and this Act . . . the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge and assumed by the commissioners, &c., and a part of any such street." The appellants say that the persons on both sides of the street are the owners of property abutting on the street, and that, if there is but one street, they are all frontagers on that street, and that thus the question arises whether the whole is an old street and none of the frontagers are liable, or whether the whole is a new street and all the frontagers are liable. The magistrate and the Divisional Court have held that there is a "new street," which is the new strip which has been added on the north side of the road, and that the frontagers on that side of the road are alone liable to contribute to the paving expenses, and that the frontagers on the other side are not liable. Whether that decision is right or not depends upon whether in fact a new street can be formed by adding a new strip along the side of an old street. The Divisional Court has held that that can be done, upon the authority of two cases of long standing, which seem to me to be quite in point. Whether those cases were

rightly or wrongly decided, I think that it would be a dangerous thing for the Court of Appeal now to interfere with those decisions and to overrule them. Many things have been done upon the authority of those cases since they were decided a long time ago. But when those cases are examined, it seems to me that they were well decided; and I certainly have no clear view which would justify me in holding otherwise than in accordance with those decisions. If, then, those cases were rightly decided, the only question is whether they can be distinguished from the present case. It has been faintly contended for the appellants that those cases were wrongly decided, and it has been strenuously contended that, if rightly decided, they are distinguishable. The first of those cases is *Richards v. Kessick* (59 L. T. Rep. 318), which seems to me to be absolutely in point. The headnote to that case is as follows: "The owners of a field adjoining a highway repairable by the inhabitants at large used it for building land, and threw open to the highway a strip of land in front of the houses erected on it. Held, that the houses with the strip of land in front of them together formed a 'street' within the meaning of sect. 150 of the Public Health Act 1875, which the urban sanitary authority, within whose district it was situate, could compel the frontagers to pave, channel, and kerb to their satisfaction under the provisions of that section." That is exactly what happened in the present case, and the facts in that case are not distinguishable from the facts in this case. The facts in this case were that a row of houses was built on the south side of the road, known as Totterdown, before the year 1855, and the road was a public highway, and after the erection of those houses became a "street," as the magistrate has found. In 1898 this street was widened from the width of 16ft. to the width of 40ft. by the addition of a new strip of land on the north side, and houses have been built along that side of the road, and the new strip of land parallel with the old street has been held to be itself a new street. That case seems to me to be absolutely in point, unless there is some good distinction which can be drawn. It is said that there is a good distinction because that case was decided under sect. 150 of the Public Health Act 1875, whereas this case arises under the Metropolis Management Acts. It is contended that sect. 150 of the Public Health Act 1875 provides that when any street is not paved, &c. to the satisfaction of the local authority, "the owners and occupiers of the premises fronting or adjoining or abutting on such parts thereof" as may be required to be paved, &c., may by notice be required to do the work, and may be charged with the expenses if the local authority have to do the work, and that therefore the decision in *Richards v. Kessick* (*ubi sup.*) was justified but is quite distinct, from a case under the Metropolitan Management Acts, in which there are no words referring to a part only of a street. That contention, however, is not well founded, because the definition in sect. 112 of the Metropolis Management Amendment Act 1862 provides that "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance, &c. whereof had not, previously to the passing of this Act, been taken in charge and assumed by . . . the autho-

rities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street." Therefore in that definition we have the same words in effect as in sect. 150 of the Public Health Act 1875, and, if we substitute for "street" in the Metropolis Management Acts the words of the definition clause, the words of sect. 105 of the Act of 1855, and of sect. 77 of the Act of 1862, will be "street, or a part of any such street." Therefore the added part of this street can exist of itself as a "new street," and the frontagers upon that part can be made to bear all the paving expenses, and the case of *Richards v. Kessick* (*ubi sup.*) is an authority directly in point. There is also another authority, the case of *White v. Fulham Vestry* (74 L. T. Rep. 425), which involves the same point. The headnote to that case is as follows: "In 1870 a road, which was then an unpaved 'new street,' with houses and a footpath on the north side only, and vacant land on the south side, was paved to the satisfaction of the local authority under the provisions of sect. 105 of the Metropolis Management Act 1855. The expenses of such paving were apportioned upon and were paid wholly by the owners of the houses on the north side, and the vestry afterwards kept the whole of such pavement in repair and paid the cost out of the general rates. In 1888 the owner of the vacant land on the south side, by an arrangement with the vestry for widening the road, set back his fence 13ft. and dedicated this strip, and the vestry kerbed a new footpath 7ft. in width on the south side, and paved and metalled the remaining 6ft., making it uniform with the carriage-way already paved, and they paid the expenses of the subsequent repairs out of the general rates. The only part left unpaved was the new footpath of 7ft., and, houses having been built on the south side of this footpath, the vestry resolved in 1894 to pave this footpath, being, as they said, a 'new street,' and they apportioned the expenses of paving the new footpath on the owners on the north side of the road as well as on the owners on the south side"; and it was held that the apportionment was wrong because the "new street" was the strip of land which had been added as a footpath and which the vestry had resolved to pave. Those facts are exactly parallel with the facts in the present case, in which the new strip of land added to the old road corresponds to the new footpath in that case. In that case, no doubt, the provisions of sect. 105 of the Metropolis Management Act 1855 had been put into operation in respect of the whole of the roadway, which was not done in this case, and the local authority had thereby done that which prevented it being a new street. Those two cases seem to me to apply exactly to the present case. For these reasons, I think that this appeal fails and must be dismissed.

ROMER, L.J.—I am of the same opinion. The main argument of the appellants leads to this, that, if an old street is widened by a strip of land being added to it on one side, the whole becomes *ipso facto* a "new street," so as to enable the local authority to deal with it upon that footing and make the frontagers upon the old part of the street liable to pay part of the expenses of paving the new part. If the argument of the appellants is correct, it leads to this, that, if a highway

becomes a new street by having houses built upon one side of it, and is paved, and the expenses of paving are paid by the owners of those houses, yet, if the street is widened on the other side, the whole becomes a "new street," and the owners of the houses on the old side of it are liable again to contribute to the expenses of paving. That cannot be so. It cannot be that, if the frontagers on an old street are in a position to say that the whole of it must be paved and maintained at the expense of the general rates, they can be deprived of that right if the owners on the other side of the street choose to widen the street, which the frontagers on the old part cannot prevent. In my opinion, that result cannot be allowed to follow. On the contrary, I think that the cases which show that that result does not follow were well decided. In this case it has been found as a fact that Tottenham was an old street with houses on the south side, and that, save and except this widening and the building of certain houses on the north side of the street, it had not altered in character or position, or in any other way since the houses on the south side were erected. Upon that finding it seems to me that it would be extravagant to say that the old street was, by the action of the owners on the north side, converted into a new street. With regard to the argument founded on sect. 98 of the Metropolis Management Amendment Act 1862, there appears to be the sufficient answer that this section was repealed by sect. 9 of the London Building Act 1894, and that this road was widened in 1898, after that repeal. For all we know the repeal of sect. 98 and the alteration of the wording in the Act of 1894 may have been for the purpose of preventing this very argument being raised. Then it was contended that, if this road was not all a new street, it was all an old street. It may have been that this strip of land which was thrown into the road could not have been utilised for the purpose of building, and that by adding it to the road the owner of the land on that side of the road could get the benefit of being able to build upon his land through having a good road in front of it. Then he says that he can throw the expense of paving his side of the road upon the general rates instead of bearing them himself. I cannot see why such a gift should be made to him. There is nothing in the Acts which requires us to hold that new land which has been added in this way to an existing road must be regarded as part of the old street. As was pointed out in the authorities which have been quoted, there is nothing to prevent the local authority treating the new strip of land, which is added to an old street, as constituting a new street of itself, especially where, as in the present case, the addition is of a substantial character, and in fact larger than the old part of the road. In my opinion that argument also fails. I agree, therefore, that this appeal fails and must be dismissed.

MATHEW, L.J.—I am of the same opinion. It is said by the appellants that there are two ways in which the road in question may be regarded; either the whole road, including any addition thereto, is an old street, or the whole is a new street because the new part is more important than the old part and has swallowed up the old part. The latter contention depended principally on sect. 98 of the Act of 1862, though that section

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has been repealed. That section was probably repealed for the very reason that it might work injustice, and to set the law free from the possible interpretation that an old street might become a new street. In my opinion neither contention can be accepted. The street as a whole was neither a new street nor an old street; it was both. Why then cannot a part of it be regarded as a new street? It seems to me that it would be quite just to do so. To treat the added part as a new street is to accept the authority of the two cases which have been referred to and which are both clearly in point. In the case of *White v. Fulham Vestry* (*ubi sup.*) the frontagers upon the old part of a road had been called upon to pay the expenses of paving it; the road was then widened, and it was contended that the frontagers on the old part were liable to contribute to the expenses of paving the new part. It was held that this was an unreasonable contention, and that it could not be adopted. It is said that there is a distinction between that case and the present case. What was the principle of the decision in that case? It was that the frontagers on the old part of the street were exempt from liability to pay any part of the expenses of paving the new part because they had previously contributed to the expenses of paving the old part, and could not, therefore, be called upon to pay the expenses of paving the new part. That is really the same as the present case. I think that the principle of the decisions in those two cases applies to the present case, and I see no reason for saying that those cases were wrongly decided. This appeal, therefore, fails and must be dismissed.

Appeal dismissed.

Solicitor for the appellants, *Frederick Du Bois*.
Solicitors for the respondents, *W. W. Young and Son*.

Monday, April 12.

(Before WILLIAMS and MATHEW, L.JJ.)

HOLLAND v. BENNETT. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Writ—Service out of jurisdiction—Breach of contract—Wrongful dismissal—Letter posted out of, but received within, jurisdiction—No breach within jurisdiction—Order XI., r. 1 (e).

When a servant is wrongfully dismissed by a letter posted by the employer abroad and received by the servant within the jurisdiction, there is no breach within the jurisdiction of the contract to employ, and leave cannot be given to serve out of the jurisdiction notice of the writ in an action by the servant for wrongful dismissal, under Order XI., r. 1 (e).

Cherry v. Thompson (26 L. T. Rep. 791; L. Rep. 7 Q. B. 573), *Matthews v. Alexander* (Ir. Rep. 7 C. L. 575), and *Hamilton v. Barr* (18 L. Rep. Ir. 297) approved and followed.

APPEAL by the plaintiff from an order of Bucknill, J. at chambers.

The action was brought by the plaintiff to recover damages for wrongful dismissal by the defendant.

In the early part of 1901 the plaintiff was engaged by the defendant as the correspondent of the *New York Herald* in London.

On the 27th Oct. 1901 the defendant, who was then resident in France, wrote and posted in France a letter to the plaintiff, which he received in London, dismissing him from his employment as London correspondent.

The plaintiff thereupon issued the writ in this action claiming damages for wrongful dismissal, and subsequently obtained leave to issue a concurrent writ for service out of the jurisdiction and to serve notice thereof upon the defendant in France.

The defendant entered a conditional appearance, and then applied to have the notice of the writ and the service thereof set aside, upon the ground that the alleged breach of contract did not occur within the jurisdiction.

The Rules of the Supreme Court, Order XI., provide:

Rule 1. Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever—(e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.

The master made an order setting aside the notice and the service thereof, and Bucknill, J. affirmed that order.

The plaintiff appealed.

E. Tyndal Atkinson, K.C. and *P. Rose Innes*, for the appellant.—The order of the master and the judge was wrong, and the notice and service thereof ought not to be set aside. The master and the learned judge acted upon the authority of *Cherry v. Thompson* (26 L. T. Rep. 791; L. Rep. 7 Q. B. 573), which was a decision upon sect. 18 of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76). The provisions of sect. 18 of the Common Law Procedure Act 1852 were very different from the provisions of Order XI., r. 1 (e). Under the former the whole cause of action had to arise within the jurisdiction, or there had to be a breach of a contract made within the jurisdiction; but under Order XI., r. 1 (e), it is only necessary that there shall be a breach within the jurisdiction of a contract wherever made. The decision in *Cherry v. Thompson* (*ubi sup.*) was that the whole cause of action must arise within the jurisdiction, and that if the contract was made out of England the whole cause of action did not arise in England, though the breach occurred there. That decision is not applicable to Order XI., r. 1 (e). As to the other point in *Cherry v. Thompson* (*ubi sup.*), that the breach of contract did not occur within the jurisdiction because the letter refusing to perform the promise to marry was posted by the defendant in Germany and received by the plaintiff in England, that is not applicable to a case of wrongful dismissal. In that case the letter was only evidence that the defendant had so acted as to constitute a breach of the promise to marry; the conduct which amounted to the breach occurred in Germany, and the letter received in England was merely evidence of the breach. That is very different from a case like this of wrongful dismissal where the plaintiff would necessarily go on serving until the receipt of the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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letter; in such a case it could not be said that the servant was dismissed until he received the letter dismissing him, and therefore the breach was not complete until receipt of the letter. The doctrine is that the postmaster is the agent of both parties, and that consequently a letter delivered to the postmaster is delivered to the addressee; but that doctrine can only be applicable when both parties are in the United Kingdom, and cannot apply to a foreign postmaster, when the writer is abroad and the addressee in England.

J. Eldon Bankes, K.C. and Norman Craig for the respondent.—The order of the master and judge was clearly right. In *Cherry v. Thompson* (*ubi sup.*) it was decided in terms that where a letter refusing to perform a contract is posted out of the jurisdiction the breach of contract is complete, and therefore the breach occurs out of the jurisdiction. That decision is clearly applicable to the present case, and shows that this alleged breach of contract occurred in France. There are two Irish decisions as to where the breach of contract arises in cases of wrongful dismissal by letter—*Matthews v. Alexander* (Ir. Rep. 7 C. L. 575), decided under the Common Law Procedure Act, and *Hamilton v. Barr* (18 L. Rep. Ir. 297), decided under the same rule as rule 1 (e) of Order XI. In both those cases it was held that, where a letter was posted out of Ireland dismissing a servant in Ireland, the alleged breach occurred out of Ireland. The case of *Mayer v. Claretie* (7 Times L. Rep. 40) has some bearing upon this question, for in that case the service out of the jurisdiction was set aside upon the ground that the alleged breach of a contract to employ was not shown to have taken place within the jurisdiction, though the contract was to employ within the jurisdiction. As soon as a letter is posted, either within or out of the jurisdiction, refusing to carry out a contract to employ, there is a complete breach of the contract. Therefore, as soon as the defendant posted in France the letter dismissing the plaintiff the alleged breach of contract to employ was complete, and occurred out of the jurisdiction.

P. Rose Innes in reply.

WILLIAMS, L.J.—I think that the order of the master and of Bucknill, J. was right. Unless we are prepared to say that the cases of *Cherry v. Thompson* (26 L. T. Rep. 791; L. Rep. 7 Q. B. 573), *Matthews v. Alexander* (Ir. Rep. 7 C. L. 575), and *Hamilton v. Barr* (18 L. Rep. Ir. 297) were wrongly decided, it is impossible for us to come to any other conclusion than that there was no breach of contract within the jurisdiction. I think that it is a matter of very great importance, with reference to a practice of this kind, that the decisions should be uniform. It is now suggested that we should hold that the previous decisions were wrong, and that there was not any complete breach of contract when the letter was posted abroad. I think that there was a complete breach when the letter was posted, and under those circumstances the order was right and the appeal must be dismissed.

MATHEW, L.J.—I agree. *Appeal dismissed.*

Solicitors for the appellant, *Spencer Cridland and Co.*

Solicitors for the respondent, *Lewis and Lewis.*

Wednesday, March 5.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

ATTORNEY-GENERAL (on the Relation of the Bromley Rural District Council) v. COPELAND. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Highway—Drainage of surface water—Discharge on to land of adjoining owner—"Drain"—Improper outlet—Presumption of legal origin—Highway Act 1835 (5 & 6 Will. 4, c. 50), s. 67.

The surface water collecting at a certain point on a highway was received in a catch-pit, from which it was carried through the hedge by the roadside by means of a pipe 6ft. long, and was discharged on to the surface of the adjoining land. This system had lasted as long as living memory would go when the defendant purchased the adjoining land and stopped up the outlet of the pipe from which the water was discharged. The local authority claimed an injunction to restrain him from stopping up the pipe.

Held, reversing the decision of Lord Alverstone, C.J., reported 84 L. T. Rep. 562; (1901) 2 K. B. 101, that there was nothing in the manner in which the water was discharged on to the defendant's land which prevented the arrangement for getting rid of water from the highway from being a "drain" within sect. 67 of the Highway Act 1835; and that under the circumstances a legal origin for the drain ought to be presumed.

THIS was an appeal by the plaintiffs from a judgment of Lord Alverstone, C.J. at the trial of the action without a jury.

The action was brought for an injunction to restrain the defendant, who was owner of a piece of land adjoining a highway in the parish of West Wickham, in the county of Kent, of which the Bromley Rural District Council were the local authority, from stopping up a pipe by which the surface water collecting on the highway was discharged on his land.

The Highway Act 1835 (5 & 6 Will. 4, c. 50) provides as follows:

Sect. 67. The said surveyor, district surveyor, or assistant surveyor shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, flats, or bridges as he shall deem necessary in and through any lands or grounds adjoining or lying near to any highway upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in inclosed lands or grounds are herein directed to be settled and paid.

The powers and duties of the surveyor of highways under this section were, as regards the highway in question, vested in the Bromley Rural District Council.

The highway in question was an ancient one, running north and south. There was a point in the road where the gradients rose both towards north and south, so that the surface water collected there.

On the west side of the road this water was collected in a catch-pit, from which it was carried by an iron pipe into another catch-pit on the east side, and from the eastern catch-pit an iron pipe

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

6ft. long, put through the hedge by the road side, discharged the water on to the surface of the adjoining land.

There was no evidence as to the date when this arrangement for draining the highway was first made, but in 1868 the existing catch-pits were repaired, and the pipe which the defendant had stopped up was put in its present position.

About two years before this action was brought the defendant bought the piece of land on to which the water was discharged by the pipe in question, and built some houses thereon. He then stopped up the end of the pipe, and the present action was then commenced for an injunction to restrain him from continuing this obstruction to the drain.

At the trial of the action Lord Alverstone, C.J. held that as the pipe which the defendant had obstructed was not connected with any out-fall channel, it was not a "drain" within sect. 67 of the Highway Act 1835, and he refused the injunction.

The case is reported 84 L. T. Rep. 562; (1901) 2 K. B. 101.

The district council appealed.

Bray, K.C. and Clarke Williams for the appellants.

G. B. Rashleigh (Dickens, K.C. with him), for the respondent, relied on the judgments in

Croft v. Rickmansworth Highway Board, 60 L. T. Rep. 34; 39 Ch. Div. 272.

COLLINS, M.R.—The ground of these proceedings instituted by the Attorney-General on the relation of the Bromley Rural District Council is that the defendant has stopped up a pipe or drain, and has thereby caused water to accumulate on a highway. Lord Alverstone, C.J., at the trial, gave judgment for the defendant on the ground that this pipe was not a drain within the meaning of sect. 67 of the Highway Act 1835, in respect of which the local authority could acquire the right they claimed to have. It was proved that this pipe—or drain, as I will call it for the present purpose—has existed for as long as living memory will go, and therefore it must have existed before this local authority came into existence. The powers and duties of the old surveyor of highways have in recent times, so far at least as the present matter is concerned, been vested in the local authority. Where there has been a long established user it is the duty of the court to try and find a legal origin in order to explain the existence of the user. But it was said that this drain, having no proper outlet, did not come within the words of the statute, and the Lord Chief Justice has so held. Now, the road rises to the north and to the south of this drain, and the formation of the ground is such that water running down the slopes would be impounded at a certain point unless some means were provided for carrying it away. A catch-pit was therefore made on the west side of the road, and water running into it was drained away to another catch-pit on the east side from which a pipe 6ft. long was put through the hedge by the road side, and this pipe discharged the water from the catch-pits on to the defendant's land the other side of the hedge. That arrangement has existed, as I have said, for as long as living memory will go. It is quite compatible with the evidence that a ditch had once existed on the

defendant's land by which the water from the pipe would have been carried away. I can see no reason why this arrangement should not be held to be a drain within sect. 67. The user has been continuous for many years, and a legal origin ought to be presumed for it. I think that this arrangement is a drain within the section, and that the appeal ought therefore to be allowed. I wish to add that the case of *Croft v. Rickmansworth Highway Board* (*ubi sup.*) does not touch the point here because there the question was entirely confined to the consideration of a dumb well, excluding anything of the nature of a pipe to discharge the water as in the present case.

ROMER, L.J.—I am of the same opinion. There are three alternatives in this case. First, there might have been a natural drain carrying the water across the defendant's land, and the pipe may have been put there merely in order to assist the natural flow of water. If that were so the defendant would have no right to stop the water. Secondly, the work done by the surveyor of the highway in 1868 may have been done in pursuance of some legal right outside his statutory powers. Thirdly, the lapse of time would justify us in making some assumptions. This pipe, though small in itself, is part of a system of drainage, and may have been put down under the powers given by the Highway Act 1835, and I think we ought to assume that it was legally done under the Act, either with the consent of the defendant's predecessor or upon the payment of compensation. It is argued that this could not have been done because the pipe has no proper outlet. But what is a proper outlet? The water has been discharged in this way since 1868. No one knows exactly what was the previous state of affairs, and how can anyone say that there never has been a proper outlet? I think that the local authority have established their right to this drain and their right to have it kept clear, and therefore the appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. It is clear that there must have been for a long time some means for preventing the water from accumulating at this point in the road. Under the Highway Act the surveyor had power to make necessary drains on payment of compensation. There is no evidence of any compensation ever having been paid, but it is quite possible that the landowner waived his claim. The present arrangement has existed since 1868. I think that we are bound to uphold what has been done on the assumption that it was legally done.

Appeal allowed.

Solicitors for the plaintiffs, May, Sykes, and Co.

Solicitor for the defendant, Arthur Pearce.

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FOULGER v. ARDING.

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Wednesday, March 12.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

FOULGER v. ARDING. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Lease—Covenant by tenant to pay impositions charged or imposed in respect of the premises on the landlord—Construction—Liability of tenant—Notice by sanitary authority to landlord to abate nuisance.

A lease contained a covenant by the lessee that he would "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no covenant to repair either by lessor or lessee.

Under a local Act the sanitary authority served a notice on the lessor requiring him to remove an offensive privy and to construct a water-closet in accordance with certain requirements.

The lessor did the work required, and brought an action against his lessee to recover the expenses.

Held, reversing the decision of the King's Bench Division (84 L. T. Rep. 467; (1901) 2 K. B. 151), that the words of the covenant were wide enough to cover these expenses, and that the obligation on the lessor to incur them was one which might reasonably be supposed to have been within the contemplation of the parties at the time of the execution of the lease; and that, therefore the lessee was liable under his covenant to recoup his lessor.

THIS was an appeal by the plaintiff from a judgment of the King's Bench Division (Lord Alverstone, C.J., and Lawrence, J.), reversing a decision of the deputy judge of the Wandsworth County Court.

The plaintiff was the landlord and the defendant was the tenant of a house at Streatham under a lease for sixteen years from June 1892.

The action was brought to recover the amount of the expenses incurred by the plaintiff in executing certain structural works as required by the London County Council, which amount the plaintiff contended that the defendant was bound to pay under a covenant in the lease.

The lease contained no covenant to repair either by the lessor or lessee, but it contained the following covenant by the lessee that he

Will pay and discharge all taxes rates including sewers main drainage assessments or impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by the authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted).

In Aug. 1900 the plaintiff received from the local sanitary authority a notice under sect. 4 of

the Public Health (London) Act 1891 (54 & 55 Vict. c. 76) requiring him as owner of the demised premises to abate a nuisance arising from a very foul and offensive privy by removing the privy and building a water-closet strictly in accordance with the bye-laws of the London County Council, laying a new drain and executing such other works as might be found necessary to prevent a recurrence of the nuisance.

The defendant refused to do the work thus required to be done, and the plaintiff thereupon had it done at a cost of 35l.

The plaintiff then brought this action in the Wandsworth County Court to recover the 35l.

The deputy County Court judge decided that the defendant was liable under the covenant, and gave judgment for the plaintiff accordingly.

On the defendant's appeal the Divisional Court consisting of Lord Alverstone, C.J. and Lawrence, J., reversed the decision of the deputy County Court judge, and ordered judgment to be entered for the defendant.

The case is reported 84 L. T. Rep. 467; (1901) 2 K. B. 151.

The plaintiff appealed.

R. M. Bray, K.C. and Clavell Salter for the plaintiff.—This covenant refers not merely to impositions charged on the land, but also to those imposed on the landlord, tenant, or occupier in respect of the land, and accordingly has a much wider meaning, than it would have had, if it had referred only to impositions charged on the land. The present case is therefore distinguishable from one in which the covenant was to pay all impositions whatsoever, which during the term should become payable in respect of the demised premises:

Tidswall v. Whitworth, 15 L. T. Rep. 574; L. Rep. 2 C. P. 326.

The tendency has been to widen the words of covenants of this sort so as to increase the burden on the tenants. The important question in construing these covenants is not so much which of the words "charge," "imposition," "out-goings," "duties," and such like expressions has been used, but whether the liability mentioned, whatever it may be, is spoken of as being imposed upon some individual, such as the landlord or owner in respect of the premises. The landlord was held entitled to recover paying expenses where the covenant was to pay duties and assessments which should be assessed or imposed on the tenant or landlord of the demised premises in respect thereof:

Thompson v. Lapworth, 17 L. T. Rep. 507; L. Rep. 3 C. P. 149.

Drainage expenses were held to be within a covenant as to assessments and outgoings which should be assessed or imposed on the demised premises or upon the landlord or tenant in respect thereof:

Crosse v. Raw, L. Rep. 9 Ex. 209.

A landlord was held not entitled to recover from his tenant the expenses of abating a nuisance pursuant to the requirements of the sanitary authority under the Public Health Act 1875 in a case where the covenant by the tenant was to pay charges, assessments, and impositions charged, assessed, or imposed on the demised premises. The covenant there did not, as in the present case, contain any reference to charges, assessments, or

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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impositions imposed on any individual in respect of the demised premises:

Rawlins v. Briggs, 3 C. P. Div. 368.

The landlord recovered against his tenant in a case where the covenant referred not only to expenses charged on the premises but also upon any persons in respect thereof:

Hartley v. Hudson, 4 C. P. Div. 367.

Similar cases decided in favour of landlords are

Budd v. Marshall, 42 L. T. Rep. 793; 5 C. P. Div. 481;

Aldridge v. Ferne, 17 Q. B. Div. 212.

There is another case in which the landlord was successful against his tenant where the words of the covenant were almost identical with those of the covenant in the present case:

Smith v. Robinson, 69 L. T. Rep. 434; (1893) 2 Q. B. 53.

In two other cases in which the landlord was successful there was no mention in the covenant as to the expenses to be borne by the tenant being imposed on any particular individual. But in those cases the covenants contained the word "duties," a word of very extensive meaning which is applicable to something to be done, as well as to money to be paid:

Brett v. Rogers, 76 L. T. Rep. 26; (1897) 1 Q. B. 525;

Farrow v. Stevenson, 81 L. T. Rep. 589; (1900) 1 Ch. 128.

As referring solely to the payment of money, "imposition" is as wide a word as any that can be found. They referred also to

Arding v. Economic Printing and Publishing Company, 79 L. T. Rep. 420, 622.

Colam for the defendant.—Words in covenants of this sort referring to the imposition of the charge on some individual in respect of the premises have not the importance attributed to them by the plaintiff. In every case cited as being in his favour the decision has turned on the substantives used to describe the burdens referred to, such as duties, obligations, outgoings, &c. The decisions have never been rested upon the existence in the covenants of some such words as "imposed on the landlord or tenant in respect of the premises." The liability in *Smith v. Robinson* (*ubi sup.*) arose from a breach by the tenant of his covenant to repair. In the present case there is no covenant to repair by the lessee. The word "imposition" occurs in all the cases cited on behalf of the plaintiff except in *Farrow v. Stevenson* (*ubi sup.*) and yet in no case was any reliance placed, in giving judgment, on the existence of that word in the covenant. The word in the present case means something *ejusdem generis* with the preceding words. It cannot be used fairly as applicable to such a structural alteration in the house as the building of a water-closet:

Allum v. Dickinson, 47 L. T. Rep. 493; 9 Q. B. Div. 632;

Wilkinson v. Collyer, 51 L. T. Rep. 299; 13 Q. B. Div. 1;

Badcock v. Hunt, 60 L. T. Rep. 314; 22 Q. B. Div. 145.

Salter replied.

COLLINS, M.R.—The cases on this subject run very fine as often must be where the decisions are on the construction of covenants, which are

not always drawn in exactly the same words. On the whole it seems to me that this appeal ought to be allowed. I have often had to go through the whole series of cases as has been done in the argument before us, and I do not propose to go through them all again. Such a course in a case of this sort is often a lamentable waste of time, and I would rather take a broad view of the matter. It is obvious that the covenant we have now to consider was drawn with the view of putting upon the tenant the obligation of paying certain expenses which would otherwise fall on the landlord. The question is whether this particular obligation which was originally put on the landlord, has by this covenant been thrown on to the tenant. The obligation arose under the Public Health (London) Act 1891, the structural condition of the demised premises being such as to let in the powers given by the Act to the local authority in the case of the existence of nuisances. Notice was served on the owner of the premises requiring him to abate a nuisance caused by an offensive privy, and to construct a water closet in accordance with the bye-laws of the London County Council. The plaintiff did the necessary work, and the question now is whether his tenant is bound by this covenant to repay the plaintiff the costs of the work. No point is taken by the defendant that the plaintiff did not act under compulsion, or that his claim under the covenant is affected by his not having waited for a "nuisance order" under sect. 5 of the Act. Now, by the words of this covenant the lessee covenants to "pay and discharge all taxes, rates, including sewers, main drainage assessments, and impositions whatsoever, which now are, or at any time or times hereafter, during the continuance of the said term hereby granted be taxed, rated, assessed, charged, or imposed upon or in respect of the said premises or any part thereof on the landlord, tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There are one or two difficulties which might be raised on these words, and which it will be well to remove. It is clear on the authorities that a defect inherent in the premises at the time of the demise may be the subject-matter of an obligation which by a covenant of this sort can be thrown by the landlord on to the tenant. It is also clear on the authorities that covenants of this kind are capable of being construed as being directed not merely to charges in the nature of rates and taxes but also to capital charges in respect of structural work. If the matter were unencumbered by authority and could be looked at regardless of the labyrinth of reported cases, I think that no one could doubt that an obligation imposed on a landlord in respect of a structural defect which he was called upon by statute to remedy, might properly be described as an imposition charged or imposed on the landlord in respect of the premises. If the matter were clear of authority, I think that the obligation imposed on the plaintiff would come within the words of the covenant. But for the authorities I think that the only answer to that would be that suggested by my brother Romer in the course of the argument; if the word "imposition" is to be used in that wide sense, where is the line to be drawn? Supposing a house in a street were built in front of the building line so that an obligation

lay on the owner to pull the house down and rebuild it further back, could it be said that an obligation of that sort was an "imposition" within a covenant of this sort for which the tenant would be liable? An argument of that kind may be met thus: Underlying the whole matter is the consideration that the covenant is part of the demise from the landlord to the tenant, and the covenant must be assumed to relate only to such matters as may reasonably be supposed to have been contemplated by the parties as being within the purview of their agreement. The pulling down and rebuilding of the demised premises is a matter so far outside that which in ordinary circumstances is likely to happen, that it should be considered as not being within the contemplation of the parties. But this really seems to me to follow from the authorities. The word "outgoings" has been held to cover such an obligation as we have now to consider. That word, too, in its widest sense, might cover more than the parties to the covenant might be supposed to have contemplated at that time. But though the word itself is capable of such a meaning, that is no reason why it should not be construed in a narrow meaning as covering an obligation which the parties might reasonably be supposed to have contemplated. Apart from authority, therefore, I think that the word "imposition" is large enough to cover the present case. Then is there anything in the authorities which debars us from giving the word its natural meaning? It is said that there is no reported case in which the word "impositions" alone has been held to cover such an obligation as this. The court has never rested its judgment solely on that word, but has fastened on some other word in the covenant before it as the basis of its judgment. On the other hand it is to be observed that there is no decision that the word "impositions" would not be wide enough to cover such an obligation, and it does not follow that because the court has fastened on other words than "impositions" as the basis of a judgment, it would not have fastened on "impositions" if those other words had not been there. The word, therefore, to my mind, is wide enough to cover this obligation, and the obligation is of a kind which the parties may reasonably be supposed to have had in their contemplation at the time of the making of the lease as an ordinary incident likely to arise in the relation between them. I wish now to say a few words on the general current of authority. Of course the case one begins with is *Tidswell v. Whitworth* (*ubi sup.*). The distinction which for a long time was taken between a covenant such as was the subject of that case, and a covenant such as is to be found in *Thompson v. Lapworth* (*ubi sup.*) was that in the one case there was no reference to the person on whom the obligation was to be imposed, whereas in the other case it was spoken of as imposed "on the tenant or landlord of the premises demised in respect thereof." In later cases emphasis was laid rather on the words such as "duties" or "outgoings," which were used as describing the nature of the obligations. *Brett v. Rogers* (*ubi sup.*) and *Farlow v. Stevenson* (*ubi sup.*) are cases of that sort. I do not feel quite sure that at the time when *Tidswell v. Whitworth* (*ubi sup.*) was decided a covenant in the same form as that which occurs in *Farlow v. Steven-*

son (*ubi sup.*) would not have been treated as throwing the obligation on the tenant. But that matter is not material now. On the earlier decisions I think the arguments of the plaintiffs' counsel ought to prevail. This covenant contains a word apt to describe the particular obligation in question, and also words showing that it cannot be limited to charges on the premises themselves, but extends to charges imposed in respect of them on persons—namely, landlord, tenant, or occupier. I do not propose to go in detail into these authorities. The words of the covenant are *prima facie* wide enough to cover the obligation in question which is one of a class which would be within the contemplation of the parties at the time of the lease, and there is nothing in the authorities to debar us from so holding. For these reasons I think that the appeal should be allowed.

ROMER, L.J.—I am of the same opinion. After hearing the arguments I am satisfied of one thing, that the authorities are in a very unsatisfactory condition. I feel sorry that the line to which *Tidswell v. Whitworth* (*ubi sup.*) pointed was not followed up in subsequent cases; but undoubtedly the tendency of later authorities has been rather in favour of the landlord, not in restriction of the meaning of these covenants. In particular I regret the line of authorities by which an extensive meaning has been given to the word "duties" in covenants of this kind, but it is too late, for this court at all events, to alter the law as now practically settled. As the authorities now stand, if the word "duties" had been used in this covenant I think that there would be no doubt that the defendant in this case would have been liable to recoup his landlord. For that proposition I need only refer to *Farlow v. Stevenson* (*ubi sup.*). That being so, can we draw a distinction between that case and the present? It would, in my opinion, be lamentable if the law resulting from the authorities were to be laid down thus: that where a covenant speaks of "duties imposed" on the landlord or tenant in respect of the demised premises, an obligation such as the present should fall on the tenant, but where the covenant speaks of "impositions charged or imposed" on the landlord or tenant in respect of the demised premises, then the tenant is not liable for such an obligation as the present. We ought not to draw such a distinction as that. The words "duty imposed," as interpreted by the authorities, mean a sum of money payable in respect of a duty imposed. What then does "imposition" mean in this covenant? I should say it meant a sum of money payable in respect of an imposition. A duty imposed is, I think, an imposition, and the word "imposition" seems to me to be larger than the word "duty." We ought not to give it a narrower meaning. I agree that it ought not to be treated as covering anything which may reasonably be supposed to have been outside the contemplation of the parties, but I cannot say that the expenses incurred by the landlord in this case were clearly not intended to be covered by this covenant. The liability imposed on the landlord was to make a new water-closet; it arose during the continuance of the demise, and it was imposed on him under the statutory powers given to the local sanitary authority. The money expended by him was in respect of something arising during the demise. It does not appear to me that the liability was one

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which as between the landlord and the tenant the landlord had clearly bound himself to bear. The case is not of such a kind that anyone, looking at the nature of the contract, could clearly say that it must have been outside the contemplation of the parties. On the contrary, I think, that it is just one of those liabilities which probably was contemplated by the contract. I agree that the appeal should be allowed.

MATHEW, L.J.—I am of the same opinion. The two cases of *Tidswell v. Whitworth* (*ubi sup.*) and *Thompson v. Lapworth* (*ubi sup.*) indicate the two streams of authority on this subject. In the first case there was a covenant by the tenant that he would pay and discharge all taxes, rates, assessments, and impositions whatsoever which should become payable in respect of the demised premises, and the Court of Common Pleas held that the covenant did not apply to a payment by his landlord of a sum of money which had become payable by reason of a breach of a duty imposed by Act of Parliament on the owner of the demised premises. In the other case, *Thompson v. Lapworth* (*ubi sup.*), which has since been followed in many other cases, the covenant which the tenant then had entered into was held to cover a charge in respect of the demised premises which, like that in the present case, might be described as a capital charge. A landlord who is able to dictate terms to his tenant would naturally be desirous of getting rid of liability to such a charge as this, and the more so because the amount of such a liability would be uncertain. In many of the cases cited the landlord has been successful in thus throwing his liability on to his tenant. The words used in the covenants in the various reported cases have not always been the same, though the object of the landlord may have been the same. In the present case the tenant has agreed to pay main drainage assessments which are charges resembling that which the plaintiff has paid in being of the nature of capital expenditure. The charge in the present case is not imposed on the premises but on the landlord in respect of the premises. In such cases if it were necessary for the landlord to show that the charge was imposed on the premises, the tenant would escape, and consequently words are often introduced of the same kind as are employed in the covenant we are now considering, "charged or imposed upon or in respect of the said premises or any part thereof on the landlord, tenant, or occupier." This charge seems to me to come within those words, and it is one which must have been within the contemplation of the parties. I think that the tenant is unfortunately liable, and this appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Foulger, Robinson, and Miller.*

Solicitor for the defendant, *G. A. Nichols.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

April 15, 16, and 24.

(Before FARWELL, J.)

RIMMEE v. WEBSTER. (a)

Principal and agent—Power of sale—Transfer to agent of indicia—Fraudulent mortgage by agent—Limit of authority—Notice to mortgagee—Estoppel—Priority—Vendor's lien—Redemption.

*R., a trustee under the will of G., employed H., a stockbroker, to sell a bond of the T. Commissioners of the value of 2000*l.*, part of the testator's estate, and the bond was sent to H. at his request. Shortly after H. wrote R. that he was arranging the sale, and inclosed a transfer deed to himself, which was expressed to be made on receipt of that sum by R., although no money was in fact paid. H. then obtained registration as owner of the land, and in the meantime had fraudulently mortgaged it to W. for 1000*l.*, who was ignorant of the real title of H. H. subsequently became bankrupt, and W. died. In an action by R. against W.'s executors and H. claiming delivery up of the bond or that he was entitled to a vendor's lien thereon or redemption:*

Held, that, whether the case was regarded as one of general authority with no limit brought to the notice of the mortgagee or as one of estoppel, the circumstances were such that the plaintiff had by his act or default displaced the higher equitable right given to him by the priority of his title in point of date. His claim for a vendor's lien also failed, and accordingly there would be the usual judgment for redemption.

On the 17th July 1900 the plaintiff was appointed a trustee of the will of Charles Gerrard, who died in 1893, and part of whose estate consisted of a bond of the Tyne Improvement Commissioners for 2000*l.*

This bond was duly transferred to the plaintiff on the 15th Aug. 1900, and the transfer was duly registered by the commissioners on the 28th Aug. 1900.

The defendant Hall was a stock and share broker at Darlington.

In Sept. 1900 the plaintiff instructed Hall to sell the bond, which was on the 14th of that month sent to him at his request. Hall knew that it was held by the plaintiff as trustee of Gerrard's estate.

On the 13th Dec. 1900 Hall wrote to the plaintiff stating that he had arranged to sell the bond in two portions of 500*l.* and 1500*l.*, and he inclosed two transfer deeds by which the security was transferred to himself, and they were expressed to be made in consideration of 1500*l.* and 500*l.* respectively paid to the plaintiff by Hall, although no money was in fact paid. These transfers were duly executed and returned to Hall the next day by the plaintiff.

On the 4th Jan. 1901 the plaintiff received the usual notice from the secretary of the commissioners informing him that these transfers had been lodged for registration, and pointing out that the transfers were not in proper form and suggesting some alterations. They were sent as

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altered to the plaintiff by Hall, and on the 28th Jan. were returned by him to Hall duly altered and initialled, and on the 4th Feb. 1901 were in due course registered.

On the 17th Dec. 1900 Hall obtained from the late defendant Webster a loan of 1000*l.* on the security of the bond and transfers. He told Webster that he was the owner, and asked for a temporary loan.

Webster's evidence had been taken on commission, and he had since died. There was no suggestion, so far as Webster was concerned, that the transaction was open to suspicion; he had known Hall for some time, and had perfect faith in his honesty.

On the 22nd Dec. 1900 Hall executed a mortgage by deed (dated the 17th Dec.) of the bond in favour of Webster, and on the 28th Dec. Webster sent the bond and the transfers to the secretary of the commissioners to be registered, and notice of his mortgage was given.

On the 18th Jan. 1901 the secretary wrote to Webster that the commissioners could not take cognisance of his notice of mortgage, but, if he wished it, they were willing to register as an absolute assignment; and on the 28th Jan. Webster wrote them that he did not propose to have his mortgage registered at present.

In the meantime the plaintiff was pressing Hall to carry out the sale of the bond, and on the 11th March Hall came to London and wrote to Webster on account of financial difficulties, and on the 14th March the plaintiff's solicitors gave Webster notice of the plaintiff's title. On the 18th March Webster sent his mortgage to the commissioners for registration and requested them to register it, but before this was done the writ in this action was issued. Hall became bankrupt and was in prison, and the question was which of two innocent persons was to suffer for his dishonesty.

Upjohn, K.C. and *G. F. Hart* for the plaintiff. —We are entitled in the circumstances to have the bond delivered up to us, or at least, in the alternative, to judgment for redemption. The holder of such a bond takes subject to all equities affecting it:

Re Natal Investment Company, 18 L. T. Rep. 171; L. Rep. 3 Ch. 355.

[*FARWELL, J.*—That case is difficult to reconcile with other cases.] The defendant Webster cannot set up that the original purchase money is not still due:

Bickerton v. Walker, 53 L. T. Rep. 731; 31 Ch. Div. 151.

The cases show that if you constitute a man your agent and authorise him to raise money, if he avails himself of his apparent authority and goes beyond the actual authority, you are bound. But where you employ him for a particular purpose—for instance, to carry out a sale and invest him with title for that transaction—he cannot bind you by engaging in a totally different transaction:

Cory v. Eyre, 1 De G. J. & S. 149;
Shropshire Union Railways and Canal Company v. The Queen, 32 L. T. Rep. 283; L. Rep. 7 H. L. 496;

Carritt v. Real and Personal Advance Company, 61 L. T. Rep. 163; 42 Ch. Div. 263.

[*FARWELL, J.*—This is a different class of case. You have an agent with authority to sell and he

mortgages. Does not one cover the other, and does it not come within *Perry-Herrick v. Attwood*, 2 De G. & J. 21?] No case allows an agent to mortgage when he has only authority to sell:

Perry-Herrick v. Attwood (*ubi sup.*);

Brocklesby v. Temperance Permanent Building Society, 72 L. T. Rep. 477; (1895) A. C. 173.

Jenkins, K.C. and *W. Baker* for the defendant Webster's executors.—When Hall got on the register of the commissioners he had the legal title. We prefer to rest the case on the principle that, where two persons suffer for the fraud of a third, the innocent person who has so acted that his acts naturally led to the committal of the fraud on the other innocent person must suffer:

Farguharson Brothers and Co. v. King and Co., 85 L. T. Rep. 264; (1901) 2 K. B. 697.

[*Upjohn, K.C.*—There the dissenting judge was an equity judge.] *Carritt v. Real and Personal Advance Company* (*ubi sup.*) was an altogether different case. The true owner, having enabled Hall to hold himself out as the owner, cannot set up his title against that of an innocent purchaser from Hall:

Henderson and Co. v. Williams, 72 L. T. Rep. 98; (1895) 1 Q. B. 521.

There is no authority and no reason in principle for limiting a power of sale so as not to include a power to mortgage. [*FARWELL, J.*—Suppose there were a trust for sale. Would that include a power to mortgage?] The cases are not the same. [*FARWELL, J.*—Here the actual property was transferred, and therefore it looks like a trust for sale.] Has the defendant done anything to displace his priority in time? What is sufficient negligence for that purpose? The facts show that Hall was not a trustee for sale. It was a mere power:

National Provincial Bank of England v. Jackson, 55 L. T. Rep. 458; 33 Ch. Div. 1.

There the priority was sustained because it was held that the subsequent equity had notice. The Conveyancing Act 1881, s. 55, is applicable as to the receipt for the consideration money. The case against us as to that is

Renner v. Tolley, 68 L. T. Rep. 815.

The section applies to every kind of consideration. The transfer is an acknowledgment of the receipt. The section must be applied in each particular case. *Carritt v. Real and Personal Advance Company* (*ubi sup.*) is distinguishable because the transfer here was for full consideration. Where a man transfers to a trustee for himself, a nominal consideration only appears:

Moore v. North-Western Bank, 64 L. T. Rep. 456; (1891) 2 Ch. 599.

Upjohn, K.C., in reply, referred to *Shropshire Union Railways and Canal Company v. The Queen* (*ubi sup.*); the judgment of Lord Macnaghten in *Henderson and Co. v. Williams* (*ubi sup.*); and *Northern Counties of England Fire Insurance Company v. Whipp* (51 L. T. Rep. 806; 26 Ch. Div. 482). The case of *National Provincial Bank of England v. Jackson* (*ubi sup.*) has no application here. He also referred to *Ireland v. Hart* (86 L. T. Rep. 385); (1902) 1 Ch. 522, where *Joyce, J.* apparently did not agree with the ruling of Lord Selborne in *Société Générale de Paris v. Walker* (54 L. T. Rep. 389; 11 App. Cas. 20).

Cur. adv. vult.

April 24.—FARWELL, J. (after stating the facts).—The question in this case is one of conflicting equities: the legal title is in Hall; Webster never obtained that registration which was essential under the Companies Clauses Act 1845 to obtaining the legal title, nor had he when he requested the commissioners to register his mortgage on the 18th March “a present absolute and unconditional right” to registration: (*Nanney v. Morgan*, 58 L. T. Rep. 238; 37 Ch. Div. 346; *Ireland v. Hart* (*ubi sup.*). The question, therefore, is whether the plaintiff by any act or default of his has displaced the higher equitable right given to him by the priority of his title in point of date. It is contended that there is a broad general principle, perhaps most succinctly stated by Ashurst, J. in *Lickbarrow v. Mason* (2 T. R. 70) that, “wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.” But, to adopt the words of Lord Selborne in *Sewell v. Burdick* (52 L. T. Rep. 445; 10 App. Cas. 81), “it is often dangerous to infer, even from very strong words when used *diverso intuitu*, conclusions on other subjects which, if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified.” It would serve no useful purpose were I to attempt to go through and discuss the various common law cases that have been cited to me, especially as in the latest case of *Farquharson Brothers and Co. v. King and Co.* (*ubi sup.*) there is a remarkable conflict of judicial opinion. But I desire to express my respectful concurrence with the observation of Williams, L.J., where he says, at p. 712 of the Law Reports, in that case: “I think that it is impossible, in the face of various authorities on the subject, to say that in every case in which the act of one of two innocent persons has enabled a third person to occasion loss, the first-mentioned person must sustain the loss.” It is, indeed, plain that a man may in many cases entrust another with all the *indicia* of ownership, including the legal title, and yet not deprive himself of his equitable rights. I am not concerned to consider the cases at common law, as this is a question of equities only, and it is sufficient to refer to two authorities to illustrate my meaning. A man may transfer his shares in a company to a single trustee and intrust him with the certificate, and yet enforce his equitable title against a petitioner or mortgagee of the trustee who has not obtained the legal title: (*Shropshire Union Railways and Canal Company v. The Queen* (*ubi sup.*). And, again, he may cause land purchased by him to be conveyed to a trustee by a deed containing a statement that the trustee has paid the purchase money and may hand over the deed to him, and yet enforce his equitable title in a similar way: (*Carritt v. Real and Personal Advance Company*, *ubi sup.*). The principle upon which these cases are founded is stated by Cairns, L.C., at p. 507 of the Law Reports, so far as concerns the present case. He says there: “My Lords: In the first place, the arguments at your Lordships’ Bar on behalf of the respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner—that is to say, entitled to the whole equitable interest—such a person ought not to have a trustee at all holding

the *indicia* of legal ownership; or, if he chooses for his own purpose to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that therefore if the person entitled absolutely to the equitable interest in a share in a railway company chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land, and to every other species of property, and it goes to say that, whereas there is a large, well-known, recognised, and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law.” And he continues, at p. 509: “Then, my Lords, in the fourth place this circumstance was relied upon, that the *cestuis que trust* had allowed the trustee to have possession of the certificates of the shares. Now, the certificate of a share or stock of a railway company is merely a solemn affirmation, under the seal of the company, that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate. Undoubtedly the stock did stand in the name of Mr. Holyoake. If I am right, the directors were justified in having it in his name, and they were also justified in giving him the certificates, which did no more than tell that which any person would have found out by looking at their books—namely, that the stock stood in his name.” On the other hand, it is equally well settled that if a man hands over the *indicia* of title to a third person for the purpose of enabling that person to raise money either for his own benefit (*Perry-Herrick v. Attwood*, *ubi sup.*) or for the benefit of the principal (*Brocklesby v. Temperance Permanent Building Society*, *ubi sup.*), but with a limit on the amount, the lender, being ignorant of such limit, is entitled to a charge for the whole amount advanced, although it exceed the limit. It is sufficient to read one passage in the judgment of Lord Macnaghten, at p. 184 of the Law Reports. He says: “A person places his title deeds under the control of an agent, and instructs the agent verbally to procure for him a certain sum by means of those deeds. The agent then obtains from a banker on the security of the deeds an advance in excess of the amount which the principal directed or intended him to raise and misappropriates the difference. Who is to bear the loss? Is the principal to suffer for the fraud of his agent, or the banker, who on the invitation of the principal has dealt in good faith with the agent in the very matter intrusted to his agency? It would seem to be in accordance with common sense that the loss should fall upon the principal.

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No authority has been produced to the contrary, and the judgment under appeal is in accordance with the principle of the decision in *Perry-Herrick v. Attwood* (*ubi sup.*), though the facts of the two cases are different. The principle laid down in *Perry-Herrick v. Attwood* seems to be this: If a person permits title deeds which belong to his security to be dealt with for the purpose of creating a preferential charge of a definite amount and the limit is exceeded, he cannot as against innocent third parties who have advanced their money without notice of the limit complain that the authority which he gave has been exceeded in that respect. *Perry-Herrick v. Attwood* was not a case of agency, but it seems to me that the principle is equally applicable in a case of that sort." The principle underlying these cases is that the man possessed of the prior equity cannot be deprived of that equity unless he has been guilty of some negligence, but the word "negligence" imports the neglect of some duty towards the person injured: (*Swan v. North British Australasian Company Limited*, 2 H. & C. 175). A man is entitled to deposit his deeds with his solicitor or banker, or to send his certificates to his broker, or to vest his property in the name of another person and hand him the title deeds without thereby giving rise to any implication inconsistent with his own beneficial title. Because his acts are in accordance with the common usage of mankind, and no other member of the community therefore is entitled to allege that such a course of action contained any invitation to him to act from which a duty to him could be inferred. But the course of action above mentioned is also consistent with an intention that the person to whom the *indicia* of title are intrusted should deal with them. If once there is proof or admission that such was the intention, then the case falls to be decided in accordance with the principles governing the cases of authority given to an agent. The owner comes then under a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority which he has by his own act made apparently co-extensive with absolute ownership. That disposes of Mr. Upjohn's argument that the cases of *Perry-Herrick v. Attwood* and *Brocklesby v. Temperance Permanent Building Society* (*ubi sup.*) and that class of cases are confined to an excess of the limit of borrowing, and do not extend to a mortgage when the authority is only to sell. The authority which the owner has given can only be limited by the *indicia* of property which he has given; the particular authority proved or admitted is necessary in order to make the case one to which the principles of agency apply at all. But when once you have that the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case becomes one of actual authority apparently equivalent to absolute ownership and involving the right to deal with the property as owner, and any limitation on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee. Then it is urged that Hall became a trustee for sale when the bond was transferred to him, and that a trust for sale does not authorise a mortgage. But it was the unnecessary transfer of the legal title to him that enabled him to deal with the bond as owner, and the principles which

I have stated are equally applicable whether the dishonest vendor or mortgagor has the legal title as a trustee or not. The gist of the case is that the real owner has invested the dishonest vendor or mortgagor with all the *indicia* of title as absolute owner for the purpose of enabling him to deal with the property, but in a limited way only; whether the trust was to sell only or to mortgage only is immaterial if the mortgagee or purchaser had no notice of the existence of any trust at all. Further, there is another class of cases distinct from the cases of authority or agency which do fall under the general principle that I have cited from *Lickbarrow v. Mason* (*ubi sup.*), and which are cases of pure estoppel. If the owner of property clothes another person with the apparent ownership and right of disposition thereof by not merely transferring it to him, but also by acknowledging that the transferee had paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who took it in good faith and for value. *Rice v. Rice* (2 Drew, 73) is a good illustration. If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers the property, he "voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from any shadow of incumbrance of adverse equity" (p. 83), and he cannot be heard to say that he never in fact received such purchase money. It makes no difference, in my opinion, whether that acknowledgment is made before the passing of the Conveyancing Act on a conveyance of land by the receipt clause in the body of the deed and the indorsed memorandum; or since the Act by the former only, or in a statutory transfer by the statement in the statutory form that the money has been paid. The statutory form is given in the schedule to the Act as the effectual mode of transfer, and the Act requires that the true consideration should be stated. It would be disastrous now to hold that these forms, which have been used for years, are not fully effectual, but that they require to be supplemented by a conveyancing receipt clause. There is nothing adverse to this in the case of *Carritt v. Real and Personal Advance Company* (*ubi sup.*). In that case the purchaser on completion took the conveyance of land to a trustee for himself; the purchaser's name did not appear on the conveyance, but the purchase money was stated to have been paid by the trustee. Chitty, J. held that this statement did not involve any representation that the trustee had paid for the property out of his own money. But the decision does not extend to a case where the owner himself conveys in consideration of the payment of the purchase money to himself by the transferee. The distinction is obvious. The mere statement that the purchase money has been paid by the transferee is consistent with such payment having been made out of trust moneys in his hands belonging to a third person; but it is not consistent with absolute nonpayment. There is no contradiction of the deed in saying that the purchase money was paid by him out of some third person's money. There is a direct contradiction in saying that it was never in fact paid at all. In this case the plaintiff transferred the whole legal title to Hall, for the purpose of

enabling him to sell, and he executed a transfer which stated that Hall had paid him the consideration. He was fully aware of this, and his letter of the 28th Feb. appears to point to an intention on his part that Hall should raise money on the bond, but I do not think it fair to lay much stress on that letter, as the plaintiff was not cross-examined. But, however the case is regarded, as one of general authority with no limit brought to the notice of the mortgagee or as one of estoppel, the plaintiff, in my opinion, fails to establish the priority that he claims. And his claim to a vendor's lien fails also on the authority of *White v. Wakefield* (7 Sim. 401) and *Rice v. Rice* (*ubi sup.*). There must therefore be the usual judgment for redemption. The bond is to be transferred, pending redemption, into the joint names of the plaintiff and one of the defendant's executors, and, as the whole difficulty has arisen through Hall's rascality, his trustee must pay all the costs of the action.

Solicitors: *H. W. Hennicker-Rance; Williamson, Hill, and Co.*

Friday, May 2.

(Before FARWELL, J.)

RIPLEY v. ARTHUR AND CO. (a)

Attachment—Passing off—Action for—Default of pleading—Injunction—Alleged breach—Estoppel.

The plaintiff brought an action against the defendants for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of the plaintiff's manufacture. The defendants made default in pleading, and the injunction was granted in due course. Later it appeared that a similar article to that complained of was being put upon the market by N., for whom the defendants were acting as agents for sale. On a motion for attachment of the defendants for breach of the injunction no direct evidence was forthcoming, and the case was rested on admissions by the defendants (which the court held to be insufficient) and on the fact that the defendants, having allowed judgment to go against them by default, were estopped from saying that the goods complained of were not an imitation of those of the plaintiff's manufacture.

Held, that in these circumstances an attachment could not issue.

THIS was a motion for the attachment of John Stevenson Stubbs, who was the sole partner in the defendant firm.

On the 10th Aug. 1900 the plaintiff had issued a writ against the firm, claiming an injunction to restrain them from selling or offering for sale any laundry blue not being of the plaintiff's manufacture so got up or arranged for sale as to induce the belief or enable others to represent that the laundry blue so sold or offered for sale was of the plaintiff's manufacture, or in any manner representing that any blue not of the plaintiff's manufacture was "Oval Blue," or blue of the plaintiff's manufacture. A statement of claim was delivered in due course in this action, but the defendant firm failed to put in a defence, and on the 2nd March 1901 judgment was obtained in the action in default of pleading

practically in the terms of the writ above mentioned.

The blue of which the plaintiff complained was known as "Bobby Blue," and sold by the defendant under a certain get-up which the plaintiff alleged to be a colourable imitation of the get-up of his "Oval Blue." A copy of the said judgment, with the usual warning as to neglect to obey the same indorsed, was served upon Stubbs personally on the 8th March 1901. In Sept. 1901 the plaintiff discovered that this "Bobby Blue" was again put upon the market under practically the same get-up, and was sold by W. G. Nixey, a manufacturer of black lead, and that Stubbs had been engaged by Nixey to push the sale of such blue. The plaintiff thereupon endeavoured to obtain evidence from shopkeepers and others to enable him to move for the attachment of Stubbs, but was unable to do so, the shopkeepers fearing that they might thereby become mixed up in litigation or involved in disputes between rival manufacturers with both of whom they dealt. The defendant Stubbs had, in the course of the proceedings, made certain statements to the clerks of the plaintiff's solicitors and others, and in these circumstances the motion for attachment was rested on such statements, and on the fact that, Stubbs having allowed judgment to go against him, it was not open to him to say that the blue complained of in the action was not an imitation of the plaintiff's goods.

Butcher, K.C. and J. F. Waggett for the motion. —A judgment by consent or in default is as effective as an estoppel or a judgment in a contested case:

Re South American and Mexican Company; Ex parte Bank of England, 71 L. T. Rep. 594; (1895) 1 Ch. 37;
Newington v. Levy, 23 L. T. Rep. 595; L. Rep. 6 C. P. 180.

If the defendant had the opportunity of controverting the matter, it is the same as if he had actually controverted it:

Houston v. Sligo (Marquis), 52 L. T. Rep. 870; 29 Ch. Div. 448.

We seek to show what it was that defendant admitted was an infringement, and then that what he is now doing is an infringement of the judgment which estops him. The question is for the court:

Payton v. Snelling, 17 Pat. R. 635.

Whinney, for the defendant, was not called upon.

FARWELL, J. (after stating the facts, continued:—) Now, it is said that this is sufficient to enable the plaintiff to come here and ask for the committal of the defendant without giving any evidence that he has brought himself within the terms of the judgment. In my opinion it is absolutely impossible I can hold that the judgment that any particular article is so got up and arranged as to constitute a fraudulent intent and actual deceit so as to be restrained in general terms from passing off such articles includes any particular articles which may come within it or not as to which no evidence is adduced. A case has been cited to me to show that the court had, after argument by the plaintiff as the owner of a particular cottage, held evidence

(a) Reported by A. W. CHASTER, Esq., Barrister-at-Law.

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admissible to show what cottage. No doubt if evidence had been adduced at the trial and the case adjudicated upon by the court the matter would have become *res judicata*. But there is nothing of that kind here. It is not according to the practice of the court to construe a judgment and send a man to prison when evidence is not admissible. The motion is entirely misconceived unless the plaintiff can show that the defendant has contravened the terms of the order. I cannot say what the pleader had in his mind when he set up the claim as to passing off. It is the specific article operating as a breach of the injunction to which the evidence should have been directed, showing that it is so got up and arranged as to come within the terms of the judgment. The plaintiff has not attempted to do that. It is quite clear on the affidavits that there is no admission by the defendant on which I can rely. The motion therefore must be dismissed with costs.

Solicitors: *Chester and Co.*, agents for *Nicholson and Pemberton*, Liverpool; *Monro, Slack, and Jepps*, agents for *J. Watson*, Liverpool.

Friday, May 2.

(Before FARWELL, J.)

Re TELFAIR; GARRIOCH v. BARCLAY. (a)

Will—Construction—Gift of income to two persons "so that each shall receive half during their lives"—Gift over—Death of one person—Implied gift to the other.

By his will a testator gave the income of his residuary estate to E. W. G. and H. H. G. "in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives." After "their deaths" the income was given over to other persons.

Held, that on the death of E. W. G., H. H. G. took by implication the income of the whole fund during her life.

THE testator, Charles Robert Telfair, late of Cheltenham, by his will made the 18th Aug. 1869, after revoking all prior wills, directed his real and personal estate, after payment of his debts and funeral expenses, to be sold and the proceeds invested on the securities therein mentioned. And he continued:

The interest due on such securities is to be paid to my widow for and during the term of her natural life. After her death this interest is to be paid to my sisters-in-law, Elizabeth Walcot Grant and Hughina Houston Garrioch, in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives. After their deaths this interest is to be paid to Williamina Johan Garrioch, my wife's niece, during her natural life. And after her death this interest is to be paid to Euphemia Garrioch, another of my wife's nieces, during her natural life. And after her death . . . my will is that all the securities become the property of the Royal National Lifeboat Institution of England.

And he appointed his widow and R. Telfair executors of his will.

The testator died on the 8th Oct. 1870, and his will was duly proved by the widow alone on the 28th Nov. 1870. Elizabeth Walcot Grant died

on the 18th Dec. 1889, and the widow on the 21st Sept. 1901.

In these circumstances a summons was taken out by Hughina Houston Garrioch against the widow's executors, Williamina Johan Garrioch, and the Lifeboat Institution as defendants, asking, among other things, whether, according to the true construction of the will and in the events which had happened, she was entitled during her life to the whole of the income of the residuary estate.

W. A. Peck for the summons.—The whole question is what in the circumstances the plaintiff is now tenant for life of. I submit that she is entitled to the whole income of the fund during her life:

Vaughan Hawkins on Wills, p. 202;

Tuckerman v. Jefferies, 4 Bac. Abr. 467; 11 Mod. 108;

Malcolm v. Martin, 3 Bro. C. C. 49;

Armstrong v. Eldridge, 3 Bro. C. C. 214.

The more recent cases are:

Pearce v. Edmeades, 3 Y. & Coll. 246;

Re Richerson; *Scales v. Heyhoe*, 69 L. T. Rep. 590; (1893) 3 Ch. 146;

Re Buller; *Buller v. Giberne*, 74 L. T. Rep. 406.

Marcy and Robertson-Macdonald for the defendants other than the Lifeboat Institution.—The defendants the widow's executors or the defendant Williamina Garrioch are entitled to half the income during the life of the plaintiff:

Wills v. Wills, L. Rep. 20 Eq. 342.

Pearson for the Lifeboat Institution.—There is no gift over during the plaintiff's life, and therefore, if there is not an intestacy, my clients are entitled. *Wills v. Wills* and *Armstrong v. Eldridge* (*ubi sup.*) are both distinguishable.

FARWELL, J.—I have come to the conclusion that the plaintiff's contention is right, although the will is open to various constructions. I think the true view is as suggested in the argument, that the interest which is dealt with is whole throughout, and that different generations are provided for in due order. First it is to the widow for life, then the entire interest is to the sisters-in-law, and then after their deaths the entire interest goes again to the nieces in succession, and after their deaths there is a gift over. Now, the words are somewhat curious. It is not after the death of the widow to pay merely to "my sisters-in-law in equal parts," but it goes on that each was to receive a half during their natural lives, and after their deaths, &c. Without going through the cases, it is established by various authorities, as laid down by Lord Abinger, C.B. in *Pearce v. Edmeades* (*ubi sup.*), that "if in a will, after words creating a devise to two in common, you find by other words that the devise over is only to take effect after the death of both, the effect of that is to control the former words." I do find here that the whole is to go over on the death of both. The court struggles against an intestacy, so that it cannot be given to residue if on a fair reading there is an implied gift of the whole interest to Williamina after the deaths of both. I read the words, "equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives," as really being a sort of qualification and not to indicate an ordinary tenancy in common. The real gift is to the two sisters-in-law, naming

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them, and then the words which follow are only an explanation of what is to happen during the lives of both, and he then gives the entire interest after the deaths of both; so that there is an implied gift to the survivor, and the explanatory words are intended only as an explanation of the term "during the lives of both." As to such a reading, there is ample authority in the judgments of the Lord Chancellor in *Armstrong v. Eldridge* (*ubi sup.*) and of Lord Abinger in the case above referred to. Jessel, M.R. in *Wills v. Wills* (*ubi sup.*) did not mean that the residue in the will went at once to the children of the tenants for life. So here the nieces take only subject to the interests of the sisters-in-law. But whether the will would bear that meaning or no, I think the testator intended that the survivor of the sisters-in-law should take the whole income for her life.

Solicitors: *Heath and Hamilton*, agents for *Ticehursts, M'Ilquham, and Wyatt*, Cheltenham; *Crowders, Vizard, and Oldham*; *Clayton, Sons, and Fergus*.

Friday, April 25.

(Before FARWELL, J.)

MAYOR, &C., OF BRADFORD AND OTHERS v. FERRAND AND THE URBAN DISTRICT COUNCIL OF SHIPLEY. (a)

Practices—Action for interference with water supply—Interlocutory application for an order for plaintiffs to enter upon and make excavations in defendant's land—Application refused for an action to restrain interference with the plaintiffs' water supply.

The plaintiffs applied by motion for an order permitting them to enter upon the defendants' land in order to inspect a certain shaft, and if necessary sink other shafts for the purpose of ascertaining whether water which came to the surface at a certain spring flowed underground in a known and defined channel.

Held, without deciding whether the plaintiffs might or might not be entitled to make the necessary inspection and excavations at some time, that there was no sufficient evidence to justify the court in making any order on the motion.

MOTION for an order that the plaintiffs might enter upon certain lands of the defendants, and particularly that portion of the said land in the possession of the defendant council, and that they might be authorised to make the necessary experiments and observations upon the said land for the purpose of ascertaining whether or not the waters which previously issued at a spring known as the Sweet Well Spring before so issuing flowed in a definite underground channel, or that such further or other directions might be given to enable the plaintiffs to obtain the necessary evidence in support of certain allegations in the statement of claim to the effect that the said water flowed in a defined channel, and that the defendants had wrongfully diverted the plaintiffs' water supply.

It was alleged by the statement of claim that the plaintiff corporation were the owners of a mill and premises known as Sunnysdale Mill,

situate at the junction of two streams known as the Bradup Beck and Fenny Shaw Beck, which joined together to form the Morton Beck, and upon the banks of the Bradup and Morton Becks respectively. The water in the Bradup Beck was used for working the mill.

The other plaintiffs were interested either as riparian owners or otherwise in the continued supply of water to the Morton Beck.

It was also alleged that the defendant William Ferrand was the owner and occupier of an allotment of moorland called the Morton Moor, upon which a spring known as the Sweet Well Spring rose and flowed by means of a stream known as the Sweet Well Dyke into the Sunnysdale Reservoir on the Bradup Beck.

In the year 1900 the defendant Ferrand entered into an arrangement with the Shipley Urban District Council under which he granted permission to them to sink certain shafts or wells on his land in close proximity to the spot where the waters of the Sweet Well Spring flowed to the surface. Shafts having been sunk in pursuance of this agreement, the waters were diverted.

The plaintiffs claimed (*inter alia*) an injunction to restrain this diversion of water.

The defendants by their defence pleaded (*inter alia*) that the water in question had never flowed in a defined channel before it reached the surface, but that it percolated underground by undefined and undefinable and unknown and unascertained and unascertainable channels, and not otherwise.

The plaintiffs applied to the court by way of motion to obtain an order to the effect above set out, in order to establish the fact that the said water flowed in a defined channel.

Affidavits were filed which showed that mere inspection of the defendant council's works, which had been permitted, was not sufficient, and that the flow of water into the shaft from the well was about 220,000 gallons *per diem*, by which amount the daily flow of water in the becks was diminished.

Buckmaster, K.C. and *Austen-Cartmell* for the plaintiffs.—The main question for decision in this case is whether the water from the Sweetwell Spring is water which percolates through the soil in an undefined channel, or whether it flows in a defined channel underground. If the plaintiffs can establish that it flowed in a defined channel, they are entitled to succeed. Engineers say that without experiments it is impossible to decide the question; and for the purpose of making such experiments the plaintiffs require to enter upon the defendants' land and make experiments in their existing shaft, and if necessary sink shafts themselves higher up. It may be necessary, in order to carry out the experiments, to remove a rubble wall, but that can be done without permanent injury to the defendants. [FARWELL, J.—What is the defendants' objection? An issue of this kind being raised, if the parties go to trial, and it is found necessary to direct experiments to be made, they may have to be carried out at the defendants' expense.]

Butcher, K.C. and *A. P. Longstaffe* for the defendants.—It is submitted that there are three objections to an order being made in the terms of the motion: (1) The court has no jurisdiction to make any such order. The notice of motion does not refer to inspection; the plaintiffs are merely

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

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endeavouring to manufacture evidence. It is provided by Order L., r. 3, that the court may direct inspection of any property or thing being the subject of a cause or matter. The alleged defined channel is not the subject-matter of this action. Further, that rule gives the court no power to order excavations in a case of this kind, although it is true that the court has power to allow excavations for the purpose of inspecting a known thing, such as a drain:

Lumb v. Beaumont, 51 L. T. Rep. 197; 27 Ch. Div. 356.

There being no power under the existing rules, it is also clear that the court has no general jurisdiction:

Ennor v. Barwell, 1 De G. F. & J. 529.

(2) In the second place, if leave is granted to the defendants to make excavations where they please, irreparable damage may be done to the defendants' property. [FARWELL, J.—But the plaintiffs are substantial people] (3) The third and most important point is that the fact of the plaintiffs seeking to make these experiments and excavations is proof that the water flows in no known or defined channel within the meaning of the decision in *Chasemore v. Richards* (33 L. T. Rep. O. S. 350; 7 H. L. O. 349). It is essential that the channel, whether above or below ground, should be known and defined, and if the nature of the flow of water cannot be ascertained by inspection or by reasonable diligence, it cannot be said that the channel is known. There are no English cases upon the meaning of the words "defined" or "known," but certain Irish cases throw light upon the question. Thus, in *Black v. Ballymena Township Commissioners* (17 L. Rep. Ir. 459) it was held that "defined" means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. It was also held that "known" means the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground. It was held in *Ewart v. Belfast Poor Law Guardians* (9 L. Rep. Ir. 172) that although water flowed subterraneously in a channel which was, and by excavation could have been ascertained to be defined, the principle of *Chasemore v. Richards* (*ubi sup.*) applied, as the channel was not known.

Buckmaster, K.C. in reply.—On the question of jurisdiction it is submitted that this case is governed by *Lumb v. Beaumont* (*ubi sup.*). The question there was how the defendants were using their property; here the plaintiffs also seek to find out how the plaintiffs are using their land. The case of *Black v. Ballymena Township Commissioners* (*ubi sup.*) shows that the evidence which the plaintiff seeks to produce is not only admissible, but is essential to the plaintiff's case. The fact that water is coming up in a large volume is strong *prima facie* evidence that the water is flowing in a defined channel. He referred to

Grand Junction Canal Company v. Shugar, 24 L. T. Rep. 402; L. Rep. 6 Ch. 483.

FARWELL, J.—I have come to the conclusion that I cannot make any order on this motion, nor can I usefully do what I rather hoped to do for the sake of the parties—namely, determine the question of law. I do not agree with Mr. Buckmaster in saying that Mr. Butcher's proposition

goes the length of saying that the evidence is inadmissible. The real point, to my mind, is this: the plaintiffs have to show that the underground water which they claim flows in a well-defined known channel. Now, the meaning of the word "known" has been discussed in two Irish cases, and I reserve my opinion as to the meaning of it until the English courts have discussed it; but so far as *Palles*, V.C. is concerned, I do agree with the following observations which he makes in giving judgment in *Black v. Ballymena Township Commissioners* (*ubi sup.*), at p. 474 of the report: "In considering this question—i.e., the meaning of the words "known" and "defined"—the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel, but must be a knowledge, by reasonable inference, from existing and observed facts in the natural, or, rather, the pre-existing, condition of the surface of the ground. The onus of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream, when it emerges into light, comes from and has flowed through a defined subterranean channel." All the evidence at present before me in support of the plaintiffs' case is to be found in par. 5 of James Watson's affidavit, where the deponent says: "From our experience as water engineers it is our opinion that the water so abstracted flows in a well-defined channel underground, and that it is in no sense percolating water. It is, however, impossible to assert this fact with absolute certainty without taking out part of the rubble masonry, and sinking other shafts in the land between the said shaft and the place where the water formerly issued to the surface, in order that the channel of the stream may be examined and defined. The rubble masonry as it stands at present completely obstructs what is, in our opinion, a well-defined channel through which the spring originally flowed." I do not agree with the view that evidence of this sort is inadmissible, because the court has to ascertain to the best of its knowledge where the water does flow and whether that channel is known. For example, if we had a stream going underground at one point, and saw it emerging at another point, it seems to me it would then be necessary to excavate in order to find whether it was the same stream or some other stream that had intervened. I feel that I should be doing wrong to the plaintiffs if I were to say that the evidence now before me is all the evidence which they can get. I do not think that would be doing justice. But, on the other hand, having regard to the view expressed by the Vice-Chancellor, with which I agree, I do not think I should be right in making an order to enable the plaintiffs, who do not know that the water runs down in any known channel, to go and search for a defined channel. The crux of this case being to ascertain whether there is or is not such a channel, the plaintiffs have not even given *prima facie* evidence that there is. In these circumstances, and without deciding the other two points raised by Mr. Butcher, I make no order on the motion, the costs to be costs in the action.

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Re SPIRAL GLOBE LIM.; WATSON v. SPIRAL GLOBE LIM.

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Solicitors for the plaintiffs, *Nussey and Fellowes*, for *Vint, Parkinson, Hill, and Killick*, Bradford.

Solicitors for the defendants, *Johnson, Weatherall, and Sturt*, for *Wade, Bilborough, Booth, and Co.*

April 17 and 19.

(Before JOYCE, J.)

Re SPIRAL GLOBE LIMITED; WATSON v. SPIRAL GLOBE LIMITED. (a)

Company—Debentures—One series—Two separate issues—Registration—Creation—Companies Act 1900 (63 & 64 Vict. c. 48), s. 14.

On the 1st Sept. 1900 the seal of the S. G. Company was affixed to each of a series of twenty debentures.

On the 24th Sept. 1900 ten of these debentures were issued, and the remaining ten on the 5th Jan. 1901.

Held, that these debentures were not required to be registered under sect. 14 of the Companies Act 1900.

On the 28th Aug. 1900, the defendant company resolved, at a meeting of its directors, to issue at par debentures to bearer to the amount of 2000*l.*, bearing interest at 6 per cent., redeemable in twelve months from date of issue, and for the sum of 100*l.* each.

On the 31st Aug. 1900 the form of the debentures was approved, and on the 1st Sept. 1900 twenty debentures of 100*l.* each were sealed with the company's seal. Ten of these debentures were issued on the 24th Sept. 1900 to the plaintiffs, who were the company's bankers, in consideration of an advance of 1000*l.* The remaining ten were left in the possession of the solicitors of the company.

On the 3rd Jan. 1901 a resolution was passed instructing the secretary to obtain from the solicitors the ten unissued debentures, and to deposit them with the company's bankers as security for an overdraft; and they were so deposited on the 5th Jan. 1901.

On the 18th April 1901 the company went into voluntary liquidation.

This was a debenture-holders' action, in which the question was raised whether the debentures issued on the 5th Jan. 1901 ought to have been registered in pursuance of sect. 14 of the Companies Act 1900.

Sect. 14 of the Companies Act 1900 provides:

(1) Every mortgage or charge created by a company after the commencement of this Act and being either (a) a mortgage or charge for the purpose of securing any issue of debentures . . . shall, as far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured. (4) Provided that where a series of debentures containing any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient to enter on the register (a) the total amount secured by the whole series; and (b) the dates of the

resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and (c) a general description of the property charged; and (d) the names of the trustees, if any, for the debentureholder. (5) Where more than one issue is made of debentures in the same series, the company may require the registrar to enter on the register the date and amount of any particular issue, but an omission to do this shall not affect the validity of the debentures issued. (6) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured . . . and the company shall cause a copy of the certificate so given to be indorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered.

Sect. 35 provides:

This Act shall, except as otherwise expressed, come into operation on January 1, 1901.

Mark Romer for the plaintiff.—No registration of the ten shares issued on the 5th Jan. 1901 was necessary. "Created," in sect. 14 of the Companies Act 1900, has a different meaning to "issued." Debenture are "created" within the meaning of the section directly they are sealed. The effects of sub-sects. 4 and 5 as to the registration of a series of debentures issued at different times is this: that the whole series is to be registered at one and the same time. If "created" in sub-sect. 4 means issued, then by virtue of sub-sect. 5 it is plain that there would only necessarily be the registration of the first issue; it would not be essential for later issues to be registered. But this would be contrary to the purpose of the section. The effect of sub-sect. 5 is to protect the case of a second issue, there being no duty to register such issue where the whole series has been registered already. Sub-sect. 6 confirms the view that there is to be a registration once and for all. On the proposition that a debenture is created directly it is sealed, he referred to *Roberts v. Security Company Limited* (75 L. T. Rep. 531; (1897) 1 Q. B. 111), *London Freehold and Leasehold Property Company v. Baron Suffield* (77 L. T. Rep. 445; (1897) 2 Ch. 608), and to *Elphinstone on the Interpretation of Deeds*, p. 120: "The operation of the deed is not suspended by the fact that the party who executes it retains it in his own custody."

H. S. Simmons for the liquidator.—The debentures were not created until issued. In both the cases that have been cited everything was complete except some formality. But here everything remained to be done except the sealing. The debentures were not created until a mortgage was found. In *Re Ambrose Lake Tin and Copper Company* (38 L. T. Rep. 587; 8 Ch. Div. 635) Cockburn, C.J., referring to the meaning of the term "issue" in sect. 5 of the Companies Act 1867, said: "The Act of Parliament imposes no condition upon allotment such as it imposes upon the issue of shares, and I think that, inasmuch as the term 'issue' is used, it must be taken as something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment

(a) Reported by SYDNEY DAVAT, Esq., Barrister-at-Law.

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may be made entire and complete." He also referred to

Mowatt v. Castle Steel and Iron Works Company,
55 L. T. Rep. 645; 34 Ch. Div. 58.

Romer in reply.

In the course of the arguments *Re S. Abrahams and Sons Limited* (86 L. T. Rep. 290) was referred to.

Cur. adv. vult.

JOYCE, J.—The provisions in the Companies Act 1900 with respect to the registration of debentures and mortgages appear to me by no means well drawn. There are various inaccuracies of expression in the terms used, and they present considerable difficulties of construction, so much so that commentators on the Act are compelled to say that the true interpretation cannot be what the words literally mean. The result of my perusal of the Act in connection with the prescribed forms, particularly having regard to sub-sect. 6 of sect. 14, is that, in my judgment, if the Act had been in force in the year 1900, the proper registration ought to have been made in Sept. 1900. But the Act did not come into operation until the 1st Jan. 1901, so that, in my opinion, no registration of these debentures under the Act was required.

Solicitor: *John J. Stands.*

Oct. 29, 1901, Feb. 10, March 22, and
April 19, 1902.

(Before JOYCE, J.)

Re GREENWOOD; GOODHART v. WOODHEAD. (a)

Will—Real estate—Devise—Condition precedent—Condition subsequent—"To take and use the name of Greenwood only"—Death—Insanity—Act of God—Impossibility.

The testator J. N. G. by his will devised his real estate to trustees upon trust for his daughter J. G. during her life; and, after her decease, for the children or remoter issue born in the lifetime of J. G. in such shares as J. G. should by deed or will appoint, and, in default of such appointment, for the children of J. G. as tenants in common. And, if J. G. should have no children, the testator devised his real estate to his cousin W. A. N. on condition that W. A. N. should take and use the name of Greenwood only. The testator died on the 11th Aug. 1853. W. A. N. died on the 5th Nov. 1855 intestate, leaving W. N. his heir. W. A. N. had not during his life taken the name of Greenwood. J. G. was born on the 30th June 1843 and was married, but had no issue. On the administrator of W. N. seeking a declaration that, in the event of J. G. dying without having issue, he would be entitled to the real estate of the testator:

Held, that, even if the condition that W. A. N. should take and use the name of Greenwood only was a condition subsequent, the fact of W. A. N. not having complied with the condition during his life disentitled the administrator; and that although during the last eighteen months of his life W. A. N. suffered from insanity.

Quære, whether the condition was not a condition precedent.

(a) Reported by SIDNEY DAVES, Esq., Barrister-at-Law.

THE testator. James Newsome Greenwood, by his will, dated the 24th May 1853, after making certain devises and bequests, devised his real estate to trustees upon trust for his daughter Jane Greenwood during her life for her sole and separate use without power of anticipation; and, after her decease, for the children or remoter issue born in the lifetime of his said daughter in such shares as she should by deed or will appoint, and, in default of such appointment, for her children, their heirs and assigns, as tenants in common. And, if the testator's daughter Jane Greenwood should have no children, the testator devised his real estate to his cousin William Alexander Newsome on condition that, if the testator's wife was then living, she should have the use and enjoyment for the remainder of her life of the dwelling-house in which the testator resided, and on further condition that William Alexander Newsome should take and use the name of Greenwood only. (The will is to be found more fully referred to at the commencement of his Lordship's judgment.)

On the 11th Aug. 1853 the testator died.

The testator's daughter Jane, who was born on the 30th Jan. 1843, was now married to Jeremiah W. Woodhead; but she had never had any issue.

The testator's cousin William Alexander Newsome died on the 5th Nov. 1855, intestate, leaving William Newsome, his only son and heir-at-law, him surviving.

William Alexander Newsome did not during his life take the name of Greenwood.

William Newsome died on the 26th July 1900, having made a will dated the 10th Nov. 1881. The executors were dead, and letters of administration with the will annexed were granted to Stephen Cleves Goodhart on the 6th Nov. 1900.

Stephen Cleves Goodhart now sought that it might be declared that, according to the true construction of the will of the testator, the plaintiff, as the legal representative of William Newsome (who became entitled to the residuary real estate of William Alexander Newsome) would, in the event of Mrs. Woodhead having no children, be entitled to the real estate of the testator James Newsome Greenwood.

Leigh Clare for the trustees of the testator's will.

Badcock, K.C. and E. S. Ford for the administrator of William Newsome.—The condition that William Alexander Newsome should take the name of Greenwood is not a condition precedent to his taking the remainder in fee. They referred to

Jarman on Wills, 5th edit. vol. 2, pp. 841-843;

Egerton v. Lord Brownlow, 4 H. L. Cas. 1;

Woodhouse v. Herrick, 1 K. & J. 352;

Gulliver v. Ashby, 4 Burr. 1930.

In *Davies v. Lowndes* (1 Bing. N. C. 597, at p. 618) it was held by Tindal, C.J. that where an estate is devised on condition of the devisee's changing his name, it is sufficient if he changes it within a reasonable time. As regards conditions subsequent, it is stated in *Theobald on Wills*, 5th edit., p. 541, that "In the case of conditions subsequent, if the condition is impossible, impolitic, or illegal, the gift remains, though there may be a gift over on non-performance of the condition." Now, here the non-performance of the condition does not arise from the act or default of the devisee William Alexander Newsome; his death

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rendered the performance of the condition impossible. This condition subsequent then was rendered impossible by an act of God; the condition is accordingly void and the devise remains good:

Butcliffe v. Richardson, 26 L. T. Rep. 495; L. Rep.

13 Eq. 606;

Collett v. Collett, 14 L. T. Rep. 95; 35 Beav. 312.

Hughes, K.C. and Edward Clayton for Mrs. Jane Woodhead.—The condition is a condition precedent. Whether the condition is to be taken as a condition precedent or condition subsequent is to be determined by the intention of the testator. This, then, we submit, is the condition upon which the devisee is to take the remainder. If Jane Woodhead had predeceased the devisee William Alexander Newsome, the legal estate would have remained in the trustees until the performance of the condition. The rents in the meantime would presumably go to the heir-at-law. If the condition was a condition subsequent, it could not be ascertained until the death of the devisee whether he should take a remainder in fee. If the conditions were subsequent, the devisee must perform the condition within a reasonable time, certainly within the period of his life. It cannot be said to have become impossible by an act of God. They referred to

Re Farrer and Champion (1887) W. N. 202;

Roundel v. Curren, 2 Br. Ch. Cas. 66;

Cory v. Bertie, 2 Vern. 333;

Acherley v. Vernon, Willis 153.

Badcock, K.C. in reply.

JOYCE, J.—In this case, the testator, James Newsome Greenwood, who died on the 11th Aug. 1853, by his will dated the 24th May previous, devised his real estate to trustees upon the trusts thereafter expressed—that is to say, “upon trust for my daughter Jane Greenwood during her life for her sole and separate use independent of any husband with whom she may intermarry and without power of anticipation. And after her decease in trust for all and every or such one or more exclusively of the others or other of them of the children or remoter issue born in the lifetime of my said daughter, in such shares at such times under such provisions and generally in such manner and with such power of sale, and of giving discharges for effecting any payment or division as she, notwithstanding she may be under coverture, by any deed or deeds to be executed by her in the presence of and attested by two or more witnesses, or by her last will and testament in writing duly executed, shall direct or appoint and, in case of no direction or appointment or of an incomplete direction or appointment being made, the whole or so much as shall not be so directed or appointed shall after her decease be in trust for all the children if more than one or her only child if but one, their, his or her heirs or assigns for ever as tenants in common.” Then, “And, if my said daughter shall have no child or children, then I give and devise all my messuages, land, and tenements, whether freehold or copyhold or of any other tenure and wheresoever situate, unto my cousin William Alexander Newsome, formerly of Russell-street, Bloomsbury, London, but now of Great Budge House, near Romsey, in the county of Hants, his heirs and assigns, for ever, on condition, nevertheless, that, in case my said wife shall be then living, she

shall have the use and enjoyment for the then remainder of her life of the dwelling-house in which I now reside, together with the yards, gardens, lands, and grounds occupied therewith, and on further condition nevertheless that he take and use the name of Greenwood only, but subject,” and so on. The first condition as to use and enjoyment, &c., is not a condition properly so-called, but according to the authorities is construed as creating a charge or trust for the benefit of the widow, or a reservation or exception in her favour out of the devise. I proceed to consider the second condition—namely, that the devisee take and use the name of Greenwood only. The testator's daughter Jane is married to Jeremiah W. Woodhead. She is in the fifty-ninth year of her age and childless, and the question has been raised what, in the event that will doubtless happen of no child being born to her, is or will be the effect of the limitation I have mentioned, the subject thereof being real estate and real estate only, and the testator's cousin, William A. Newsome, the devisee in remainder, being dead without having taken or used the name of Greenwood. Strictly, perhaps, it is a future question, but the persons entitled in any view of the case are in existence, and desire to have the question decided. I think it will be expedient and proper to decide it. The contention on behalf of the testator's daughter, who was also his heiress-at-law, was that the condition imposed of taking and using the name of Greenwood only was a condition precedent properly so-called, in which case it would be clear beyond question that the remainder in fee to W. A. Newsome, which was contingent if the condition be precedent, never could become vested, and that she as such heiress-at-law is or will be entitled to the reversion in fee upon her own life estate in default of the birth of issue to her. On the other hand, it was contended on behalf of the representatives of W. A. Newsome that this condition was not precedent, but a condition subsequent; that the remainder in fee to W. A. Newsome was, as it would then be, a vested remainder in him subject to the possibility of its being defeated by the birth of issue to Mrs. Woodhead, and to the consequences—whatever that might be—of the condition not being fulfilled; and further that, inasmuch as W. A. Newsome has died, and Mrs. Woodhead is living, the performance of this condition subsequent has become impossible by the act of God, so that W. A. Newsome's remainder in fee cannot fail or be divested by reason of his failure to comply with the condition. The law upon the subject of estates upon conditions is to be found fully stated in the first volume of Preston on Estates, and in the same learned author's edition of Sheppard's Touchstone, c. 6, the difference between a condition precedent and a condition subsequent being most clearly stated at p. 842 of the second volume of the fifth edition of Jarman on Wills. The particular condition in question is an affirmative or positive condition requiring an act to be done by the devisee, which might have been performed instantaneously at any time without the consent or concurrence of any other person being necessary, for whatever may be the law as to armorial bearings, any person may at any time take and use any name he pleases: (Davidson's Precedents in Conveyancing, 3rd edit., vol. 3,

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p. 357 n.; *Earl Cowley v. Countess Cowley* (85 L. T. Rep. 254; (1901) A. C. 450); and per Tindal, C.J. in *Davies v. Lowndes*, 1 Bing. N. C. 597, at p. 618). There is no gift over or express defeasance in the event of refusal or failure to comply with the condition. All these are circumstances which have been considered to favour the conclusion that such a condition is precedent. Above all, however, no period is expressly allowed or limited for the performance of the condition. If it had been to take and use the name of Greenwood only, "within or on or before the expiration of twelve months after acquiring the possession or enjoyment of the estate," the condition would, in my opinion, have been subsequent, so that, if W. A. Newsome had died before coming into possession or within the twelve months, there would have been good grounds for contending that the condition had become inoperative and might be disregarded. Now, the question whether a condition annexed to a devise be precedent or subsequent depends upon the intention, and there is no doubt that, if it be possible for the court to hold it to be subsequent, this construction is preferred to the view that it is a condition precedent. In the case of *Woodhouse v. Herrick* (1 K. & J. 352) Wood, V.C. decided that a devise in remainder to children, "but all the sons to take the name and arms of James Woodhouse (the testator) in addition to their own name," was a condition subsequent. There, however, the condition required arms to be taken as well as a name: (see also per Kindersley, V.C., 2 Dr. & Sm. 275). If the condition be subsequent, the subject being real estate, no gift over was necessary to make the condition effectual; the testator's heir would become entitled on breach of the condition. But now, without first determining whether the condition in question here be a condition precedent or a condition subsequent, let us consider how the matter would have stood if Mrs. Woodhead had died without issue, but W. A. Newsome was living. Even if the condition were precedent and the remainder to W. A. Newsome contingent it appears to me that, having regard to the position of the legal estate under this will, the remainder to W. A. Newsome would not have failed by reason of the determination of the prior life estate in Mrs. Woodhead before compliance with the condition. It is possible, but I think improbable, that in the event supposed of Mrs. Woodhead dying without issue in the lifetime of W. A. Newsome he might have been called upon to perform the condition within a convenient or reasonable time, though it be not a condition for the benefit of or concerning any third person who could have called for its fulfilment. Perhaps, however, the heir could have done so. Upon the whole I am satisfied that it would have sufficed and been a compliance with the condition by W. A. Newsome if he had taken and used the name of Greenwood only at any time during his life (*Randall v. Payne*, 1 Bro. Ch. Cas. 55), though he would not have been entitled to the possession or enjoyment of the land unless or until he complied with the condition, if precedent. Let us suppose further that W. A. Newsome had subsequently died without having taken or used the name of Greenwood. Could it then have been said that the performance of the condition had been rendered impossible by the act of God

so that he was excused and that his remainder in fee simple had become absolute? It would as it seems to me have become impossible—if this term could properly be applied in such a case—by the devisee's own default, not by the act of God, which has been defined to be an accident presumably impossible to foresee or guard against reasonably. The consequence of holding that in the event first stated the condition had become inoperative would be that every condition to be personally performed by a devisee upon condition, must, upon his death before compliance, be considered to have become impossible by the act of God, and so, if a condition subsequent, need never be performed at all and might from the first have been wholly disregarded. To return to the actual facts of this case, the devisee W. A. Newsome has died in the lifetime of the preceding tenant for life. Although not required to comply with the condition during the existence of the preceding life estate, I do not doubt that he could have done so just as much as if the condition had been to marry an Englishwoman or go to Rome, and that, if he had immediately after the testator's death taken and used the name of Greenwood only, his estate in fee simple in remainder would have become absolutely vested in interest subject only to the possibility of its being defeated or displaced by the birth of issue to Mrs. Woodhead, the tenant for life. The actual possession and enjoyment must, of course, have been postponed until her death. A contingent interest, and *à fortiori* an estate vested in interest, though not in possession, is capable of being operated upon by a condition subsequent and being made to cease and become void: (*Egerton v. Lord Brownlow*, 4 H. L. Cas. 1; see also *Lambrde v. Peach*, 4 Drew, 553; and *Re Muggeridge's Trusts*, 1 L. T. Rep. 436; Johns 625). Upon consideration of the authorities, I have come to the conclusion that if a condition be one to be performed by the devisee personally, not at a particular time but in effect at any time he pleases, and not requiring the intervention or concurrence of any other person, no period being expressly allowed or limited for its performance, which may possibly outlast the life of the devisee (as, for example, twelve months after coming into possession and the like) the period for the performance of the condition is naturally and necessarily the life of the devisee and no longer, and the condition is not complied with—in fact, is broken—if the devisee dies without having performed it: (see *Acherley v. Vernon*, Willes, 153). The result, if I am right so far, is that the condition in the present case (whether it be precedent or subsequent) is one which might have been performed by the devisee immediately or at any time during his life, without the consent or concurrence of any other person. It never became impossible by the act of God in the technical sense of that expression; but the period for performing it has simply been allowed to pass and the devisee has failed to perform it having only himself to blame for his default. As I said at first, if the condition be precedent, there is no question, for the devise of the fee in remainder could not now ever vest and has failed. And I do not see that W. A. Newsome, or rather his representatives, can under the circumstances be in any better position even if the condition be held to be subsequent. For at the moment of

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his death without having performed the condition the devise of the remainder which *ex hypothesi* was vested has failed, and the heir Mrs. Woodhead, there being no express gift over, became entitled to the remainder or reversion upon her own life estate subject to the possibility of a child being born to her who would be entitled under a preceding contingent limitation. It appears to me that, as matters stand, the plaintiff could not succeed unless he could establish each of two things—viz. (1) that the condition in question was not a condition precedent, but a condition subsequent, and (2) that the performance of the condition became impossible by the act of God, and not by the mere default of the devisee W. A. Newsome. The plaintiff cannot, in my opinion, show the latter, whatever may be the true view as to the former. It therefore follows that this action fails, and must be dismissed.

After his Lordship had delivered the above judgment it was discovered that for over six months previous to his death William Alexander Newsome had been detained in an asylum with an attack of insanity, which had existed during the preceding twelve months. Under these circumstances his Lordship allowed the case to be restored for further argument as to whether this insanity of William Alexander Newsome should affect the conclusion arrived at in his Lordship's judgment.

Badcock, K.C. and *E. S. Ford* for the administrator.—The lunacy which afflicted the devisee was an act of God rendering the performance of the condition impossible. In the case of *Re Bird; Bird v. Cross* (8 Rep. 326), where a testator made a bequest adding a proviso that if the legatee, who was abroad, did not within a fixed period return to England and appear before the trustees of the will, he should forfeit the bequest, and the legatee became a lunatic, but had within the period lucid intervals during which he might have returned but did not, Kekewich, J. held that the lunacy was an act of God, making performance of the condition impossible, and that, the condition being subsequent, the lunatic was entitled. His Lordship said: "It is objected that three years were allowed for performance, and that there were times during that period when it might have been accomplished. As the plaintiff did not avail himself of these opportunities, it is said that he has debarred himself from the right to allege impossibility. But these opportunities do not appear to have occurred towards the end of the period allowed, and the plaintiff was not bound to seize the first chance that presented itself so long as a reasonable time for its performance remained." That case, we submit, is a distinct authority in favour of the administrator here. They also referred to

Woodhouse v. Herrick, 1 K. & J. 352.

Hughes, K.C. and *Edward Clayton* for Mrs. Woodhead.—There is no evidence to show that during the period of his insanity the devisee was incapable of changing his name. Moreover, from Aug. 1853, when the testator died, till April 1854 the devisee was admittedly sane, and the fact that he became insane then is to be regarded in no different light than if he had died then. For these two reasons it cannot be said that the per-

formance of the condition became impossible by an act of God. They referred to

Acherley v. Vernon, Willes, 153.

Leigh Clare for the trustees.

Badcock, K.C., in reply, referred to

Davis v. Lowndes, 1 Bing. New Cas. 517.

Cur. adv. vult.

JOYCE, J.—I am by no means certain that the condition in the present case was not a condition precedent. If subsequent, however, it was not to be performed on a particular day, nor was any definite period fixed or allowed by or within which it was to be fulfilled. I do not consider it to be proved as a matter of fact that W. A. Newsome was actually incapacitated to perform the condition by the lunacy with which he was afflicted during the last eighteen months of his life. But the law with respect to conditions affecting real estate is more stringent in reference to performance than it is with respect to legacies and personal estate. In cases like the present, when the condition imposed upon the devisee is simply to do something which could be done at once (no particular time being expressed, fixed, or allowed), and required no consent or concurrence on the part of any other person, I am not aware of any authority for holding that the subsequent affliction of the devisee by either mental or physical infirmity excuses him from the obligation of performance. If the former judgment is right it is quite immaterial that the infirmity supervened during the lifetime of the testator's daughter. It would furnish no better excuse than that it would have done after her decease. Now, everybody must die at some time. Many, if not most, die by disease that wholly incapacitates them to transact business, it may be for a long period before actual death. Is this such an extraordinary accident or event as must be considered impossible to have been within the contemplation of the testator? Was the obligation imposed conditional upon the mental capacity of the devisee continuing down to the moment of his decease? If a person whose life is prematurely cut short by sudden accident is not to be excused, I do not see why one who survives to an extraordinary old age in second childishness ought to be excused if only his incapacity becomes great enough for some period before his decease. It is no more reasonable that insanity or premature decay of mind should excuse than that death itself should have that effect. In cases of contract a party who, but for his own delay, might have performed his obligation before it became impossible cannot afterwards resist an action for non-performance on the ground of impossibility. It is not suggested that W. A. Newsome was not perfectly competent for at least nine months after the testator's death when the remainder in fee vested in him, if the condition was, as it is contended to be, a condition subsequent. The result is that, in my opinion, the fact of the lunacy ought not to make any difference in the result of my judgment, and the action must nevertheless be dismissed.

Solicitors for administrator of Col. Newsome, *Robins, Hay, Waters, and Hay*.

Solicitors for Mrs. Woodhead and the trustees, *Jaques and Co.*, for *Watts and Son*, Dewsbury.

CHAN.] *Re* SIR F. S. HUNT; HARVEY'S CLAIM—*Re* HOPKINS; *Ex parte* DE STEDINGK. [BANK.]

Monday, March 24.

(Before MATHEW, L.J. in Chambers.)

IN LUNACY.

Re SIR FREDERICK S. HUNT, BART.;
HARVEY'S CLAIM. (a)*Interest—Lunacy—Bankruptcy—Winding-up of lunatic's estate—Claim by co-surety under contract of indemnity—Costs.*

IN this case Sir Frederick Seager Hunt, Bart., had been certified by the Master in Lunacy to be incapable of managing his affairs and Lady Hunt had been appointed receiver of his estate. The estate proved to be insolvent and was ordered to be wound-up in Lunacy, and notice was given by the receiver to the creditors in the usual way to come in and prove their claims. Harvey was one of such creditors.

By several indentures of mortgage, one Barwell had mortgaged life policies with different life offices to secure the repayment of 35,000*l.* or thereabouts. Sir Frederick S. Hunt and Harvey had joined in such indentures as co-sureties for the purpose of further securing such repayment.

Barwell made default, and, Sir F. S. Hunt being lunatic and insolvent, Harvey was called upon to pay and did pay the whole of the said sum of 35,000*l.* together with interest.

By two contracts of indemnity, executed shortly after the said indentures, Sir F. S. Hunt agreed to indemnify Harvey against all claims, demands, and liabilities incurred by him in respect of such co-suretyship.

Harvey, in bringing in his claim against the estate in respect of such co-suretyship and indemnity before Master Ambrose, claimed to be allowed (1) interest at the rate of 4*l.* per cent. per annum on all sums paid by him under the said indentures as from the respective dates of payment; and (2) the costs of proving his claim the same to be added thereto.

The master held that 3*l.* per cent. interest only was payable, and declined to allow any such costs. Harvey appealed.

The appeal was heard before Mathew, L.J. in chambers on the 24th March 1902.

Chaster, for the appellant, stated the facts.

MATHEW, L.J., as to the interest, intimated that he thought 4*l.* per cent. was payable.

T. L. Wilkinson for the receiver.—The old rule was that 4*l.* per cent. was payable, but recent cases show that that rate is now considered too high, and that 3*l.* per cent. only should be charged. He cited

Re Goodenough; *Marland v. Williams*, 73 L.T.Rep. 152; (1895) 2 Ch. 537;

Rouille v. Bebb, 83 L.T.Rep. 633; (1900) 2 Ch. 107;

Re Lambert; *Middleton v. Moore*, 76 L.T.Rep. 752; (1897) 2 Ch. 169.

Chaster in reply.—These cases are all distinguishable, inasmuch as they turned on the question as to the rate chargeable as between tenant for life and remainderman, or as to bringing sums into hotchpot. Interest was allowed a co-surety in contribution at 4*l.* per cent. (*Lawson v. Wright*, 1 Cox, 275; *Hitchman v. Stewart*, 3 Drew, 271), and where the co-surety was bankrupt (*Re Swan*, I.R. 4 Eq. 209), and where there was an indemnity (*Petre v. Duncombe*, 2 L.M. & P.

(a) Reported by A. W. CHAMBER, Esq., Barrister-at-Law.

107; see *Ex parte Bishop*, 15 Ch. Div. 400). The same rate is still payable: (per Stirling, L.J. *Re Lambert*, *ubi sup.*, p. 180; Seton, 6th edit., vol. 3, p. 2136).

MATHEW, L.J. said it was clear upon the authorities that the rate as to interest upon debts had not been altered; 4*l.* per cent. was the rate allowed on a judgment debt, and the same rate was allowable on a debt of this kind. He therefore allowed the appeal, and gave the appellant his costs of and incidental to proving his claim and of the appeal, such costs to be added to his claim.

Solicitors: Ingle, Holmes, and Sons; Wellington Taylor.

KING'S BENCH DIVISION, IN BANKRUPTCY.

Monday, May 5.

(Before WRIGHT, J.)

Re HOPKINS; *Ex parte* DE STEDINGK. (a)*Bankruptcy—Proof of debts—Breach of contract—Damages in tort—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 37.*

S. stored goods with H. under a verbal contract, in breach of which H. sold the goods. S. brought an action against H., and in the statement of claim set out the contract and its breach, but made no claim for damages for breach of contract, but only for detinue and conversion. Before judgment a receiving order was made against H., of which S. had notice.

Held, that S. having elected to sue in tort rather than contract, must abide by the result, and that the trustee in H.'s bankruptcy had rightly rejected S.'s proof founded on that judgment debt and costs.

THIS was a motion by Mrs. de Stedingk by way of appeal from the decision of the trustee in the bankruptcy of T. E. Hopkins, rejecting her proof founded on a judgment debt and costs.

In Feb. 1901 the appellant stored with the bankrupt a quantity of household furniture, and on the 3rd May she borrowed 20*l.* from the bankrupt, who subsequently sold the goods.

On the 30th Sept. 1901 the appellant issued a writ in the King's Bench Division, and on the 12th March 1901 she obtained judgment for 300*l.* and costs against the bankrupt.

The receiving order was made on the 30th Jan. 1902 and was followed by an order of adjudication on the 18th Feb.

Notice of the making of the receiving order was given to the appellant.

The writ in the action of *Stedingk v. Hopkins* was indorsed as follows:

The plaintiff's claim is for: (1) Damage for the trover and conversion of certain goods by the defendant the property of the plaintiff; (2) damages for detinue; (3) damage to goods detained but returned to the plaintiff by the defendant.

The material paragraphs of the statement of claim were as follows:—

3. In or about the month of Feb. 1901 the plaintiff delivered to the defendant, who received the same, certain goods and chattels, the property of the plaintiff, to be by the defendant stored and safely and securely kept for the plaintiff until such time as the

(a) Reported by J. ANWYL THOROLD, Esq., Barrister-at-Law.

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plaintiff should require delivery of them. The defendant verbally agreed to take the custody of the said goods and chattels upon the terms and conditions hereinbefore set forth.

4. On or about the 3rd day of May 1901 the defendant advanced to the plaintiff the sum of 20l.

5. On or about the 15th day of June 1901 the plaintiff tendered to the defendant the said sum of 20l., and requested him to deliver to her the said goods and chattels.

6. The defendant refused to accept the said sum of 20l. and to deliver the said goods and chattels to the plaintiff or any of them; but stated that the said goods and chattels had been sold, and that the plaintiff had no further claim, title, or interest in the said goods and chattels or any of them.

9. By reason of the said unlawful conversion and detention the plaintiff has been damaged. She has lost the said goods and chattels, and has been deprived of the use and enjoyment of them, and has thereby lost the profit she would have earned by furnishing a flat therewith and letting the same.

The plaintiff claims: (1) The return of the said goods and chattels, or their value—viz., 307l.; (2) damages for the detention and conversion; (3) alternatively, an account.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) enacts as follows:

SECT. 37 (1). Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy. (3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in the bankruptcy. (8) "Liability" shall for the purposes of this Act include . . . any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking.

Muir Mackenzie and *E. A. Abinger* in support of the appeal.—Although the plaintiff in substance brought her action for the conversion of her goods, she might have recovered damages for the breach of the contract set out in par. 3 of the statement of claim, and she can therefore now elect to treat the judgment as if it had been obtained on contract. The real question is whether at the date of the receiving order her claim was provable in the bankruptcy, and whether the bankrupt after his discharge will be entitled to set up his bankruptcy as a bar to this judgment. They cited

British Goldfields of West Africa Limited, 80 L. T. Rep. 638; (1899) 2 Ch. 7;

Parker v. Norton, 6 Darnford & East, 695;

Jack v. Kipping, 46 L. T. Rep. 169; 9 Q. B. Div. 113;

Watson v. Holliday, 48 L. T. Rep. 545; 20 Ch. Div. 780.

Carrington for the trustee.—This proof was rightly rejected. The appellant elected to obtain her judgment on conversion or detinue, and having obtained judgment in tort she cannot prove in the bankruptcy because she might have obtained a judgment based on contract. In the words of the judgment of Ashhurst, J. in *Parker v. Norton* (*ubi sup.*), the form of the action precludes the appellant from proving her demand under the bankruptcy. Moreover, the measure of damages in conversion or detinue is larger

than for a breach of contract. The discharge of the bankrupt will be no bar to the plaintiff's right under her judgment. There is no right of proof on a judgment in detinue, which has not been followed by execution:

Re Scarth, 31 L. T. Rep. 737; L. Rep. 10 Ch. 234.

Muir Mackenzie in reply.—Although in form an action in tort, in substance it was for breach of contract. The contract was set out in the statement of claim, and it was on that contract that the action was founded. He referred to

Johnson v. Spiller, 1 Douglas, 767.

WRIGHT, J.—I am of the opinion that the rights of this creditor depend on her pleading in the action she brought against the debtor. [His Lordship read the indorsement on the writ and the material parts of the statement of claim, and continued:] The statement of claim gives the history of the case, it sets out the contract and alleges its breach, but no claim is made for damages for breach of contract, but only for detinue and conversion. That being so, I can only come to the conclusion that the appellant was suing in tort, and in that case she cannot prove in bankruptcy in respect of the judgment debt and costs recovered in that action. I do not think she has brought herself within the language of sect. 37 of the Bankruptcy Act 1883. A party who elects to sue in tort rather than contract must abide by the result.

Motion dismissed with costs.

Solicitors: J. W. Browne; Hyman, Isaacs, and Lewis.

Supreme Court of Judicature.

COURT OF APPEAL.

March 12 and 13.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

HARBURG INDIA-RUBBER COMB COMPANY v. MARTIN. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Guarantee — Indemnity — Verbal promise — Promise to answer for debt of another — Statute of Frauds (29 Car. 2, c. 3), s. 4.

The defendant was a director of and held a large number of shares in a company, which he had also financed, but he had no charge on its property. The plaintiffs were judgment creditors of the company and had issued a writ of f. fa. upon the judgment, but the sheriff had failed to levy because he could not effect an entry.

The defendant then verbally promised the plaintiffs that he would indorse bills for the amount of the debt.

Held, that the promise was not a contract of indemnity, but "a promise to answer for the debt of another" within sect. 4 of the Statute of Frauds; and as it was not in writing the plaintiffs could not maintain an action against the defendant for the breach of it.

Decision of Mathew, J. reversed.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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THE plaintiffs were a foreign company and had supplied goods to an English company called the Crowdus Accumulator Syndicate Limited.

The syndicate failed to pay for the goods and the plaintiff company, having recovered judgment against them for the amount due, issued a writ of *fi. fa.* upon the judgment which the sheriff failed to execute because he could not effect an entry.

The defendant Martin was chairman of the Crowdus Syndicate, he held a large number of shares in it, he had also financed it, but had nothing in the shape of a charge on its property.

A day or two after the sheriff failed to take possession the defendant called on Mr. Winter, who represented the plaintiff company in England, and at that interview the defendant verbally promised Mr. Winter that he would indorse two bills of exchange, each for half the amount of the debt, and payable respectively at three and six months, and on the faith of this promise Mr. Winter withdrew the writ.

This action was afterwards brought for damages for breach of the defendant's agreement.

The defence was that no such contract was ever made as that on which the plaintiffs relied; and, secondly, that if such a contract was made it was a promise to answer for the debt of others, and was not in writing as required by sect. 4 of the Statute of Frauds, and therefore the action could not be maintained.

At the trial before Mathew, J. the jury found, upon the question of fact, a verdict in favour of the plaintiffs.

The question arising under the Statute of Frauds was then argued before the learned judge.

On the 28th Jan. 1901 his Lordship delivered judgment, holding sect. 4 did not apply, the material part of which was as follows:—

MATHEW, J.—Now, what is the result of the evidence? At the time when the defendant came to Mr. Winter the plaintiffs were in a position to take possession of the goods, and they were in a position analogous to that of persons having possession of the goods, and their legal position is recognised in *Williams v. Leper* (3 Burr. 1886), and the principle is recognised in the later cases of *Thomas v. Williams* (10 Barn. & Cress. 664) and *Edwards v. Kelly* (6 M. & S. 204; 18 R. R. 349). Those cases have been discussed with approval, and very sensible and reasonable cases they are, and in the facts they closely approach the present case. They are discussed in the notes to *Forth v. Stanton* (1 Wms. Saund. 211e). What was the object of the arrangement here? The object of the arrangement was to protect the goods of the syndicate; and it was not to pay the debt of another. It is pretty clear that what the defendant suggested was that he should have time to sell all that belonged to the company. If, in fact, the object of the contract was to protect the goods, that would be sufficient to take this case out of the Statute of Frauds. But there is another point still more clearly in favour of the plaintiffs, and that is, that the promise was given for the purpose of obtaining a direct personal advantage for the defendant himself. He had invested a large sum in the syndicate, and would lose every farthing of it unless time was given for the syndicate to get on its legs. With

that object—and, I should gather, the sole object he had in view—he made the promise in question. That that is a ground for saying that the case is not one within sect. 4 of the Statute of Frauds is clear from *Sutton v. Grey* (69 L. T. Rep. 354, 673; (1894) 1 Q. B. 285). Under those circumstances it appears to me clear that the 4th section of the Statute of Frauds does not apply, and my judgment on that point ought to be in favour of the plaintiffs.

From this decision the defendant appealed.

English Harrison, K.O. and E. F. Colam for the appellant.—The guarantee was a promise or contract “to answer for the debt of another” within the meaning of sect. 4 of the Statute of Frauds. There is no memorandum or note of it in writing and signed by him, and therefore this action cannot be maintained, and the plaintiffs are not entitled to the amount awarded to them by the jury. There is no original promise here founded on a new consideration. The goods did not belong to the defendant, but to the syndicate, in which he was only one of the shareholders. *Williams v. Leper* (3 Burr 1886) and *Edwards v. Kelly* (6 M. & S. 204; 18 R. R. 349) do not apply. The defendant had no interest in the transaction within *Couturier v. Hastie* (8 Exc. 40) and *Sutton v. Grey* (69 L. T. Rep. 354, 673; (1894) 1 Q. B. 285). The plaintiffs’ right of action only arises from the alleged contract, which, under the statute must be in writing, and not from the fact that he had indorsed the bills:

Steele v. McKinlay, 43 L. T. Rep. 358; 5 App. Cas. 754;

Jenkins v. Coomber, 78 L. T. Rep. 752; (1898) 2 Q. B. 168.

C. A. Russell, K.C. and W. Wills for the plaintiffs.—The defendant’s promise was not a guarantee of the debt of the company. It was an original contract of indemnity. The defendant was a large shareholder in the company, and therefore it was to his interest to prevent their property being seized under the *fi. fa.*, as the syndicate would have been ruined. Therefore the real object of his promise was to secure his own interest, and not to guarantee the payment of the debt. If a promise to pay a debt is merely incidental to the main object of a larger bargain, the contract is not within the statute. It is not a question of motive, but a question of the object. The plaintiffs here insisted that the defendant should take on himself the liability of the debt. They referred to

Williams v. Leper (*ubi sup.*);

Edwards v. Kelly (*ubi sup.*);

Brampton v. Paulin, 4 Bing. 284;

Walker v. Taylor, 6 C. & P. 752;

Forth v. Stanton, 1 Wms. Saund. 210;

Couturier v. Hastie (*ubi sup.*);

Fitzgerald v. Dressler, 7 C. B. N. S. 374, 392;

Sutton v. Grey (*ubi sup.*);

Guild v. Conrad, 71 L. T. Rep. 140; (1894) 2 Q. B. 883;

Outling v. Aubert, 2 East, 325;

Wilkinson v. Unwin, 7 Q. B. Div. 636.

WILLIAMS, L.J.—In this case the material facts are very short indeed. The plaintiffs had supplied goods to a company called the Crowdus Accumulator Syndicate. The syndicate did not pay what was due, and the plaintiffs recovered judgment against them, and placed in the hands

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of the sheriff a writ of *fi. fa.* to realise the amount of the judgment. The sheriff found that the works had stopped, and the place was closed, and he did not take possession. After this there was a meeting between Mr. Martin, the defendant, and Mr. Winter, who represented the plaintiff company. A conversation took place at the meeting, and the jury found that Mr. Winter's account of that conversation is an accurate one. To put the result of that conversation shortly, Mr. Martin promised that he would indorse some bills for the amount of the judgment debt. It is said that that amounted to an oral promise to give a guarantee of this judgment debt owing by the syndicate to the plaintiff company. It is said on behalf of the defendant that this was a promise by Mr. Martin by word of mouth to make himself answer for this debt of the syndicate. It is said on behalf of the plaintiffs that this was not a promise to make himself answerable for the debt of another—that is, the syndicate—but that it was a contract of indemnity, by which I suppose is meant a new contract in the nature of an original obligation. The question which has to be decided is whether or not this bargain is “a promise to answer for the debt of another” within the 4th section of the Statute of Frauds. Mathew, J. has found that it does not not come within that section. I am sorry I cannot agree with that conclusion. I think that this contract as plainly as possible was a promise by Mr. Martin to make himself answerable for the debt of the syndicate. Our attention has been called to a great number of cases in which the court has treated various transactions as being outside sect. 4. The earlier cases were most of them what I may call “property cases.” In those cases either the person who made the promise had property which he wished to release from liability or there was some property which he wished to acquire. It is not necessary for me to refer to those cases one after the other. I cannot agree that the present case comes within any of that class. The defendant's promise was not, as it seems to me, either a new contract of purchase or a new contract for the release of any property which was his, or property in which he had an interest. Our attention was next called to the exception which has been established by what I may call the “*del credere* cases,” beginning with *Couturier v. Hastie* (*ubi sup.*) and coming down to *Sutton v. Grey* (*ubi sup.*). It is said, and I think truly said, that those cases are of a different species from the property cases. I deliberately say of a different species, not of a different genus, because I think there is a wider genus, which can be plainly and simply defined, within which both of these species fall. So far as I can see, the authorities have left us with a general rule, which I will attempt to define presently, and each of these two classes of cases falls within this general rule. In each of them, I think the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but whether he does so or not, it is the substance, not the form, which is regarded. Now, before going away from these instances, I should like to mention one more class which I do not treat as an exception from sect. 4, but which I think does not come within the

section at all. I mean the cases which have been spoken of as “indemnity cases.” Of course, in one sense all guarantees, whether they come within sect. 4 or not, are contracts of indemnity. But the difference between those indemnities which come within the section and those which do not is very shortly expressed in these words in the notes to *Forth v. Stanton* (William's Notes to Saunders, edit. 1871, vol. 1, p. 234): “These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable.” That, to my mind, is an accurate description of a guarantee or indemnity which comes within the 4th section of the Statute of Frauds, as distinguished from an original liability which is not within the section, and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor, and has been called in the argument a contract of indemnity. I do not wish to go at length into the case, but it seems to me that *Guild v. Conrad* (*ubi sup.*) entirely confirms this as being the true view of the distinction between an indemnity and a guarantee which comes within the 4th section. In that case the defendant had orally promised the plaintiff that, if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner the defendant would provide the plaintiff with funds to meet the bills, and it was held by the Court of Appeal (affirming the judgment of Mathew, J.) that this was a promise of indemnity and not of guarantee, and therefore not required by sect. 4 of the Statute of Frauds to be in writing. In his judgment Lindley, L.J. said (1894) 2 Q. B. 892: “The authorities are *Thomas v. Cook* (8 B. & C. 728) and *Wildes v. Dudlow* (L. Rep. 19 Eq. 198). *Thomas v. Cook* appears to me to be indistinguishable from this case, if the facts here are such as I take them to be.” Then the Lord Justice cites a passage from the judgment of Parke, J. in *Thomas v. Cook* (*ubi sup.*): “This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiffs should be indemnified against the bond. If the plaintiff at the request of the defendant had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same.” Lord Davey said (1894) 2 Q. B. 896: “In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not.” It seems to me that those judgments entirely confirm the view which is taken in the notes to *Forth v. Stanton* (*ubi sup.*), which I have read. In my judgment, in the present case the circumstances show plainly that there was a guarantee of the payment of a debt for which the syndicate was primarily liable, and not an original promise by Mr. Martin to keep the plaintiffs indemnified. In my judgment a contract of indemnity does not come within sect. 4, but I think there is nothing to justify us holding that in the present case the contract is a contract of indemnity. I think it is a contract of guarantee—a promise

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to answer for the debt of another." That being so, I now wish to refer to those cases which, so far as the words of the contract are concerned, might come within sect. 4, but which have been held not to come within it because of the object of the contract. It seems to me that whether you look at the "property cases" or whether you look at the "*del credere* cases," in each of those cases really the conclusion came to was, that the contract in question did not fall within the section because of the object of the contract. In each of those cases there was really a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. According to my understanding of those cases, this is not a question of motive, it is a question of object. You must find in fact what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property—to relieve property from a liability, to get rid of incumbrances, or to secure greater diligence in the performance of the duty of a factor, or to secure the introduction of business into a stockbroker's office—in all those cases there was a larger matter which was the object of the contract. If that is the object of the contract, the mere fact that as an incident to it—not as the immediate object but indirectly—the debt of another to a third person will be paid does not bring the case within the section. That being so, I ask myself whether in the present case we can really find any larger contract? I cannot do so. It seems plain to me upon the evidence here, that the only matter which was present to the mind of Mr. Martin and was presented by him to Mr. Winter was this, "Will you forbear for a time? Will you give the syndicate, which I believe has a future before it, the opportunity of turning round? I believe that if it has that opportunity it will do well and will pay you; and to induce you to forbear I will give you bills which will secure payment to you at specified periods of this debt, in case the syndicate does not come forward and pay you itself." It seems to me that is the real effect of the conversation, and that is the whole of this contract, and there is neither purchase nor a *del credere* arrangement, nor anything else outside this bargain, and the mere fact that Mr. Martin had, as he seems to have done, financed the Crowds syndicate to a large extent, and that that was his motive for coming forward and bargaining for forbearance cannot make any difference as to the object of the contract. That might have been the motive that induced him to make himself answerable for the debt of the syndicate, but it was not the object of the contract. The object of the contract was simply to obtain forbearance from the creditors in respect of this debt. It was contended that the true definition of the cases which do not come within sect. 4 was not those in which the obligation to pay the debt of another is an incident of a larger contract, but those in which the main object is to secure the promisor's own personal interest. But if the cases which do not come within the section were so defined there would be nothing left to come within it, because in every case there must be a consideration which the promisor bargains for, which is to come to him from the promisee. That is just as true of mere forbearance

as it is of anything else. If the contract between the promisor and the promisee is that the promisor will be answerable for the debt of the debtor of the promisee if he will forbear, and if the main object is to obtain that forbearance, that would be sufficient to take the case out of the statute. In my opinion, so to hold would be simply to repeal sect. 4. Then, with reference to the case of *Fitzgerald v. Dressler* (*ubi sup.*). That case was decided long after *Couturier v. Hastie* (*ubi sup.*), and in his judgment Cockburn, C.J. quoted the notes to *Forth v. Stanton* (1 Wms. Saund. 211e), and he expressly approves of that note, subject to one qualification. The passage which he quoted was this: "The fair result seems to be that the question, whether each particular case comes within this clause of the statute or not depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." The Chief Justice then said (7 C. B. N. S. 392): "I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking." I wish to point out that Cockburn, C.J. was there in terms dealing only with the "property cases" as an instance, and to my mind clearly only meant to deal with them as an instance, of a general rule. I have attempted to define that general rule, and I think that every one of the exceptions which is to be found in the cases comes within the rule as I have defined it. It is not necessary to say anything on the other point—the question of damages—because in the view which we take of the case it does not arise. I think, therefore, that the judgment of Mathew, J. should be reversed and this appeal allowed.

STIRLING, L.J.—I am of the same opinion. But the case is one of difficulty. We are differing from Mathew, J., and we have heard a most excellent and elaborate argument on the subject. And I will therefore add a few words, though I agree entirely with what has been said by Williams, L.J. In the first place, I think that the decision in *Guild v. Conrad* (*ubi sup.*) does not apply. I think it is impossible to arrive here at the conclusion at which the learned judge arrived in that case, that the defendant's contract here was to pay the debt whether the company, of

which he was a director, could pay it or not. In the case of *Guild v. Conrad*, it was found that the contract was not a contract to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay, but the contract was to find funds to enable the plaintiffs to meet certain acceptances. Here, it seems to me that the transaction which was in contemplation was to give time to the syndicate, in the expectation that in the interval it would be placed in funds by which it would be enabled to pay all its debts. The important element (which existed in *Guild v. Conrad*) that there was no expectation that the syndicate would ever be able to pay, appears to me to be wanting in this case. Now, that being so, we have to consider whether the case is one of a contract "to answer for the debt, default, or miscarriage of another person," within the meaning of the 4th section of the Statute of Frauds. Undoubtedly the decisions run fine in these cases, and the main stress of the argument has been to extend the doctrine which was laid down in *Couturier v. Hastie* (*ubi sup.*) and in *Sutton v. Grey* (*ubi sup.*) to the present case. I accept the passage, which has been cited from the judgment of Cockburn, C.J. in *Fitzgerald v. Dressler* (*ubi sup.*), as stating the law with reference to the two classes of cases, of which *Williams v. Leper* (*ubi sup.*) and *Walker v. Taylor* (*ubi sup.*) are the types. He said (7 C. B. N. S. 392): "If there be something more than a mere undertaking to pay the debt of another, as, where the property, in consideration of the giving up of which the party enters into the undertaking, is, in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another where the person making the promise has himself no interest in the property, which is the subject of the undertaking." I do not forget that in the case of *Williams v. Leper* (*ubi sup.*) a promise to pay rent was given by an auctioneer, who had possession of the property, under instructions from the real owner to sell it, but when the reasons assigned by the learned judges for the decision which they arrived at are examined, it appears to me that the auctioneer was there treated as the agent of the owner, with authority from the owner to enter into a contract to pay the rent out of the proceeds of the sale. That promise must be taken to have been the promise of the real owner, and therefore the case is brought within the statement of the law to which I have just referred. Again, in the case of *Walker v. Taylor* (*ubi sup.*) it seems to me that the transaction really was a purchase by the defendant of a right of the plaintiff which the defendant thought would be valuable to him. Having acquired the right he refused to pay, and it was held to be a case which did not fall within the Statute of Frauds. We then come to the case of *Couturier v. Hastie* (*ubi sup.*), and there it was held that a contract by a *del credere* agent was not within the statute. Looking at the judgment of Bowen, L.J. in the following case of *Sutton v. Grey* (69 L. T. Rep. 354), it is quite clear that he regarded the case of *Couturier v. Hastie* as going to the verge of the law, and he referred to the remarks which were made on

it in the case of *Wickham v. Wickham* by Wood, V.C. (2 K. & J. 437). The case of *Sutton v. Grey* is one in which there was a contract between the plaintiffs, a firm of brokers, and a person, the defendant, who employed them. The terms were that the defendant should introduce clients to them, and that the plaintiffs should transact business on the Stock Exchange for clients thus introduced upon the terms that as between the plaintiffs and the defendant, the defendant should have half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by the defendant, and he should pay to the plaintiffs half of any loss which might be incurred by them in respect of such transactions. An action was brought by the plaintiffs to recover from the defendant half the loss which they had incurred, and it was held that the defendant, having an interest in the transaction equally with the plaintiffs, the principle of *Couturier v. Hastie* (*ubi sup.*) applied. Lord Esher, in the Court of Appeal, cited the passage already referred to from *Fitzgerald v. Dressler* (*ubi sup.*), and commented on it in this way: (1894) 1 Q. B. 289 "The learned judge there used the words 'has himself no interest in the property which is the subject of the undertaking,' because he was dealing with a case of property; but if his words be read, as I think they should be, 'has no interest in the transaction,' he is adopting that interpretation of *Couturier v. Hastie* (*ubi sup.*) which I think is the right one." It was really upon this passage from the judgment of Lord Esher that the argument for the plaintiffs in the present case has been founded. As it seems to me, in the judgment of Cockburn, C.J. in *Fitzgerald v. Dressler* and in the judgment of Lord Esher, "interest" means some species of interest which the law recognises. Here the defendant had no such interest in the property, which was about to be seized by the sheriff. He was simply a director of the company who had taken, no doubt, a deep interest, in the popular sense of the word, in its proceedings. He held a large number of shares; I think he was the largest shareholder in the company. He had also financed the company, but he had not anything in the shape of a charge on this property whatever; he was simply, at the best, a general creditor of the company. Now, it is contended that we should read the words "interest in the transaction" in a wide sense, and as importing a sort of "business interest" in the company—that sort of interest which a creditor and a shareholder of a company has in its prospects. It seems to me that so to do would be to go a long way to repeal the 4th section of the Statute of Frauds, and to give an extension to the doctrine of *Couturier v. Hastie* (*ubi sup.*) much further than I am prepared to extend it. On these grounds, I think that the appeal ought to be allowed, and the judgment of Mathew, J. reversed.

COZENS-HARDY, L.J.—I agree. It seems to me for the reasons which my Lord has given, and which I will not repeat, that this was certainly not a contract of indemnity. The contract is one which falls *prima facie* within sect. 4 of the Statute of Frauds, unless it can be brought within some recognised or some logical exception. Now, one great peculiarity here is that neither the plaintiffs nor the defendant had possession of, or had any interest in, the goods of the

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syndicate. But it has been forcibly and most ably argued, that the case is brought within the recognised exceptions from the section, because the defendant, Mr. Martin, though he had no right or interest in the goods, yet had in a business sense an interest in them. It was argued that we ought to look at the object of the promise which he entered into, and that if we can come to the conclusion that the object of Mr. Martin in giving the promise was to secure a benefit for himself, and not to secure forbearance for the syndicate, then we ought to hold that the case is not within the Statute of Frauds at all. I cannot agree with that. It seems to me to involve a confusion between object and motive. I cannot doubt that the object of the promise which was made by Mr. Martin was to secure the forbearance of the plaintiffs for three months and six months in enforcing the debt due from the syndicate. If that be so, the authorities do not in any way, it seems to me, support the contention of counsel for the plaintiffs. They have been divided conveniently into three classes. The first consists of what have been called the "property cases." I do not think they can be dealt with more accurately, and certainly not more shortly, than they are by Williams, J. in his judgment in *Fitzgerald v. Dressler* (*ubi sup.*). He said (7 C. B. N. S. 394): "At the time the promise was made the defendant was substantially owner of the lineised in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute. The case of *Williams v. Leper* (*ubi sup.*) proceeded upon this, that the defendant there had an interest in the property: his property was incumbered by the landlord's claim for rent; therefore the promise was a promise to pay a debt to which that property was subject, and not simply a promise to answer for the debt or default of another within the meaning of the statute. This is in accordance with the cases of *Castling v. Aubert* (*ubi sup.*) and *Anstey v. Marden* (1 N. R. 124; 8 R. R. 713), which, as is stated in the note to which my Lord has referred (*Forth v. Stanton*, 1 Wms. Saund. 211e) were decided not to be within the statute 'on the ground that there was in both cases a purchase of an interest, not a mere undertaking to pay the debt of another.'" Then stress has been placed on what is called "the document cases." Those cases seem to me to stand on an entirely different footing. If I go to a banker or another person who has certain documents which he holds as security for a debt, and I ask him to hand over the documents to me on payment of the debt, that is simply a purchase of the security. Although it may be, I thus become answerable for the debt of another, that is not the main object of the contract. The third class of cases consists of those cases which have been called the "*del credere* cases." When they are fairly looked at they seem to me to only amount to this, that a contract—e.g., for the employment of a *del credere* agent—need not be in writing, although it incidentally involves the answering for a debt of another person. In other words, if the court can find that there is a main contract, the object of which is not to answer for the debt

of another, that contract is not within sect. 4, even though incidentally it may result in a liability to answer for the debt of another. For these reasons I agree with my Lords, and think the appeal ought to be allowed.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchard, Barham, and Lawford.*

Solicitors for the defendant, *West, King, Adams, and Co.*

April 15, 16, 17, and May 5.

(Before COLLINS, M.R., STIRLING and COZENS-HADY, L.JJ.)

Re ALDAM'S SETTLEMENT. (a)

APPEAL FROM THE CHANCERY DIVISION.

Settled Land—Tenant for life—Power of leasing—Mining lease—Varying minimum rent—Wayleave—Settled Land Act 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 10 (ii.) (iv.), s. 6, (ii.), s. 7, sub-s. 2, s. 8, s. 9, sub-s. 1 (i.) (ii.), s. 11, s. 17, sub-s. 1, s. 53—Settled Land Act 1884 (47 & 48 Vict. c. 18) s. 4.

By an agreement, dated in Feb. 1900, the tenant for life of settled estates agreed with a colliery company to lease to them a seam of coal under the estates, known as the "Barnsley thick seam," for a term of sixty years from the 1st Jan. 1898.

The agreement provided (*inter alia*):

"3. The royalty or acreage rent shall be at the rate of 30l. per foot per acre, but due allowances shall be made for bad, faulty, or unworkable coal, or coal so thin or so cut off by faults of such magnitude that it cannot be worked without loss. The lessees shall also pay a similar royalty rent for all coal and slack other than the Barnsley thick seam got in the drifting and sold off.

"4. The minimum or certain rent is to be: For the first year, nil; for the second year, 2s. 6d. per acre; for the third year, 5s. per acre; for the fourth year, 10s. per acre; and for the fifth year and each succeeding year, 1l. per acre. The minimum rent shall begin to be paid as from the 1st Jan. 1899.

"6. Undergettings may be made up at any time during the term.

"7. When all saleable coal, except such parts (if any) as are not to be worked or paid for, shall have been worked or paid for, a nominal rent of 10s. shall be paid for the remainder of the term in substitution for the royalty and minimum rents.

"9. No wayleave rent is to be paid for any other part of the Barnsley thick seam of coal under any other land in the parish of Wickersley."

The questions were: First, whether the tenant for life had power under the provisions of the *Settled Land Acts* to grant a mining lease, reserving a varying minimum rent; secondly, whether he had power to insert in the lease a proviso for the cesser of the minimum rent after all the demised minerals had been worked and paid for; thirdly, whether the lease might contain a wayleave for foreign coal to continue after cesser of the minimum rent at a nominal rent.

Held, that upon the evidence it was clear that the agreement was made honestly in the interests of

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

all parties, and was the best that could be made for the development of the estate; and that there was nothing therein which could, as a matter of law, be considered to violate the requirements of the Settled Land Act 1882.

Decision of Byrne, J. (ante, p. 76) reversed.

APPEAL by the plaintiff, the tenant for life, from a decision of Byrne, J. (*ante*, p. 76).

Neville, K.C. and John Dixon, for the appellant, referred to

Re Lowther's Estates (unreported), cited in Mac-Swinney on Mines, Quarries, and Minerals, 2nd edit., at p. 178;

Settled Land Act 1882, s. 2, sub-s. 10 (ii.) (iv.), s. 6 (ii.), s. 7, sub-s. 2, s. 8, s. 9, sub-s. 1 (i.) (ii.), s. 11, s. 17, sub-s. 1, s. 53;

Settled Land Act 1884, s. 4.

L. S. Bristowe, for the respondents, the trustees of the settlement, and an infant remainderman referred to:

Doe d. Sutton v. Harvey, 1 B. & C. 426; 25 E. R. 444;

Mountjoy's case, 5 Co. Rep. 5;

Hallett to Martin, 48 L. T. Rep. 894; 24 Ch. Div. 684;

Montgomery v. Charteris, 5 Dow. 293;

Jegon v. Vivian, 13 L. T. Rep. 769; L. Rep. 1 C. P. 9, at p. 34;

Sugden on Powers, 8th edit., pp. 785-6;

Farwell on Powers, 2nd edit., p. 624.

[COZENS-HARDY, L.J. referred to *Re Gladstone*; *Gladstone v. Gladstone* (82 L. T. Rep. 515; (1900) 2 Ch. 101, at p. 105).]

Neville, K.C. replied.

Cur. adv. vult.

May 5.—The following written judgments were delivered:—

COLLINS, M.R.—This is an appeal from the decision of Byrne, J. upon certain questions as to the validity under the Settled Land Acts of certain provisions in an agreement for a mining lease entered into by the tenant for life under a settlement made by the will of William Aldam, deceased. The first question is whether or not the tenant for life has power under the provisions of the Settled Land Acts to grant a mining lease as proposed for sixty years, reserving a minimum yearly rent not commencing until the second year of the term, and increasing year by year until the fifth year of the term. This question the learned judge has answered in the negative. Sect. 6 of the Settled Land Act 1882 provides that: "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding . . . (ii.) in case of a mining lease, sixty years." Sect. 7, sub-sect. (2), provides that "Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case." Sect. 9 provides that "(1) In a mining lease the rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any

facilities given in that behalf; and (ii.) a fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent." Sect. 53 provides that: "A tenant for life shall, in exercising any power under this Act, have regard to the interest of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." The affidavits filed in support of the summons, which are uncontradicted, show that it is usual in the district to charge no minimum rent in the first year, and also to charge a gradually increasing rent in the first few succeeding years, till a certain limit is reached, which is always below the value of the probable annual get of coal, and that this is reasonable, having regard to the great initial outlay and time required for the opening out and development of a new mine. They also assert that the rent reserved under this agreement is the best that could be got, and beneficial to all persons entitled. Byrne, J. was of opinion that the fact that no minimum rent was reserved in the first year was fatal, though he would have been satisfied had it been fixed at a nominal amount only, and saw no objection to the graduated scale, provided the maximum rent was made to begin in the fifth year, or on the death of the tenant for life if he died before that date. He based his view on this latter point on the ground that by the will a second tenant for life might possibly succeed before the remainderman. I cannot agree with the learned judge in his answer to the first question. The Settled Land Acts, as the learned judge admits, contain no provision making a minimum rent obligatory in the first year. There need not be any minimum rent at all, though there is power to reserve one. And, while there need be no minimum rent, there may be an acreage rent according to the quantities gotten, which might, and probably would, be nothing in the first year. Whence, then, comes the obligation to reserve a minimum rent in the first year if one is reserved at all? The epithet "fixed" does not create it. It is, I think, used only in contradistinction to an acreage rent fluctuating according to the amount gotten, and a rent would be "fixed" for any year in which a sum defined beforehand was reserved as rent. The learned judge founded his view upon the fact that sect. 4 of the Settled Estates Act 1877 permitted a peppercorn, or any rent smaller than that ultimately made payable, to be reserved during the first five years of mining and building leases, whereas in the Settled Land Act 1882, though there is such a provision as to building leases (sect. 8), it is not extended to mining leases in sect. 9. But in the earlier legislation building and mining leases were dealt with together in one section; in the present Act they are dealt with separately; and, as Mr. Neville pointed out, a peppercorn may well have been treated as strictly applicable to a building lease creating the true relation of landlord and tenant, but inapt in the case of a mining lease, which is really in its essence rather a sale at a price payable by

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instalments than a demise properly called. But however this may be, I think the provisions of the Settled Estates Act have very little bearing on the construction of the Settled Land Acts, which, as was explained in *Bruce v. Marquis of Ailesbury* (67 L. T. Rep. 490; (1892) A. C. 356), rest on a very different principle. In that case Lord Macnaghten, speaking of the Settled Land Act, said (at p. 364): "The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce without doing away altogether with the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the Settled Estates Acts. In those Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the Settled Land Act the paramount object of the Legislature was the well-being of settled land. The interests of the persons entitled under the settlement are protected by the Act, as far as it was possible to protect them. They must be duly considered by the trustees or by the court whenever the trustees or the court may be called upon to act. But it is evident, I think, that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests." A similar observation was made by Lord Lindley in *Re Gladstone; Gladstone v. Gladstone* (82 L. T. Rep. 515; (1900) 2 Ch. 101, at p. 105), where he said: "The Settled Land Act was intended to get rid of a number of old authorities, and to enable a tenant for life to do that which he could not have done before the Act. I do not think that any case decided before the Act can have any application to the present case." Here, on the evidence, the stipulation in question is, from a business standpoint, reasonable and proper, if the best price for the coal is to be realised, and can clearly be no disadvantage to the remainderman, even if that were the paramount consideration, which it is not. It is, I think, clear on the evidence that this agreement was made honestly in the interests of all parties, and the possible difference to a tenant for life succeeding before the fifth year must not be allowed to defeat an arrangement which is the best that can be made for the development of the estate. Questions 2 and 3 are as follows: (2) Whether or not the tenant for life has power to insert in the lease a proviso for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof, if any, as, in accordance with the lease, are not to be worked or paid for, shall have been paid for at the acreage rent reserved by the lease; (3) whether the lease may contain a wayleave for foreign coal, to continue after cesser of the minimum rent at a nominal rent, or whether a substantial rent must be reserved for such wayleave. The learned judge has treated these together. As to the first of them, he holds that it can only be permitted provided the term be made to determine at the period of the cesser of the minimum rent, and, as to the second, that a substantial rent must be paid for the wayleave after such cesser. He points out that no separate rent is reserved for the wayleave, and that, though this is permissible under sect. 17, yet the effect of the provisions referred to in these questions would be that, if

all the coal were worked out, there would practically be a free wayleave for the rest of the term, payment having been already made for it in the rent, and that, if the tenant for life were to live till all the coal was got out, the remainderman would be subject to the burden of the wayleave for the rest of the term, without getting anything but a nominal payment for what might have been granted by them for a very substantial rent. I think the same considerations dispose of these difficulties. On the evidence it would seem to be a practical impossibility to deal with the wayleave in any other way. The coal under the land of the lessor (which consist of scattered plots) is only a small part of a seam lying under the land of several different owners, and to be properly developed under modern conditions it must be worked as part of a larger whole. The provisions in the lease are those which have been found to be the most workable in practice, and are those which are in general use in the district. Every special or unusual clause, such as those suggested by the learned judge, would mean a fetter put on the development of the estate, and would involve a diminution in the rent which the lessee would be prepared to give for the coal. The consideration given by the lessee and the rights he gets in return are all part of one bargain, and the fact that the coal under the lands of many different owners has to be worked as part of one enterprise, as to which it is impossible to say beforehand how and in what directions it is to be most economically carried out, makes it essential that the wayleave for foreign coal should be co-extensive with the term. By a provision in the will in this case, two-thirds of the rent is to be set aside as capital moneys, instead of one-fourth, which is all that the statute (sect. 11) exact in the case of a tenant for life not impeachable for waste, and the remaindermen will, therefore, suffer no injustice. It is, of course, impossible in every case to put them in precisely the same position, at whatever period during a lease the tenant for life may die, but *prima facie*, where a substantial proportion is set aside when received for the benefit of the remaindermen, it is best for all parties that the highest obtainable price should be secured for the coal and the wayleave, even though in certain contingencies the rent should drop to a nominal figure before the end of the term. It seems to me that there is nothing in the statutes to vitiate the provisions in question, and that this appeal must be allowed.

STIRLING, L.J.—William Aldam, by his will, dated the 18th Dec. 1884, devised his real estate to the use of his son William Wright Warde Aldam for life with remainder to the use of such one or more of the sons or daughters of William Wright Warde Aldam for such estates in tail or any lesser estates as William Wright Warde Aldam should by will appoint, and in default of such appointment to the use of the testator's grandson William St. Andrew Warde Aldam, the son of William Wright Warde Aldam for life with remainders over. And the testator declared that every estate for life under the limitations aforesaid should be without impeachment of waste, and also that under a mining lease, whether the mines or minerals leased were already opened or in work or not, there should be from time to time set aside as capital money arising under the

Settled Land Act 1882 two third parts of the rent, and the residue of the rent should go as rents and profits. The testator died on the 27th July 1890. William Wright Warde Aldam is now tenant for life in possession under the testator's will. His son, the tenant for life in remainder, is an infant. Mr. W. W. Warde Aldam entered into an agreement, dated the 13th Feb. 1900, with the Dalton Main Collieries Limited whereby he has agreed, as tenant for life under the settlement created by his father's will, to lease the Barnsley thick seam of coal under the settled estate for a term of sixty years from the 1st Jan. 1898. The material clauses of the agreement for present purposes are as follows: "(3) The royalty or acreage rent shall be at the rate of 30*l.* per foot per acre, but due allowances shall be made for bad, faulty, or unworkable coal, or coal so thin or so cut off by faults of such magnitude that it cannot be worked without loss. The lessees shall also pay a similar royalty rent for all coal and slack other than the Barnsley thick seam got in the drifting and sold off. (4) The minimum or certain rent is to be: For the first year, *nil*; for the second year, 2*s.* 6*d.* per acre; for the third year, 5*s.* per acre; for the fourth year, 10*s.* per acre; and for the fifth and each succeeding year, 1*l.* per acre. The minimum rent shall begin to be paid as from the 1st Jan. 1899. (6) Undergettings may be made up at any time during the term. (7) When all saleable coal, except such parts (if any) as are not to be worked or paid for shall have been worked or paid for, a nominal rent of 10*s.* shall be paid for the remainder of the term in substitution for the royalty and minimum rents. (9) No wayleave rent is to be paid for any other part of the Barnsley thick seam of coal under any other land in the parish of Wickersley. (13) The lessees are to commence working the coal with all reasonable speed and to work the seam during the lease with all reasonable diligence and bring to the surface as much coal as can reasonably be got with proper diligence." The property, the subject of the agreement, consists of a large number of detached pieces of land intermixed with the lands of other owners, and could only be profitably worked from a pit situated like that of the lessees on property not forming part of the settled estate. In consequence of doubts raised by the trustees of the will for the purposes of the Settled Land Acts, a summons was taken out by Mr. W. W. Warde Aldam for the determination of certain questions, upon which Byrne, J. has made an order declaring (1) that the applicant as such tenant for life as aforesaid has no power to grant a lease as aforesaid reserving a minimum yearly rent not commencing until the second year of the said term, and increasing year by year until the fifth year of the said term as proposed; (2) assuming there is no other objection to the proposed lease, the applicant has power to insert in such lease a proviso for the ceasing of the minimum rent when all the coal demised by the lease, except such parts thereof, if any, as in accordance with the provisions of the lease are not to be worked or paid for, shall have been paid for under the terms of the lease, and a proviso permitting undergettings to be made up notwithstanding the determination of the term, but so that the term shall determine at the period of the ceasing of the minimum rent; (3) that if the wayleave for foreign coal continues after the ceasing of the

minimum rent, a substantial and proper rent must be paid for such wayleave after such ceasing. From this order the applicant, Mr. W. W. Warde Aldam, has appealed. The questions raised turn on the provisions of the Settled Land Act 1882, the material enactments of which are the following: [His Lordship referred to sect. 2, sub-sect. 10 (ii.); sect. 6 (ii.); sect. 7, sub-sect. 2; sect. 8; sect. 9, sub-sect. 1 (i.), (ii.); sect. 11; sect. 17, sub-sect. 1; sect. 53; and continued:] In dealing with the questions raised in this case it has, I think, to be borne in mind that the Legislature has on grounds of public policy considerably increased the rights which tenants for life of real estate have at law. The alterations are very striking in the case of mining leases. A tenant for life impeachable for waste, and consequently unable at common law to work unopened mines, is now authorised to grant a mining lease of such mines, and to receive for his own use one-fourth of the rent reserved by the lease. It is also to be borne in mind that the object of a mining lease is to enable the lessee to remove for his own benefit the minerals demised, and widely differs from that of a lease of a portion of the surface where the lessee is expected, after enjoying the use and occupation of the demised property for a term of years, to deliver it up to the lessor in the same state and condition as at the commencement of the lease. The rent reserved by the mining lease rather resembles an instalment of the purchase money for the demised minerals than what is understood by rent reserved on an ordinary demise of the surface. Sect. 7, sub-sect. 2, of the Settled Land Act 1882 applies to all leases granted under the Act, whether of the surface or of minerals. Its provisions are imperative, and require the best rent to be reserved that can reasonably be obtained, regard being had to all the circumstances of the case. The word "rent" in the clause includes such rents or royalties as are authorised by the Act to be reserved in mining leases: (see sect. 2, sub-sect. 10 (ii.)). In determining whether the best rent has been reserved, the court, on a question arising between the tenant for life on the one hand and the trustees of the settlement and beneficiaries on the other, must consider not only whether it is the best rent which could be obtained as between an absolute owner and the lessee, but also whether it is such, regard being had to the interests of all parties entitled under the settlement: (see Settled Land Act 1882, s. 53). Sect. 9 of the Act (which deals with mining leases) is not imperative, but merely permissive. Sub-sect. 1 (i.) authorises the reservation of a rent varying according to the acreage worked or the quantities of mineral gotten. Sub-sect. 1 (ii.) authorises the reservation of a fixed or minimum rent, either with or without power for the lessee to make up deficiencies in working, in case the rent, according to acreage or quantity falls short of the fixed or minimum rent. It is not disputed that under the sub-section a varying rent may be reserved without the addition of a fixed or minimum rent, but it is said that if a fixed or minimum rent be reserved it must be a uniform rent. This does not appear to me to be expressed by the language of the sub-section, on which (regard being had to the policy of the Act) I do not think that a narrow construction ought to be placed. In support of his contention the learned counsel for the respon-

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Re ALDAM'S SETTLEMENT.

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dents referred to *Mountjoy's* case (5 Co. Rep. 5) and *Doe d. Sutton v. Harvey* (1 B. & C. 426). Both were cases of surface leases granted under powers very much more limited in their terms than those conferred by the Settled Land Act 1882. I shall assume, however, that these cases do apply to surface leases granted under the powers of the Settled Land Act 1882, except where varying rents are expressly authorised, but no case has been cited in which they have been applied to fixed or minimum rents under mining leases, where a varying rent was authorised. It was also pointed out that in sect. 8, sub-sect. 2, it is expressly provided that a nominal or other rent less than the rent ultimately payable under a building lease might be reserved for the first five years of the term, while sect. 9 contains no such provision. The answer appears to be that such express provision was unnecessary, for sub-sect. 1 (i.) of sect. 9 authorises the reservation of a rent varying with the actual working, and sub-sect. 1 (ii.) does not make the reservation of a fixed or minimum rent imperative. Having regard to the difference already pointed out between surface and mining leases, I am unable to see good ground for holding that, as a matter of law, the fixed or minimum rent referred to in sect. 9, sub-sects. (i.) (ii.), must be a uniform rent, and Byrne, J. was of this opinion. But he held that the provision that no rent should be paid during the first year was unauthorised, and he appears to have considered the proposed arrangement open to objection, as I understand, in the interest of the remaindermen, and particularly of the infant son of the tenant for life, who is also tenant for life. The object of a fixed or minimum rent is twofold: First to provide a specified income on which the tenant for life may rely; and, secondly (and this is the more important reason), as a security that the mine will be worked and worked with reasonable rapidity: (see the remarks of Erle, C.J. in *Jegon v. Vivian* (13 L. T. Rep. 769; L. Rep. 1 C. P. 9, at p. 34). In the present case it is proposed that the lessee shall pay no rent during the first year, and rents less than that ultimately payable during the second, third, fourth, and fifth years. If the fixed or minimum rent may vary as I think it can, I do not see why in a particular year it may not be *nil*. The scheme is framed as it is on the view that during the first five years the lessee will in all probability be under the necessity of expending large sums for the purpose of developing the coalfield, and the arrangement is both reasonable and usual as between lessor and lessee. *Prima facie*, as between tenant for life and remainderman, it is for the benefit of the remainderman; for the less the dead rent paid before he comes into possession the smaller will be the deficiencies in working to be made up during the period of his possession. It is also proposed that the fixed minimum rent shall cease when all the coal has been worked or paid for. This operates as an inducement to the lessee to work rapidly. The consequence may be that the workable coal will be exhausted during the tenure of the tenant for life, and thus the provision may operate to the disadvantage of the remainderman. In the present case two special circumstances are to be regarded. First, the large proportion—viz., two-thirds—of rent which the settlor has directed to be capitalised, of which the remainderman will

have the benefit; secondly, the peculiar nature of the property, which is not continuous, but is made of a large number of small pieces of land situate amidst the properties of other owners. Such a property cannot be advantageously worked for coal by itself; it must almost of necessity be worked along with the lands of other owners, as is in fact proposed to be done. If the working of such a mineral property be too long delayed, it may get entirely isolated and become workable (if at all) at a great disadvantage. It seems to me that these circumstances may well justify the proposed arrangements as between tenant for life and remaindermen, and I confess I cannot see that the circumstance that the next remainderman is an infant tenant for life necessarily requires the court to hold that a substantial rent ought to be reserved during the first year. A further point to be considered—viz., whether if the wayleave for foreign coal continues after the cesser of the minimum rent a substantial rent must be reserved in respect of it. Now, sect. 17 (1) of the Settled Land Act 1882 authorises mining leases to be made with a grant of (*inter alia*) powers of working wayleaves and rights of way. There is nothing in the section which requires a separate rent to be reserved in respect of any such grant. The propriety of the reservation of a separate rent must depend on the particular circumstances of the case under consideration. Here again the nature of the property must be considered, and with it this further fact (which is of great importance) that no wayleave rent is to be paid to the owners of the land through which the coal demised must be carried in order to reach the surface, so that the lessees are enabled to give a larger acreage rent than they otherwise would. I think that such a state of things may well justify the reservation of a nominal wayleave rent after the cesser of the minimum rent. In the result, therefore, I think that there is nothing in the proposed lease which can as a matter of law be held to violate the requirements of the Settled Land Act 1882, that there should be reserved the best rent that can reasonably be obtained, regard being had to all the circumstances of the case, and that due regard should be had to the interests of all parties entitled under the settlement. Whether in fact any particular lease satisfies those requirements must depend on the evidence. In cases of this sort I think the court ought not to rely on mere general statements couched in the language of the Act, as for example, a statement to the effect that the rents agreed to be paid is the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but should require the material circumstances to be set out, and the grounds for the conclusion arrived at stated. In the present case I think that this has been sufficiently done. For these reasons, and also for those given by the Master of the Rolls, I think the appeal should be allowed.

COZENS-HARDY, L.J.—This appeal raises questions of great importance as to the power of a tenant for life under the Settled Land Acts to grant a mining lease. In considering the case, I think I am entitled, and indeed bound, to have regard to the policy of the Acts as explained by the House of Lords in *Bruce v. Marquis of Ailesbury* (67 L. T. Rep. 490; (1892) A. C. 356), and not to narrow or cut down the language used

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in the Acts so as to make them conform to decisions given prior to the Acts upon powers of leasing conferred by other other instruments. A tenant for life may now grant such a mining lease as is authorised by sects. 6, 7, 9, and 17 of the Settled Land Act 1882, even though the lease may to some extent prejudice the remaindermen, provided only that the tenant for life does not fail to comply with the provisions of sect. 53 of that Act. The estate in question comprises about 340 acres of land lying in scattered plots, the coal under which cannot be worked except in conjunction with the coal under the adjoining and intermixed lands. It is proved that the terms of the agreement, to which I must refer more particularly, are such as are usually or indeed universally adopted in this particular mining district, and that the rent is the best rent within the meaning of sect. 7, sub-sect. (2). But it is said that the lease is not authorised because it reserves a minimum or certain rent varying from nothing in the first year to 1*l.* per acre in the fifth and succeeding years, and because no special wayleave rent is reserved, although the wayleave be exercised for many years after the whole of the coal has been won. Byrne, J. has held these objections to be valid, but I am unable to accept this view. It is no doubt true that the rent must be the best rent, but sect. 9, sub-sect. (1), plainly shows that the rent need not be uniform throughout the term. It may vary according to the quantity of coal got and cease when all the coal has been got. Sect. 9, sub-sect. 1 (ii.), contemplates that there may be, or may not be, a fixed or minimum rent. When once it is established that the rent is the best rent as between lessor and lessee, I can see no reason why the minimum rent, which need not be reserved at all, should not begin at the second year of the term, or why the minimum rent should necessarily be constant when once it has begun. The use of the word "rent" in the case of a mining lease is somewhat misleading. It is really purchase money for coal worked, and sect. 11 provides that a certain proportion of the rent shall be set aside as capital money. In the present case the proportion is two-thirds. There is no objection to the clause providing that what are called "undergettings" may be made up at any time during the term. Sect. 9, sub-sect. 1 (ii.), contemplates this. The minimum rent is not fixed on a descending scale, the effect of which might perhaps be that the tenant for life would get an advantage over the remaindermen. On the contrary, there is an ascending scale from the second year to the fifth year. A minimum rent is reserved in order that the lessee may have a strong pecuniary inducement to get the coal with reasonable speed and regularity. It is really a part payment in advance of the purchase money. And it is not easy to see how the remaindermen can be damaged, inasmuch as their proportion of all money so paid in advance is secured. Mr. Bristowe, who argued the case with great ability, relied upon the fact that by sect. 4 of the Settled Estates Act 1877 a peppercorn rent or any smaller rent than the rent ultimately payable may be made payable during any part of the first five years in the case of either a building lease or a mining lease, and that this provision is repeated in sect. 8, sub-sect. (ii.), of the Settled Land Act 1882 in the case of a

building lease, but that no similar provision is found in sect. 9 with reference to a mining lease. I am not impressed by this difficulty. I decline to cut down the Settled Land Acts by reference to the Settled Estates Act, which is still in force. I think the Legislature has used language which rendered it unnecessary in the case of a mining lease to insert any such provision. With reference to the wayleave, it seems to me that sect. 17 expressly authorises the grant in a mining lease of a wayleave during the whole of the term of sixty years. I find nothing requiring a separate rent to be reserved in respect of that wayleave. In short, the mining lease must be looked upon as a whole. The rent or purchase money is payable for everything comprised in the lease—i.e., for the coal plus the wayleave. This rent or purchase money may vary according to the acreage worked. The rent will cease when all the coal is won, or, in other words, the whole purchase money will then have been paid. But the lessee will still be entitled during the continuance of the term to enjoy the property demised. In my opinion the order of Byrne, J., except so far as it provides for costs, should be discharged, and an order made substantially in accordance with the notice of appeal. The costs of all parties of the appeal should be paid out of capital money.

Appeal allowed.

Solicitors for all parties, *Richard F. and C. L. Smith*, agents for *Ford and Warren*, Leeds.

Monday, March 10.

(Before COLLINS, M.R., ROMEE and MATHEW, L.JJ.)

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APPEAL FROM THE KING'S BENCH DIVISION.

Ecclesiastical Law—Chancellor of diocese—Jurisdiction—Patent of appointment—Reservation of bishop's consent in certain causes in consistory court—Validity—Prohibition.

The bishop of a diocese appointed a chancellor by letters patent which were drawn up in the form customary in that diocese. By these letters the chancellor was authorised to hear causes in the consistory court in the absence of the bishop; but, after conferring certain general powers on him, the letters contained this clause: "Nevertheless first consulting us and our successors and having our consent in case either party earnestly craves our judgment," and another clause, "Except notwithstanding and always reserved to us and to our successors the complaints and supplications hereafter to be made by whatsoever clergy in all and singular causes and reserved also to us and to our successors equally to examine and determine every cause in our proper person in our court of consistory."

A cause having been instituted in the consistory court to obtain the removal of certain ornaments from a parish church, the vicar and churchwardens in their answer to the petition propounded that before any decision in the cause the bishop should be first consulted and his consent had, and they craved the bishop's judgment and supplicated that he should hear the cause in his own proper person.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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The chancellor without consulting the bishop or obtaining the bishop's consent to his hearing the cause, held that he had jurisdiction to determine the cause, and decided it in favour of the petitioner.

The vicar and churchwardens obtained a rule nisi for a prohibition against the chancellor. Upon the argument of this rule:

Held, reversing the judgment of the King's Bench Division (84 L. T. Rep. 473; (1901) 2 K. B. 141), first, that the reservations in the patent were legal; secondly, that the limiting words in the reservations went to jurisdiction, not merely to procedure, so that, upon the bishop's judgment being craved by the defendants in the cause, the consultation with and consent of the bishop was a condition precedent to the jurisdiction of the chancellor to hear the cause; and, thirdly, that the objection to jurisdiction sufficiently appeared on the face of the proceedings.

THIS was an appeal by the vicar and churchwardens of the Church of the Annunciation in Brighton from a judgment of the King's Bench Division (Darling and Channell, JJ.) discharging a rule nisi for a writ of prohibition against Dr. Tristram, the vicar-general and official principal or chancellor of the Bishop of Chichester's consistory court in the archdeaconry of Lewes, and one George Davey.

In Jan. 1899 George Davey instituted a suit in the Consistory Court of Lewes, alleging that certain ornaments in the Church of the Annunciation were illegal, and praying for a faculty authorising their removal.

To this petition the vicar and churchwardens filed an answer (see judgment of Collins, M.R.).

To which the petitioner filed a reply (see judgment of Collins, M.R.).

These paragraphs had reference to certain clauses in the letters patent issued by the Bishop of Chichester, appointing Dr. Tristram chancellor of the diocese, and giving him authority to hear causes instituted in the Consistory Court of Lewes.

The form of this patent is to be found in the Report of the Ecclesiastical Courts Commission 1883, vol. 2, p. 671.

On the 30th Aug. 1892 the then Bishop of Chichester by letters patent under his seal, for himself and his successors, gave, granted, and confirmed to Dr. Tristram during his natural life the office or offices of vicar-general in spirituals in the archdeaconry of Lewes and official principal or president of the consistory court in that archdeaconry.

At the hearing of the suit in the consistory court Dr. Tristram held that the reservations in his patent upon which the vicar and churchwardens relied were invalid, and without consulting the bishop, or obtaining the bishop's consent to his hearing the suit, he decided in favour of the petitioner, and ordered the removal of the ornaments complained of: (see *Davey v. Hinde*, (1901) P. 95).

The vicar and churchwardens then obtained a rule nisi for a prohibition prohibiting Dr. Tristram and the petitioner from proceeding further in the matter.

The King's Bench Division (Darling and Channell, JJ.) discharged the rule.

The case is reported 84 L. T. Rep. 473; (1901) 2 K. B. 141.

The vicar and churchwardens appealed.

Feb. 18, 19.—*Duke, K.C. and Hansell* for the appellants.—Under the reservations in the patent, and in consequence of the prayer contained in par. 5 of the vicar and churchwardens' answer, the chancellor had no jurisdiction to hear the cause without referring to the bishop. These reservations are valid. This form of patent was assumed to be valid in a case in 1853:

Ex parte Medwin, 1 E. & B. 609.

It has never been suggested till now that the limitations in the patent are illegal or obsolete. There is nothing repugnant to natural justice in the bishop's reserving to himself power to take cases away from the chancellor he has appointed. A Roman by appealing to Cæsar could take away the jurisdiction of the judge about to try him, and in England a prisoner may sometimes refuse to be tried by a magistrate who is competent to try him, and require to be tried by a jury. The patent is evidently of ancient form, but unfortunately no patent granted to the chancellor of a diocese before the rebellion is known to be in existence. The fair presumption to be deduced from its wording is that this form was in existence before the seventeenth century. The only diocese in which the form of chancellor's patent is the same as this is the diocese of Ely; but in sixteen other dioceses power is reserved to the bishop to hear cases in person: (see Ecclesiastical Courts Commission 1883, vol. 2, p. 698). The Crown is the source of all jurisdiction:

Mayor, &c., of City of London v. Cox, L. Rep. 2 H. L. 289.

The bishop is judge of the court, and the chancellor being merely his delegate, he may limit his delegate's authority as he pleases:

Bishop of St. David's v. Lucy, 1 Salk. 134; 3 Salk. 90;

Gibbons v. Bishop of Oloyne, Holt, 599;

Boyd v. Philpotts, L. Rep. 4 A. & E. 297.

With which may be compared the cases of

White v. Steel, 6 L. T. Rep. 686; 13 C. B. N.S. 383;

Serjeant v. Dale, 37 L. T. Rep. 153; 2 Q. B. Div. 558.

The answer of the vicar and churchwardens distinctly raised the question of jurisdiction, and the defect of jurisdiction is therefore apparent on the face of the record:

Buggin v. Bennett, 4 Burr. 2085;

Farquharson v. Morgan, 70 L. T. Rep. 152; (1894) 1 Q. B. 552;

Ex parte Law, 2 A. & E. 45;

Mayor, &c., of City of London v. Cox (ubi sup.).

Dibdin, K.C. and Reginald Dodd for the respondents.—The defect does not appear on the face of the proceedings:

Broad v. Perkins, 60 L. T. Rep. 8; 21 Q. B. Div. 583.

The point raised by the answer to the petition was not insisted on, and at the hearing was really waived. Even if there were no waiver, the point affects procedure only, not jurisdiction, and is therefore not a proper subject for a writ of prohibition. As to the form of the patent the reservations by the bishop are invalid. The

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chancellor is the proper judge of the court, and the bishop, though he appoints the chancellor, has no authority to limit his powers:

Coke's Institutes, 4th part, 338;

Ayliff's Parergon, 161;

Godolphin's Repertorium Canoniarum, edit. 1680, p. 81;

Selden's Table Talk, XII.

2 Gibson's Codex Juris Ecclesiastici Anglicani, Tit. XLIII., c. 2;

Hillyer v. Milligan, 2 Lea, 8.

The limitations in the patent were probably introduced under the canons of 1640, due to Archbishop Laud. But by the Act of 13 Car. 2, c. 12, it was provided that those canons were to be of no effect. On this point they referred to

Procurator-General v. Stone, 1 Hagg. Cons. 424;

Croft v. Middleton, 2 Atk. 650 at 664;

Phillimore v. Machon, 1 P. Div. 481.

Duke, K.C. in reply.—There is no ground for saying that the canons of 1640 had anything to do with the limitations in this patent. They probably existed before the time of Archbishop Laud: (see the words of Lord Campbell, C.J. in *Ex parte Medwin*, *ubi sup.*). The statute of 13 Car. 2, c. 12, leaves the jurisdiction of bishops just as it was before 1640. In 1865 a return was made to Parliament called "Rothers's Return of Ecclesiastical Appeals." In the appendix is a note as to the ecclesiastical courts existing in or about 1637, certainly at some period before the canons of 1640. The note is copied from a manuscript apparently by Sir John Lambe, and runs as follows: "Note, that in all these offices derived from and under the bishop, the bishop can not so graunt his jurisdiction to his chauncellor, comisary, archdeacon, deane and chapter, &c., or so abdicate it from himself but that he also may use the same, not by prohibiting them (unlesse by way of appeals where it lieth to him), but by doing also with them or without them." In the return are several cases in which the bishop is stated to have sat either alone or with his chancellor in the consistory court. In the diary of Bishop Cartwright of the years 1686-7, published by the Camden Society in 1842, several occasions are mentioned by him of his having sat in his consistory court.

Cur. adv. vult.

March 10.—COLLINS, M.R. read the following judgment: This is an appeal from a decision of the Divisional Court discharging a rule nisi for a prohibition obtained by the appellants prohibiting the respondents from proceeding further in a certain suit instituted in the Consistorial Court of the Bishop of Chichester, in which the respondent Mr. Davey was the petitioner and the Rev. Mr. Hinde and others were respondents, and of which court Dr. Tristram is the official principal. Dr. Tristram holds his appointment as vicar-general in spirituals and official principal of the Consistory Court of the Bishop of Chichester under a patent from the bishop; and the question is whether, having regard to the terms of that patent, Dr. Tristram had jurisdiction to hear and determine the case. The patent confers jurisdiction in the following terms: "Moreover we do for us and our successors give, grant, and confirm unto the said Thomas Hutchinson Tristram during his natural life that in our absence from our Consistory Court of

Lewes he shall and may proceed by himself, his assignee or substitute, assignees or substitutes, as well in all and singular causes, businesses, suits, and complaints, spiritual and ecclesiastical, at the instance or promotion of whatsoever parties as by our mere and mixed office; also in all causes of dilapidation of the goods of the Church and robbing of churches and in all other businesses and causes whatsoever (except hereinafter excepted)"—the exceptions are not material in this case—"in our Episcopal Consistory Court of Lewes moved or to be moved the cognisance and decision whereof is known by law or custom of the realm to belong to our ecclesiastical court, and to decide and finally determine all and singular those the causes aforesaid (except hereafter excepted) with all the rights thereto incident issuing, depending, annexed, and connexed, without breach of the laws and statutes of this excellent kingdom; nevertheless first consulting us and our successors and having our consent in case either party earnestly crave our judgment." The respondents in the suit (who are now the appellants) on the face of their answer pleaded "that before any decision or final determination of the cause aforesaid the Right Reverend Father in God Ernest Roland, by Divine permission Lord Bishop of Chichester, should be first consulted and his consent had, and they earnestly crave his judgment in the premises, and humbly complain and supplicate that the said Lord Bishop should examine and determine the said cause in his own proper person in this court." To this paragraph the petitioner in paragraph 4 of his reply "submits that the consent of the Right Reverend the Lord Bishop of Chichester prayed for by paragraph 5 of the respondents' answer is not necessary to the hearing and determination of this cause, and humbly supplicates that the said cause may be examined and determined by the Worshipful Thomas Hutchinson Tristram, Doctor of Laws, the official principal of this court." The point was again raised by counsel for the respondents at the hearing before Dr. Tristram (see *Davey v. Hinde* (1901), P. 95), who nevertheless proceeded with the hearing of the case, and, after the determination of another preliminary point made by the respondents, delivered judgment on the 21st Aug. 1900, holding that he had jurisdiction, and dealing with the merits of the case. Though the fact was not and could not be averred on the face of the proceedings, it is clear from Dr. Tristram's judgment that he did not consult the bishop or obtain his consent either to his hearing the case or to the terms of his judgment. The question is whether the qualification contained in the concluding words in the grant of jurisdiction above set out deprived Dr. Tristram of the right to determine the case without first consulting the bishop and obtaining his consent, the respondents having earnestly craved the bishop's personal judgment. The case was argued and decided in the Divisional Court only on the grounds (1) that, assuming the qualification in the patent to be valid in point of law, it went to procedure only, and not to jurisdiction, and (2) that in any view the objection was not sufficiently raised on the face of the proceedings to entitle the respondents, the now appellants, to apply for prohibition. Before us the additional point was made and argued that the qualification in the patent was

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itself illegal and nugatory. First, then, with respect to the grounds on which the case was decided in the court below. Does the limitation or qualification in the grant go to the jurisdiction, or is consultation with the bishop a mere matter of procedure not affecting jurisdiction, as the court below held? On the hypothesis that the patent is valid the chancellor takes no jurisdiction but that which it confers. He is a delegate, and is bound by the terms of the instrument of delegation. Two constructions have been put upon the limiting words; but in either view it seems to me that they go to jurisdiction, and that under the patent the grantee does not acquire jurisdiction to determine the case when either party craves the bishop's judgment, unless the bishop has been consulted and has consented. It seems to me that the clause, read in its context, has the effect of shutting out from the jurisdiction of the chancellor such cases unless he has consulted and obtained the consent of the bishop to his entertaining them. I think the word "nevertheless" at the beginning of the clause, coming as it does after a general delegation of authority, points to an exclusion from the jurisdiction of a certain class of cases, unless the bishop has after consultation consented to his grantee entertaining them. Without such consent there is no grant of jurisdiction at all. But, even if the construction of the clause is that adopted in the Divisional Court by Darling, J., and I think also, though I am not quite sure, by Channell, J., it seems to me that it also goes to jurisdiction. They treat it—the consultation and consent—as having regard to the judgment only and not to the entertaining of the case; but they did not and could not ignore the fact that the clause does require consultation with the bishop and his consent to the judgment to be given. If this is the true meaning of the clause it seems to me that the judgment given in such a case, without consultation and without the consent of the bishop, would be a judgment given without jurisdiction. It is a condition precedent to the right of the grantee to give judgment, and unless he fulfils the condition he exceeds his jurisdiction in pronouncing judgment. It was, however, argued that the objection to jurisdiction had been waived, and that whether it had been waived or not it was not sufficiently raised on the face of the proceedings to justify the appellants in asking for a prohibition. Mr. Dibdin did not insist upon waiver in the ordinary sense, as being capable of founding jurisdiction, but he urged that in truth and in fact the now appellants had shown by their conduct of the case that they did not earnestly crave the bishop's judgment, and that in that sense the objection to jurisdiction must be taken to have been waived. I can see no ground whatever for saying that the appellants ever receded from the position which they took up in their pleadings. They there formulated a demand for the bishop's personal intervention; they took the point at the trial; they never receded from it, and the learned judge obviously did not consider that they had abandoned it, for in his judgment given in August he discusses and deals with it. It is true that they had, in the meantime, raised another preliminary point as to the *locus standi* of the petitioner, which was decided against them, the learned judge holding over his judgment until that point was determined. But these facts

seem to me to afford no evidence whatever that the appellants had ceased to desire the bishop's judgment; nor could they know, nor were they bound to anticipate, that, in his judgment so given, the learned judge would, from their point of view, exceed his jurisdiction. There is clear authority that the right to ask for prohibition, if not otherwise defective, still remains open to them. "For till sentence be given," says Lord Ellenborough in *Gould v. Gapper* (5 East, 345, at p. 364), "the courts of common law have no reason to suppose that the ecclesiastical court will determine wrong; which, however, if it should do, it is not too late to come then—that is, after sentence for a prohibition—for the sentence is in such case the gravamen; and so it was expressly stated to be by Holt, C.J. and the court in *Shotter v. Friend* (2 Salk. 547)." As to the objection not appearing on the face of the proceedings, I think it was sufficiently apparent to take them out of the principle on which courts act in refusing prohibition on that ground, which is really one not letting in jurisdiction, but going only to the discretion of the court in granting prohibition in cases where there was in fact no jurisdiction. The rule laid down in the memorable judgment of the late Willes, J. in the case of *Mayor of London v. Cox* (*ubi sup.*), which has been frequently followed, is really limited to cases where a party has allowed a court to proceed without disclosing his objection, and has afterwards come to set aside the proceedings. Its effect is well summarised by Lopes, L.J. in *Farquharson v. Morgan* (*ubi sup.*): "The result of the authorities appears to me to be this, that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled." There is really nothing like laches or misconduct in the present case; on the contrary, the point is sufficiently apparent on the proceedings, and it was taken in court and never withdrawn. Therefore I am of opinion that the decision of the Divisional Court cannot be supported on the grounds on which they have placed it. It is, however, necessary to consider the larger question raised by the argument of Mr. Dibdin—viz., that the limitation to the grant in the patent is itself void. This raises an historical question of some interest, but I think the burden rests on the respondents, and in my judgment they have not satisfied it. The form of the patent is, from its phraseology and the matters it embraces, obviously of very considerable antiquity. The exact form of this patent appears to be peculiar to the dioceses of Chichester and Ely; but forms reserving the bishop's jurisdiction, in some shape, in cases such as the present, are still in use in sixteen dioceses (see the report of the Ecclesiastical Courts Commission 1883), and it has not been suggested that these forms have not all been in use, at all events, from 1640 onwards. Mr. Dibdin, indeed, suggested but he failed to support the suggestion by any authority, that the origin of these reservations of jurisdiction to the bishop was to be found in certain canons, of which Archbishop Laud was said to be the author,

and which were promulgated in 1640, but were subsequently, as he said, abrogated by the statute of 13 Car. 2, c. 12, s. 5; in fact, he contended, broadly, that, before those canons were promulgated, the bishop had no jurisdiction whatever in cases of this class, but that the exclusive jurisdiction was in his chancellor. There is no doubt that a chancellor may be imposed upon a bishop (see Godolphin, p. 81, quoting Ridley): "Chancellors of dioceses are nigh of as great antiquity as bishops themselves, and are such necessary officers to bishops that every bishop must of necessity have a chancellor; and that if any bishop should seem to be so complete within himself as not to need a chancellor yet the archbishop of the province in case of refusal may put a chancellor on him, in that the law presumes the government of a whole diocese a matter of more obligation than can be well sustained by one person alone; and that, although the nomination of the chancellor is in the bishop, yet his authority is derived from the law . . . It is most probable that the multiplicity and variety of ecclesiastical causes introduced the use and office of chancellors originally; for after that princes had granted to ecclesiastical persons their causes and their consistories, and circumstances varying these causes into a more numerous multiplication than were capable of being defined by like former presidents, necessity called for new decisions, and they for such judges as were experienced in such laws as were adapted to matters of an ecclesiastical cognisance, which would have been too prejudicial an avocation of bishops from the exercise of their more divine functions." But that the chancellor's power, whatever the extent of it, is a delegated power only is clear (see Gibson's Codex, vol. 2, p. 1627, edit. 1713, quoting Stellingfleet): "And the law nowhere determines the bounds of a chancellor's power as to such acts, nor can it be supposed so to do since it is but a delegated power, and it is in the right of him that deposes to circumscribe and limit it." In a manuscript in the Public Record Office of 1636-37, apparently drafted by Sir John Lambe, Dean of Arches, and copied in Rothery's Returns, Appendix, p. xxvi., there is this passage: "Note that in all these offices derived from and under the Bishop, the Bishop cannot so graunt his jurisdiction to his Chauncellor, Commissary, Archdeacon, Deane, Chapter, &c., or so abdicate it from himself, but that he also may use the same, not by prohibiting them (unless by way of appeal where it lieth to him), but by doing also with them or without them." It was nevertheless suggested by Mr. Dibdin, as I have said, that the reservations of jurisdiction to the bishop, which continue to be found in the patents in use in so many dioceses down to the present day, took their origin from the canon of 1640 (the 11th). But the language of the canon (see it set out in Gibson, p. 1028, edit. 1713) seems to assume an existing power of reservation. And though, by 13 Car. 2, c. 12, s. 5, these canons were expressly not confirmed, that statute saves all jurisdiction existing in 1639. If the effect of the Act of 13 Car. 2, c. 12, passed in 1661, was to leave the bishop denuded of all jurisdiction in his consistorial court, as Mr. Dibdin's argument assumes, it is certainly very strange to find Lord Holt no more than forty years later asserting the bishop's right to sit there himself, and reiterating the

same opinion some years afterwards. In *Bishop of St. David's v. Lucy* (1 Salk., 134), decided in 1699, he says: "The Archbishop may hold his court where he pleaseth and he may convene before himself and sit judge himself, and so may any other bishop, for the power of a Chancellor or Vicar-General is only delegated in case of a Bishop." And in *Gibbons v. Bishop of Cloyne* (Holt, 599, at p. 602), decided in 1706, he says: "As to what is said that a Bishop may sit in his own Court and that the Vicar and he are but one person, it is true a Bishop may sit when he pleases in his own Court, but the Vicar, Chancellor, shall have fees." In 1853 a patent in the same form as at present, being that in use in the diocese of Chichester, came before the Court of Queen's Bench, consisting of Lord Campbell, C.J., and Coleridge and Wightman, JJ., in *Ex parte Medwin* (1 E. & B. 609). In delivering the considered judgment of the court, Lord Campbell says: "We desired to look at the patent before we granted or refused a rule. We have now examined it." He then summarises it, and refers to the qualifying clause. He then proceeds, at p. 615: "The court therefore is in style the bishop's court, as this is the Queen's, and the chancellor is the bishop's chancellor, as we are the Queen's judges. By a special provision, at the prayer of the party, the Bishop's judgment may be invoked, in which respect the analogy fails. But where this prayer is not made the chancellor, or official principal, seems to be an independent judge; nor is he the less so because some cases are excepted from his jurisdiction, or because that jurisdiction ceases, or is suspended, when the bishop is present. If absent the bishop cannot interfere; the parties are never supposed, by the citation or other proceedings, to be before him; nor is there any appeal from the chancellor to him." Again, after citing two passages from Ayliffe, he says at p. 616: "This passage is not very accurately expressed, but the meaning is sufficiently clear in one sense. The chancellor, or the official, has a delegated power as much as the commissary, because they equally receive from the bishop a power which was originally in him, and which originally he might have exercised himself, and probably often did. But it was a power to be exercised in a court, open to the subjects of the diocese, for the trial of all causes over which he has jurisdiction." This suggestion that they "often did" finds some support in the diary of Cartwright, Bishop of Chester, in the years 1686 and 1687, cited to us by Mr. Duke, as also from some of the cases mentioned in Rothery's Return, though that collection is limited to those cases only which found their way to the court of delegates. In his Historical Appendix (I.) to the report of the Ecclesiastical Courts Commission (1883), p. 32, Bishop Stubbs says: "The commission of the chancellor or official principal of the bishop differed from that of the official principal of the archbishop in not necessarily conferring the whole judicial authority of the bishop, who in some instances reserved particular portions of jurisdiction for his own hearing, as is done at the present day." He casts no doubt on the legality of this practice. At p. 46, par. 3, he says: "The Court of King's Bench, in the case of *Bishop of St. David's v. Lucy* (*ubi sup.*), held that the commission of chancellor, or vicar-general, could not be regarded as

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excluding the archbishop or bishop from sitting in his own court (Stephens, i, 289). But, although this is reasonable as an affirmation of law, it is not easy to adduce instances in which the power has been exercised since the Reformation. It appears from the return on the patents of official principals, made for the present commission, that in several dioceses it is the practice of the present day to reserve to the bishop himself important sections of judicial work, or a general right to execute in person the offices otherwise deputed." From the references above given it would seem that the power has been in fact occasionally, if not frequently, exercised since the Reformation. There seems to be no judicial pronouncement to be set against those above cited. The passage in Sir W. Lee's judgment in *Hillyer v. Milligan* (*ubi sup.*), decided in 1700, does not seem necessarily to involve the question of a reservation in the patent itself. I think, therefore, that it is impossible to hold a void proviso which merely excludes the jurisdiction of the chancellor in cases where the parties or either of them crave the judgment of the bishop himself, unless upon consultation the bishop consents to his assuming it. The demand of a party and the good sense of the bishop would seem to be sufficient safeguard against abuse. With regard to the form of the rule, we think it would be sufficient if the prohibition went *quousque*—that is to say, as against Dr. Tristram—until consultation with the bishop and consent by him to the judgment, and as against the other respondent until there has been such consultation and consent, or until the bishop agrees to hear the cause himself. Romer, L.J. agrees with me in this judgment.

MATHEW, L.J. read the following judgment: I agree with the reasons given by the Master of the Rolls for allowing this appeal. In the judgment of the Divisional Court it would seem to have been supposed that the bishop was bound in every case by the decision of his chancellor, that his assent was a ministerial act only, and that the omission of a mere formality was no objection to the chancellor's authority to pronounce a final judgment. It is difficult to recognise this view with the language of the patent. The authority conferred upon the chancellor to decide and finally determine causes is subject to this proviso: "Nevertheless first consulting us and our successors and having our consent in case either party earnestly craved our judgment." The legal construction of the patent would seem to be clear. Before the chancellor can pronounce his decision, where either party earnestly craves "our judgment," it is for the bishop to determine whether or not he will give his consent. But it was argued for the respondents here that the patent gave rise to no question of construction. It was said that the terms might be disregarded because the document should be treated in law as obsolete and illegal. It was pointed out that the bishop was bound by ancient usage to nominate a chancellor, and it was said that when the appointment was made the bishop was divested of every judicial function, even where, as in the present case, the patent contained express reservations. The bishop, it was contended, was prohibited by law from interfering with an official who appeared to derive such powers as he possessed from his patent, but who

might nevertheless repudiate the terms by which he had undertaken to be bound. No reliable authority was cited in support of this proposition. The law would seem to have been laid down in the contrary sense in the decisions and records which have been fully discussed by the Master of the Rolls. It is clear that patents in analogous forms have been long in use in many of the English dioceses, and the instrument in question was considered in the Court of Queen's Bench in the case of *Ex parte Medwin* (*ubi sup.*) and was treated as unobjectionable. No reason was given for holding the clause in question to be contrary to public policy, and no ground suggested for the suspicion with which the control by the bishop would seem to be regarded. It may be true that the judgments of chancellors have not in recent times been interfered with, and that litigants have been left to their remedy by appeal; but this does not show that the form of patent continuously used has become obsolete or invalid. It was next contended that, even if some of the provisions of the patent were lawful and binding, the particular clause upon which the appellants rely was illegal and had been condemned by the Legislature. To establish this the canons of 1640 were referred to, and it was suggested that then, for the first time, it was declared by Convocation that the bishop might reserve to himself the right to examine and determine every cause in his court. These canons were promptly condemned by the Long Parliament, and were treated as being subversive of the Constitution in matters relating to Church government: (see Gibson's Codex, p. 956, note p., edit. 1761). It perhaps would be sufficient to dispose of this argument to point out that the clause we are dealing with was not that provided for by the canon of 1640. But there is the further answer that there would seem to be no good ground for the assertion that the general reservation which is found in this patent "to examine and determine every cause in our proper person in our court of consistory" was intended to be stamped by Parliament with illegality. The statute of 13 Car. 2, c. 12, recited the Act of 17 Car. 1, and by sect. 2 repealed all other provisions with the temporary exception of what concerned the High Commission Court. Sect. 1 provided that nothing in the Act of 17 Car. 1 should "take away any ordinary power or authority from any of the said archbishops, bishops, or any other person or persons named as aforesaid, but that they and every of them exercising ecclesiastical jurisdiction may proceed, determine, sentence, execute, and exercise all manner of ecclesiastical jurisdiction, and all censures and coercions appertaining and belonging to the same before the making of the Act before recited in all causes and matters belonging to ecclesiastical jurisdiction according to the King's Majesty's ecclesiastical laws used and practised in this realm in as ample manner and form as they did and might lawfully have done before the making of the said Act." By sect. 5 it was provided "that this Act, or anything therein contained shall not extend, or be construed to extend, to give unto any archbishop, bishop, or any other spiritual or ecclesiastical judge, officer, or other person or persons aforesaid, any power or authority to exercise, execute, inflict, or determine any ecclesiastical jurisdiction, censure, or coercion which they

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might not by law have done before the year of Our Lord 1639; nor to abridge or diminish the King's Majesty's supremacy in ecclesiastical matters and affairs, nor to confirm the canons made in the year 1640, nor any of them, nor any other ecclesiastical laws or canons not formally confirmed, allowed, or enacted by Parliament, or by the established laws of the land, as they stood in the year of Our Lord 1639." There is there a clear reservation of the jurisdiction of the bishop in all causes and matters belonging to ecclesiastical jurisdiction. It has not been shown that the reservation of causes from the chancellor's jurisdiction has been condemned or even questioned in any decision of the courts of common law; and the fact that so many patents still contain a similar clause would seem to show that in this respect the forms in use before 1639 continued to be followed. Another point made for the respondents was this—that no effect could be given to the clause which permitted the litigant in the consistory court to crave the judgment of the bishop, because it was not pointed out by what method or to what extent inquiries were to be made by the bishop before he consented to adopt or to differ from the judgment of the chancellor. But no such directions would seem to be required. It would be the duty of the bishop to obtain all necessary information, and there would seem to be no reason to suppose that the duty would be neglected. Moreover, it should be borne in mind that the determination of the bishop would be subject to appeal. A further point was made for the respondents that even if the patent must be regarded as valid and binding the appellants had so acted in the course of litigation as to show that they had abandoned their earnest craving for the judgment of the bishop. In par. 5 of the answer the appellants raise the point and pray that before any decision of the cause the bishop should be consulted and his consent had, and they earnestly crave his judgment. In the reply the petitioner, the now respondent, Mr. Davey, objected to the bishop being consulted or to his sitting to try the cause. It appears from the report of *Davey v. Hinde*, (1901) P. 95 that the point was argued, and the chancellor dealt with it at some length in his judgment. There was no evidence that the appellants so acted as to indicate that their objection was abandoned. But reliance was placed on the delay which it was said had taken place before the application was made for a prohibition. The facts were these: A question had been raised as to the right of the petitioner to institute proceedings, and that point was decided in his favour. The judgment was suspended pending an appeal to the Court of Arches. The appeal was subsequently abandoned, and in Aug. 1900 the chancellor proceeded to judgment, and in the following term prohibition was applied for. The delay was thus fully explained. I agree that the appeal should be allowed, and the prohibition issued in the terms suggested by the Master of the Rolls.

Appeal allowed.

Solicitors for the appellants, *Brooks, Jenkins, and Co.*

Solicitor for the respondents, *Grantham R. Dodd.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, March 25.

(Before KEKEWICH, J.)

ATTORNEY-GENERAL v. RICKMANSWORTH URBAN DISTRICT COUNCIL. (a)

Local government—District council—Parliamentary opposition—Expenses of opposition—Application of district rate—Ratepayers' consent—Sanction of Local Government Board—Borough Funds Act 1872 (35 & 36 Vict. c. 91), ss. 2, 4, 8, 10—Local Authorities (Expenses) Act 1887 (50 & 51 Vict. c. 72), s. 3.

An urban district council cannot apply the district rate towards payment of the expenses of opposing a local bill not affecting their own duties, rights, or privileges, without first obtaining the consent of the ratepayers under sect. 4 of the Borough Funds Act 1872, nor is sect. 3 of the Local Authorities (Expenses) Act 1887, under which such expenses if incurred may be sanctioned by the Local Government Board, intended to prevent the court from intervening to restrain such expenses being thrown on the rate when the sanction of the Local Government Board has not been applied for.

THIS was a motion by the Attorney-General on the relation of the Rickmansworth Gas Light and Coke Company for an injunction to restrain the Rickmansworth Urban District Council from applying any part of the general district fund or rate, or any other public fund or rate under their control, to the payment of any costs or expenses incurred or to be incurred in relation to the opposing by the defendants of a Bill being promoted in Parliament by the relators unless and until the defendants first should have obtained the consent of the owners and ratepayers of the urban district of Rickmansworth to such opposition, and otherwise complied with the provisions of sect. 4 of the Borough Funds Act 1872.

Under the Rickmansworth Gas Order 1885 the Rickmansworth Gas Light and Coke Company supplied the urban district of Rickmansworth, together with the parishes of Rickmansworth Rural and Chorleywood.

The company were promoting a Bill in the House of Lords for incorporating and conferring powers on the company which provided for the increase of the capital of the company, of its borrowing powers, and of its area of supply by including the parish of Chenies, in Buckinghamshire.

The district of supply of the company had been hitherto wholly in the county of Hertford.

The district council presented a petition in opposition, mainly on the ground that the price of gas in the urban district would be increased by the extension of the area of supply to outlying rural districts, and that the proposed increase of the share capital and borrowing powers of the company were excessive.

The company thereupon brought this action, and now moved for this injunction on the ground that the council were exceeding their powers in attempting to apply any part of the district

(a) Reported by O. F. JUNCAN, Esq., Barrister-at-Law.

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fund in paying the expenses of opposing the bill, as they had not obtained the consent of the ratepayers as required by sect. 4 of the Borough Fund Act 1872. The council admitted they had not obtained the consent of the ratepayers, but relied on their common law powers to defend themselves, alleging that their duties with respect to lighting the district were affected, and also that the matter was left to the decision of the Local Government Board under sect. 3 of the Local Authorities Expenses Act 1887 (50 & 51 Vict. c. 71), which provides that

Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board.

The sections of the Borough Funds Act 1872 (35 & 36 Vict. c. 91) which were referred to were as follows:—

Sect. 2. When in the judgment of a governing body in any district it is expedient for such governing body to promote or oppose any local and personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund, borough rate, or other public funds or rates under the control of such governing body to the payment of the costs and expenses attending the same.

Sect. 4. No expense in relation to promoting or opposing any Bill or Bills in Parliament shall be charged as aforesaid unless incurred in pursuance of a resolution of an absolute majority of the whole number of the governing body at a meeting. . . . Provided, further, that no expense in promoting or opposing any Bill in Parliament shall be charged as aforesaid unless such promotion or opposition shall have had the consent of the owners and ratepayers of that district, to be expressed by resolution in the manner provided in the Local Government Act 1858 for the adoption of that Act.

Sect. 8. Nothing in this Act shall extend or be construed to alter or affect any special provision which is or shall be contained in any other Act for the payment of the costs, charges, and expenses intended to be provided for by this Act, or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exercisable by the inhabitants of any district under any general or special Act.

Sect. 10. The provisions of this Act shall not extend to applications for any Bill in Parliament for any object which would for the time being be attainable by Provisional Order.

Warrington, K.O. and B. J. Parker for the motion.—The council cannot apply the rates in opposing the Bill without the consent of the ratepayers:

Attorney-General v. Corporation of Swansea, 78 L. T. Rep. 412; (1898) 1 Ch. 602.

This case is not within the principle of *Attorney-General v. Corporation of Brecon* (40 L. T. Rep. 52; 10 Ch. Div. 204). They referred to the sections of the statutes above set out.

S. O. Buckmaster for the council.—We are properly opposing the Bill, for it affects our duties. Under sect. 3 of the Local Authorities Act 1887 the matter is placed in the discretion of the Local Government Board:

Glen on the Law of Public Health, 12th edit., p. 1822.

The cases cited do not apply to urban district councils, but only to corporations.

KEKEWICH, J.—I am of opinion that the injunction should be granted. It is of great public importance that district councils should be kept within their proper jurisdiction. They have very large powers, which are exercised for the benefit of the public, but if they show a disposition to go beyond their powers, it is equally for the benefit of the public that they should be restrained. The two cases cited on behalf of the plaintiffs, *Attorney-General v. Swansea Corporation* (*ubi sup.*) and *Attorney-General v. Brecon Corporation* (*ubi sup.*), state plainly the law which they illustrate. The sole question is whether the defendants are exceeding their common law powers, it being admitted that they have not complied with sect. 4 of the Borough Funds Act 1872, so that they cannot say that their constituents have authorised them to oppose this Bill. I have read in the petition presented by the council the clauses setting out the grounds of their opposition. It would be strange if, in a petition drawn by experienced hands, as these petitions are, and being of considerable length, there were not found some allegations of interference with their duties, properties, and privileges as a council. It is possible to point to some such allegations which, if they stood alone, might be enough to explain their opposition to the Bill. But the petition must be regarded as a whole. It sets up an opposition of an entirely different character from that of a council setting up its own interests. It seems to me that this urban district council has constituted itself a sort of representative of its district. This is an entirely false position. The council is not constituted for that purpose. Such a council has no rights of supervision over public interests as a whole, and enjoys no acts of suzerainty. Certain paragraphs in the petition are directed to show that the acts proposed by the gas company are not for the benefit of the public, and that it is not desirable, in the interests of the public, that this Bill should go through. It seems to me that in putting all these reasons forward the district council is going far beyond its duties. They are not protecting their own rights and privileges, but are endeavouring to protect the public in matters with which they are not concerned. They have brought themselves within the decision of North, J. in *Attorney-General v. Swansea Corporation* (*ubi sup.*), and the statement of law, though not the decision given by Jessel, M.R. in *Attorney-General v. Brecon Corporation* (*ubi sup.*). And not being able to call in aid the provisions of the Borough Funds Act 1872, they are acting outside their powers and ought to be restrained. Another point has been taken on behalf of the council which, if sound, is absolutely fatal to the plaintiffs. Reference was made to sect. 3 of the Local Authorities Expenses Act 1887, which provides that: "Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board." It was suggested in a note to that section in Glen on the Law of Public Health, 12th edit., p. 1322, that that enactment allows them to determine beforehand that the expenditure shall not be disallowed, and it was argued that the court should not anticipate the exercise of this discretion. In the present case the Local Government Board has not yet been applied to, and it may be that these expenses,

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some of which have not yet been incurred, may be submitted to them. The Act of 1887 has constituted the Local Government Board sole arbitrators in this respect, and it was argued that the court would do wrong to intervene. But it seems to me to be going far beyond the intention of the Act to say that because the Local Government Board may, when applied to, allow some or all of this expenditure, therefore the court must not intervene to prevent this expenditure being incurred when the Local Government Board has not been applied to. I cannot think that because there is an authority which, when applied to, may enable them to do that which at present they cannot do, therefore the court ought to hold its hand. An injunction must therefore go, not to prevent the council from opposing the Bill, but to prevent them from so opposing it as to throw the expenses on the rates until the consent of the ratepayers has been obtained.

Judgment for the plaintiffs.

Solicitors: *Baker, Lees, and Company; B. A. Read, for H. Lomas, Rickmansworth.*

Thursday, April 17.

(Before FARWELL, J.)

Re DAVIS; DAVIS v. DAVIS, SANDER, AND ROSENFELT. (a)

Breach of trust—Moneys employed by trustee in trade—Proper rate of interest.

If a trustee invests trust moneys in business with a view to benefiting the trust estate, he must account for the profit made by such investment, or at the option of the cestui que trust he must account for trade interest—i.e., 5 per cent.

Vyse v. Foster (27 L. T. Rep. 774; L. Rep. 8 Ch. 309, 329) followed.

ACTION for (*inter alia*) (1) an account of all moneys received by the defendants or any of them or by any one on their behalf as trustees of the will of Joseph Davis, deceased, in respect of the rents and profits of all or any part of the property devised and bequeathed by the will of the testator or as proceeds of the sale of any part thereof. (2) That the defendants might be ordered to make good any loss that may have accrued, and to pay any profits that they may have made by reason of any improper payments made out of or dealings with such moneys to the estate of the testator.

The statement of claim alleged (*inter alia*) that in March 1899 the defendants received a sum of 6400*l.*, proceeds of sale of part of the trust estate.

At that date the bank rate on deposits was 1½ per cent., and no trust investment paying more than 3 per cent was available.

The defendants thereupon, in good faith and as a temporary investment, lent the 6400*l.* at 3½ per cent. to a firm in which one of their number was a partner.

The firm was solvent, and was paying the same rate of interest to their bankers on an overdraft which was fully secured.

In April 1900 the defendants withdrew the sum of 6400*l.* from the firm in question, and invested it in proper securities.

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

One of the questions in the action was to determine what rate of interest was to be charged against the defendants for the period during which the sum in question was invested with the firm.

The plaintiffs suggested that 5 per cent. was the proper amount; it was urged for the defendants that the rate should be reduced from 5 to 4 per cent. in view of the diminished rate of interest obtainable for trust investments.

Bramwell Davis, K.C. (Dunham with him) for the plaintiff.—It is clear upon the authority of *Lewin on Trusts*, 10th edit., p. 298, that 5 per cent. should have been paid. He referred to

Docker v. Soames, 2 My. & K. 655.

Upjohn, K.C. (Le Biche with him) for the defendants.—The rate of interest should be reduced from 5 to 4 per cent. in view of the diminished rate of interest obtainable for trust investments: (*Lewin on Trusts*, 10th edit., p. 383). He referred to

Millard v. Gray, 2 Coll. 295.

Bramwell Davis, K.C., in reply, cited

Vyse v. Foster, 27 L. T. Rep. 774; L. Rep. 8 Ch. App. 329.

FARWELL, J. (after dealing with some preliminary matters).—I now come to a matter in which the trustees have no doubt done wrong. They sold the trust property for 6400*l.* I quite credit Mr. Rosenfelt with the desire to do the best he could for the plaintiff. He seems to have acted with very great consideration and kindness, and I think I must say Mr. Davis's conduct is extremely ungrateful. He brings an action without any foundation charging the trustees with not having accounted. They had not sold at an under value, and that is a charge without any foundation. Then he finds one point as to which, although he challenges them about two days before the writ, he gives them no opportunity of making amends. What they did was this. They sold out for 6400*l.*, and if the bank rate had been paid it would have been 1½ per cent. The plaintiff was impecunious and wanted money badly. Mr. Rosenfelt thought it was advantageous for him to have 3½ per cent. on deposit, and to wait in order to see how trust securities would go in the market. There is no evidence before me to show whether trust securities did or did not go up, nor do I think it is very important. No doubt the trustees were entitled to keep the money on deposit at the bank for a short period; I think Kay, J. has stated the limit to be six months, but I do not like to bind myself to any particular time. In this case, however, the trustees kept the money for more than a year. It was paid in to the credit of Mr. Rosenfelt's own firm, and that was done under the following circumstances, which are not unusual: Mr. Rosenfelt's business was in want of ready money from time to time, and his firm had deposited security for the large sum of 60,000*l.* with the London and Westminster Bank, in order to be allowed to overdraw whenever they pleased. At the time of which I am speaking they had an overdraft. They could not get the necessary 3½ per cent. by ordinary investment, so they placed the sum of 6400*l.* in their own business, and credited the plaintiff with 3½ per cent. upon that sum. Now, I can only say that such action is not justifiable.

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There is nothing dishonest in it, and nothing wrong in a sense, and I cannot say whether Mr. Rosenfelt's firm did or did not make any profit out of the transaction. But in all probability they did not use the money in their business without making considerable profit. In view of the fact that the sum is comparatively small and of the expense of taking an account, Mr. Bramwell Davis has very properly asked me to make an alternative order, which I am bound to make by the decision in *Vyse v. Foster* (*ubi sup.*). The statement there is that: "If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear which profits are attributable to such employment, he must account for trade interest—that is to say, interest at 5 per cent. Now, it is quite true that it has been suggested in subsequent cases and by Mr. Lewin's editor that perhaps 5 per cent. is hardly the mercantile rate of interest now, but I do not feel at liberty to so decide or to alter the 5 per cent. mentioned by James, L.J. The result is that so far as regards this particular item there must be an account unless the figures can be agreed. It is only 1½ per cent. for a period of thirteen months, and the figure arrived at had better be set off against the costs, because the action, so far as regards the issues which I have disposed of, is dismissed with costs as regards the costs relating to this particular matter, inasmuch as in my opinion the trustees were quite honest, and really did the best they could for the benefit of the plaintiff. I am not going to order them to pay any costs in respect of it, or to make any alteration in regard to the costs of the action.

Solicitors: *Gedge, Kirby, and Millett; Joseph and Hyam.*

KING'S BENCH DIVISION.

Feb. 27, 28, and March 10.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

DARLOW v. SHUTTLEWORTH AND WIFE. (a)

Inferior court—Appeal—Inferior court of record of civil jurisdiction—Appeal to King's Bench Division—Right of appeal—Judicature Act 1884 (47 & 48 Vict. c. 61), s. 23—Order LIX., rr. 9-18.

An appeal from any inferior court of record of civil jurisdiction, where there is no statute giving an appeal, can now be brought to the King's Bench Division of the High Court by notice of motion under Order LIX., rr. 10-17, as the effect of the Judicature Acts and Rules is to substitute appeals from such inferior courts for the former procedure by bill of exceptions and writ of error to the King's Bench.

In such cases, as in the case of appeals from County Courts, it is a condition precedent to the right of appeal, that the points of law relied upon for the appeal should have been taken before the judge of the inferior court.

RULE calling on the Master of the Crown Office to show cause why he should not enter for hear-

ing a notice of appeal on behalf of the plaintiff, praying that the verdict of the jury and the judgment for the defendants consequent thereon given in the Court of Pleas for the borough of Preston on the 17th May 1901, should be set aside and judgment entered for the plaintiff, or that a new trial should be had.

Notice of the order was directed to be given to the master, the defendants and the Recorder of Preston, who was the judge of the court.

The action was brought in the Preston Court of Pleas to recover a sum of 97l. odd, for principal and interest due under a covenant in a bill of sale made in 1893. The bill of sale had been registered, but not re-registered. The plaintiff contended before the learned judge (the Recorder of Preston) that although the bill of sale had not been re-registered, the plaintiff could sue on the covenant in the bill of sale to pay principal and interest. The judge was of opinion that he was bound by the case of *Fenton v. Blythe* (63 L. T. Rep. 453; 25 Q. B. Div. 417), which decided that the effect of omitting to renew the registration of the bill of sale was to make the bill of sale wholly void, and he directed the jury to find for the defendants, and judgment was given for the defendants.

The plaintiff appealed, and tendered at the Crown Office, under Order LIX., r. 10, a notice of appeal asking that the verdict of the jury and the judgment for the defendants consequent thereon should be set aside, and that judgment be entered for the plaintiff or a new trial had on the grounds: (1) That the learned Recorder was wrong in holding that the case fell within the decision of *Fenton v. Blythe* (*ubi sup.*); (2) that the learned recorder was wrong in directing the jury to find a verdict for the defendants; and (3) that there was no evidence to go to the jury in favour of the defendants.

The officer at the Crown Office stated that the proposed appeal from the Preston Court of Pleas was unheard of, and that he could not take any notice of motion or enter the appeal in regard thereto, and he refused to allow the notice of appeal to be entered.

The above rule was then obtained.

Bowlatt, for the recorder, showed cause.—There is no appeal by common law in these cases; appeal exists by statute only, and in the case of the Preston court there is no statute which gives an appeal. In this case the plaintiff complains of a misdirection of the learned recorder, and he says that as in former times he could have proceeded by a bill of exceptions and a writ of error to the King's Bench, so now he can come to this court under the Judicature Acts and Rules. Even if error did lie from an inferior court, a writ of error is not an "appeal." Order LIX., rr. 9 and 10, provide that certain rules of that order shall apply to appeals to the Queen's Bench Division from County Courts and other inferior courts of record, and that every such appeal shall be by notice of motion. These rules cannot apply here; they were only made in 1885, and under the powers given by sect. 23 of the Judicature Act 1884, so that, except by that section, there was no power in the rule committee to make rules as to appeals from inferior courts. Sect. 45 of the Judicature Act 1873 dealt with appeals from inferior courts, and assigned such appeals to a

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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divisional court, and sect. 23 of the Act of 1884 gave power to make rules with regard to such appeals. At that time "error" and "appeal" were two distinct things, and error, whether by bill of exceptions or by writ of error, was not an "appeal" within either of those two sections. It was not intended to substitute an "appeal" for a writ of error in these cases (*Bank of Ireland v. Evans*, 5 H. of L. Cas. 389), and therefore the old proceedings in error are left intact and can still be brought. If the contrary contention be right, then the argument on the other side must go to this length that not only does appeal include error, but also that where there would have been materials for bringing error then an appeal can be maintained. The Mayor's Court of London Procedure Act provides in sect. 4 that error from the Mayor's Court should go to the Exchequer Chamber; in sect. 8 that security should be given in certain cases for the costs of an appeal, and in sect. 10 that leave should be required to move in the Superior Court to set aside a verdict. If the contention of the respondents be correct then the Judicature Acts and Rules would have abolished these distinctions, but they have not done so:

Morgan v. Bowles, (1894) 1 Q. B. 236;

Kirby v. North British and Mercantile Insurance Company Limited, 74 L. T. Rep. 723; (1896) 2 Q. B. 99;

L. Blanch v. Reuter's Telegram Company Limited, 34 L. T. Rep. 691; 1 Ex. Div. 408;

Pryor v. City Offices Company, 48 L. T. Rep. 698; 10 Q. B. Div. 504.

Nor have they abolished the provision in sect. 32 of the Stannaries Act 1869, which required a deposit to be made on appeals: (*Re West Devon Great Consols Mine*, 58 L. T. Rep. 61; 38 Ch. Div. 51). Order LVIII. is the order which applies to appeals to the Court of Appeal; these appeals are to be by way of rehearing, which is different from the language used in Order LIX. as to appeals from inferior courts. By Order LVIII. (in the schedule to the Act of 1875), r. 1, "bills of exceptions and proceedings in error" were abolished, and that applied only to the Court of Appeal. That has no application to appeals from inferior courts. Appeals were introduced by the Common Law Procedure Acts, and at that time no lawyer using the word "appeals" could have intended to include writs of error, and we see, for instance, by sect. 20 of the Judicature Act 1873 which says that "no error or appeal" shall be brought, that the distinction between error and appeal still existed.

Danckwerts, K.C. (F. L. Firminger with him), for the plaintiff, in support of the rule.—By the case of *Addison v. Mayor of Preston* (12 C. B. 108) it appears that the Preston Court of Pleas for the borough of Preston was by charter a court of record for the trial of civil actions, and that it was not regulated by the provisions of any local Act of Parliament. Error at common law lay from any inferior court of record of civil jurisdiction, if in England to the King's Bench or Common Pleas, but if out of England to the King's Bench only. At common law you could not get on the record any objections which were not taken at the trial, so the statute introducing bills of exceptions was passed in 1285 (13 Edw. I, st. 1, c. 31), and although on its face it seemed to apply to the Common Pleas only, it extended to

all courts of record (see the notes to that statute in 2 Coke's Inst. pp. 425-7), and it enabled a party, who alleged an exception, to require the judge to put it in writing and authenticate it. The bill of exceptions and writ of error were mere machinery for getting the matter brought before the higher court for review. The Judicature Act and Rules now take the place of the writ of error, and in 1885 rules were made under the Judicature Act 1884 dealing with appeals from inferior courts. Where any new jurisdiction was created by Act of Parliament and the court acted as a court of record, error lay to the King's Bench (*Groenvelt v. Burwell*, 1 Salk. 263); and part of the jurisdiction of the King's Bench was to correct all manner of errors in fact or in law in all courts of record, including inferior courts (4 Coke's Inst. p. 71; 3 Comyn's Dig. p. 316, B (1); 3 Bacon's Abr. 96); but no writ of error lay if the judgment were not given in a court of record: (3 Bacon's Abr. 62). A writ of error was but a commission to examine the errors, and was that which gave the court jurisdiction (*ibid.* p. 70, where the form of the writ is given); and on such writ the record itself was generally though not necessarily removed, so that it might remain as a precedent in like cases and get the matter before the court (*ibid.* p. 74); and the writ might be returned into the Common Bench or King's Bench: (9 Viner, Abr. 484, No. 23). The writ was of right in all cases except treason and felony: (*Reg. v. Paty*, 2 Salk. at p. 504; *Jaques v. Cesar*, 2 Wms. S. 293). A bill of exceptions was held to lie from a County Court (*Strother v. Hutchinson*, 4 Bing. N. C. 83); from the Tolzey Court at Bristol (*Bruce v. Wait*, 1 M. & G. 1), and from the Borough Court of Liverpool (*Thomson v. Davenport*, 9 B. & C. 78; 2 Smith, L. O., 10th edit., p. 368), and in Coke's Repts. many instances are to be found of writs of error from almost all the local courts in England. Then came sect. 148 of the Common Law Procedure Act 1852, which abolished writs of error (Day, 4th edit. p. 164). These provisions did not apply to inferior courts, so that up to the time of the Judicature Acts there was an appeal from inferior courts by writ of error. Then came the Judicature Acts, and sect. 4 of the Act of 1873 provided that the High Court should have "such appellate jurisdiction from inferior courts as is hereinafter mentioned." Sect. 16 transferred to the High Court all the powers and jurisdiction of the Queen's Bench, and by sect. 45 "all appeals" from inferior courts which might before the Act have been brought to any court whose jurisdiction was so transferred might be heard by Divisional Courts. Then sect. 47 says that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter save for some error of law apparent on the record." That shows that the word "appeal" included "error on the record," and that "error," including error by bill of exceptions, which is mere machinery for getting the error before the court, is included in sects. 4, 16, and 45 as "appeals," and if it is not so included in sect. 45 it is a *casus omissus*: (see also rules 48, 49 and 50 in the schedule to the Act of 1873; and *Darley v. The Queen*, 12 C. & F. 520). Then as to what is a proceeding in error, the Act 27 Eliz. c. 8 enabled the party to sue out a writ of error, and Order LVIII., r. 1 (in the schedule to the Act of 1875) provided that "bills

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of exceptions and proceedings in error shall be abolished," and the definition of "appeal" in Wharton could not more aptly describe proceedings in error. Then sect. 23 of the Judicature Act 1884 provided that "the power to make rules conferred by sect. 17 of the Supreme Court of Judicature Act 1875, and enactments amending the same shall be deemed to include the power to make rules for regulating the procedure on appeals from inferior courts to the High Court." That clearly includes error, and, as pointed out by Wills, J. in *Reg. v. Kettle*, or *Reg. v. Judge of Worcester County Court* (54 L. T. Rep. 875; 17 Q. B. Div. 761), that enactment would have been unnecessary if it had been intended to deal only with procedure in the High Court. The same principle is laid down in *Eder v. Levy* (19 Q. B. Div. 210). Under sect. 23 of the Act of 1884, Order LIX., r. 9, was made providing that, "The following rules (10 to 17) of this order shall apply to appeals to the Queen's Bench Division from County Courts and other inferior courts of record of civil jurisdiction in all proceedings other than proceedings in bankruptcy," and rule 10 says that "every such appeal shall be by notice of motion," and rules 16 and 17 bring in Order LVIII. and make the provisions as to appeals to the Court of Appeal applicable to appeals from inferior courts. Nothing could be wider than these provisions. Appeals from these inferior courts are now by these rules substituted for the old form of procedure by bill of exceptions and error, but only those appeals can now be brought which formerly could have been brought by error on a bill of exceptions. This would include misdirection, or misreception, or non-reception of evidence, but would not include an application for a new trial, or an appeal on the ground that the verdict was against the weight of the evidence. He referred to

Cotton v. Vogan and Co., 73 L. T. Rep. 553; (1895) 2 Q. B. 652;

3 Bacon's Abr. 75, Title D (2).

Cur. adv. vult.

March 10.—The judgment of the court (Lord Alverstone, C.J., Darling and Channell, JJ.) was read by

CHANNELL, J.—In this case a rule nisi was granted calling on the Master of the Crown Office to show cause why he should not be directed to enter in the list of appeals from inferior courts, a notice of motion by way of appeal from a case tried in the Borough Court of Record of Preston. The notice of appeal complained of alleged misdirection by the judge of the borough court. The Master of the Crown Office refused to enter the appeal on the ground that no appeal lies from the Borough Court of Preston. The rule has been argued before us, and, in considering whether it should be made absolute, we have to determine whether there is now any such right of appeal, and, if so, in what cases. The court in question is an ancient court of record held in the borough under a charter. There is no modern Act of Parliament regulating its procedure, and giving an appeal from it, as in the case of the Mayor's Court of London, the Liverpool Court of Passage, and the Salford Hundred Court, and possibly other similar courts. The report of the case of *Addison v. Mayor of Preston* (*ubi sup.*) may be

referred to for statements as to the history and jurisdiction of the court. It is admitted that in the absence of a statute giving an appeal from the court in question to this court, no appeal would lie otherwise than by substitution for proceedings in error; but it is contended by Mr. Danckwerts, who supported the rule, that a litigant in the Borough Court could formerly have tendered a bill of exceptions to the ruling of the judge in case of an alleged misdirection by him, and then have brought error to the Court of King's Bench (or indeed at his option to the Court of Common Pleas) and that the effect of the Judicature Acts and Rules is that an appeal by notice of motion is now substituted for these proceedings in error. Several of the steps in this argument are clear. It is clear that before the Judicature Acts, error lay to the King's Bench from all inferior courts of record in the kingdom, and also that in all such courts a bill of exceptions to the ruling of the judge might be tendered, as in the superior courts. A misdirection of the judge might, therefore, if the objection to it was duly taken by a bill of exceptions, be reviewed and set right in the Court of King's Bench by the litigant issuing a writ of error, which he could do as of right. Mr. Danckwerts quoted to us many authorities in support of these propositions, but it is unnecessary to refer to them as the law was well settled, though perhaps not very familiar at the present day. These authorities are, however, useful upon the question which we have to consider as to how far the various steps in these proceedings were mere machinery or were matter of substance. The Common Law Procedure Acts of 1852 and 1854 first made changes in the ancient practice, and these Acts have now to be considered. The Act of 1852 contains a number of sections; beginning with sect. 146, as to the forms of proceedings in error. By sect. 148, "A writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause." This appears not to apply to error from an inferior court, but only to causes in the superior courts. The writ of error had been practically the commencement of a new action, and by this enactment error was to be only a step in the cause. This it could not be when the proceedings in which error was brought had been taken in an inferior court, but it is of no importance in the present case whether, in the period between 1852 and 1875, error from an inferior court ought to have been commenced by issuing a writ of error, or by filing a memorandum with the master, as was done in the case of proceedings in error from one of the superior courts. Mr. Danckwerts is clearly right in saying that the jurisdiction of the King's Bench to entertain proceedings in error from inferior courts was part of the original or inherent jurisdiction of the court to examine and correct all errors in inferior courts: (see Coke's 4th Institute, p. 71), and that the writ of error was not really in the nature of a special commission under which the judges entertained the matter, as appears to have been sometimes thought. No doubt it was the writ of error which in one sense gave the jurisdiction, but only in the same way that a writ in an ordinary action is required to give jurisdiction. The other provisions of the Act of 1852 require no notice. Then came the Act of 1854, and though it did not

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deal directly with proceedings in error, it contained enactments as to appeal to the Exchequer Chamber, which proved the death-blow to bills of exceptions in the superior courts, as from that time they were little required and were rarely resorted to. In the inferior courts of record the right to tender bills of exceptions of course remained at least down to the time when the Judicature Acts came into operation. There are, however, few, and possibly no reported instances, of bills of exceptions being in use at this period. None were quoted to us on the argument, and we have not found any ourselves. But this may be accounted for by the fact that at the time we are considering, between 1852 and 1875, the new County Courts had been for some time in operation, and the local courts of record themselves were very little resorted to and in fact were almost obsolete, except those courts which, like the Mayor's Court, London, had special Acts of Parliament giving appeals and rendering the resort to bills of exceptions as unnecessary as in the superior courts. We come now to the Judicature Acts. By sect. 4 of the Act of 1873 the High Court of Justice was to have such appellate jurisdiction from inferior courts "as is hereinafter mentioned," which reference appears to be to the 45th section. But by sect. 16 the High Court of Justice expressly got all the jurisdiction of the existing Court of King's Bench, and thus clearly got the jurisdiction to deal with errors from inferior courts of record. By the 45th section "all appeals from petty or quarter sessions, from a County Court, or from any other inferior court," are to be heard and determined by Divisional Courts. Now, on this section Mr. Rowlatt, showing cause against the rule, remarked that at that date error and appeal were distinct things, and that the lawyers who framed the Judicature Act would never have included "error" in "appeal." There is some force in this; but although it is true that the two things were distinct, yet the word "appeal" is undoubtedly the larger and more general word of the two, and in its wider sense is quite capable of including error, and when it is seen that there is, neither in the Act nor the rules in the schedule, any other provision whatever as to error from inferior courts (unless perhaps the 49th rule, mentioned below, abolishes it), we think the more reasonable construction is to hold that the words "all appeals from any inferior courts" in the 45th section include error. If this is not correct, by the 73rd section the old procedure in error would have been continued by this Act. If the 45th section does include it the procedure would still have been the old procedure until new rules were made under the 74th section. By the 49th rule in the schedule to that Act it is said that "Bills of exception and proceedings in error shall be abolished," but as this comes amongst the rules relating to procedure in the Court of Appeal it is doubtful whether proceedings in error from inferior courts are referred to, and as the Act was only dealing with the High Court, it can hardly be said that bills of exception in the inferior courts of record could have been abolished by these words. So that, while there is no clear abolition by the Act of 1873 of proceedings in error from inferior courts, there is certainly no clear expression of intention to continue them either under the old form or in any new form.

It is, however, of course absolutely clear that there is in the Judicature Act and rules which were passed to improve procedure and enlarge jurisdiction, no indication of any intention to take away any previously existing rights of suitors whether of originating proceedings or bringing error, or appealing without substituting new procedure for giving effect to those rights. The schedule to the Act of 1873 was repealed by the Act of 1875, but the same words "Bills of exceptions and proceedings in error shall be abolished," appear in Order LVIII., r. 1, in the schedule to the Act of 1875, but again the words appear in conjunction with provisions relating to the Court of Appeal. The Act of 1875 contains in the 15th section an enactment that the enactments as to appeals from County Courts might be extended by Order in Council to any other inferior court, and if this power had been acted on in the case of the Preston Court, it would have prevented the question now before us arising, but no such Order in Council has been made, at all events as to the Preston Court. Practically the Act of 1875 left all the questions we have to consider just as they were left by the Act of 1873. Nor were any rules which throw any light on the matter before us made until after the passing of the Judicature Act of 1884, which by sect. 23 enacted that the power to make rules conferred by sect. 17 of the Judicature Act 1875 should be deemed to include power to make rules for regulating the procedure on appeals from inferior courts to the High Court. Under this Act the present rules as to appeals from inferior courts were made, including Order LIX., r. 10, that all such appeals shall be by notice of motion. This concludes the history of the matter, and gives us the material on which our decision is to be based. The result is that, unless error from inferior courts is included both in the Acts and rules under the words "appeals from inferior courts" there is no provision for it. All through these enactments and rules there is no mention whatever of "error from inferior courts," and no mention of proceedings in error at all except to abolish them, and although it is doubtful whether this express abolition relates to error from inferior courts, it is we think impossible not to hold that so far as the Superior Court and the procedure in it is concerned, the old form of proceedings in error from inferior courts is gone, and the new forms of appeal are substituted for them. The High Court of Justice on its creation got the jurisdiction to entertain error from inferior courts, and that jurisdiction cannot have been lost. If the true view is that the old forms have been abolished without any clear substitution of the new forms for them, the new forms would nevertheless apply, just as it was held after the abolition of real actions, that a personal action could be maintained for a matter on which previously no personal action lay: (*Thomas v. Sylvester*, 29 L. T. Rep. 290; L. Rep. 8 Q. B. 368). In fact, however, the old forms appear to have gone, not so much by express abolition, as by the substitution of the new forms for the old. Turning now to the cases, the only case quoted to us of error brought since the Judicature Acts from an inferior court was *Le Blanch v. Reuter's Telegram Company Limited* (*ubi sup.*). That came from the Mayor's Court, and was brought on notice of motion to the Divisional Court for hearing appeals from inferior

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courts, and as the court of error from the Mayor's Court prior to the Judicature Acts was the Exchequer Chamber and not the Queen's Bench, the Divisional Court held that the appeal must go to the Court of Appeal as having the jurisdiction of the Exchequer Chamber. Mellor, J., however, appears to have been clearly of opinion that "error" was abolished, and "appeal" substituted; and, in *Pryor v. City Offices Company* (*ubi sup.*), Brett, M.R. seems to have been of opinion (see 10 Q. B. Div. at p. 507) that error on the face of proceedings in the Mayor's Court was properly brought before the Court of Appeal by way of appeal. We hold, therefore, that error from an inferior court is now properly brought in the High Court by notice of motion. No difficulty arises from the abolition of the writ of error, by which proceedings in error were formerly commenced, for many matters are now commenced in the High Court without a writ, for instance, by originating summons, and County Court appeals by notice of motion, and when such matters are, in accordance with the practice of the court, duly commenced without writ, there is jurisdiction to hear them. There is a somewhat greater difficulty as to the part of the proceedings in the inferior court prior to the error coming before the High Court, particularly as to the bill of exceptions. In *Reg. v. Kettle* (*ubi sup.*), a case which decided that the statutory appeal from a County Court by special case had been abolished by the High Court rules, and an appeal by notice of motion substituted for it, Wills, J. pointed out that the Act of 1884 was unnecessary if it was meant to authorise only rules for the part of the procedure on appeal from inferior courts which took place in the High Court, and that the power given by the Act of 1884 clearly extended to altering so much of the procedure in the County Court as was merely machinery for the appeal. Again, in *Eder v. Levy* (*ubi sup.*), it was held that for the old appeal from the Mayor's Court by special case, in cases over 20l. there was substituted an appeal by motion, and that the former mode of appeal having been as of right and without the necessity of the leave of the court below, the new appeal by motion might be made without leave, notwithstanding a section of the Mayor's Court Act providing that appeals by motion required leave. With these cases quoted by Mr. Danckwerts we must compare the cases quoted by Mr. Rowlatt—namely, *Re West Devon Great Consols Mine* (*ubi sup.*), *Morgan v. Bowles* (*ubi sup.*), and *Kirby v. North British and Mercantile Insurance Company Limited* (*ubi sup.*). In the first of these it was held that the Judicature Acts and rules under them as to inferior court appeals had not dispensed with the necessity for a deposit as a condition of an appeal under the Stanneries Act. This was put on the ground that the Stanneries Act was special legislation, and per Bowen, L.J., *generalia specialibus non derogant*. In *Morgan v. Bowles* (*ubi sup.*), it was held that the condition as to deposit imposed by sect. 8 of the Mayor's Court Act had not been abrogated by the new rules as to inferior court appeals. *Eder v. Levy* (*ubi sup.*) was not quoted to the court, but the two cases as reported are not necessarily inconsistent, for it does not appear by the report of *Eder v. Levy* (*ubi sup.*), that the question of deposit was raised. The two cases together bring out clearly the distinction that while matters of mere procedure for

the purpose of getting the appeal before the higher court can be altered by rules, conditions subject to which only is there a right of appeal cannot be so altered. In *Kirby v. North British and Mercantile Insurance Company Limited* (*ubi sup.*), a similar decision was given by the Court of Appeal as to the condition of time imposed by the same section of the Mayor's Court Act, and the court clearly held that the giving of the notice in proper time, and the giving of the security were conditions precedent to the existence of the right of appeal. In addition to the cases quoted to us on the argument, we may refer to the case of the *Attorney-General v. Sillem* (9 L. T. Rep. 835; 2 H. & C. 581; 10 L. T. Rep. 434; 10 H. of L. Cas. 704), in which there was both in the Exchequer Chamber and in the House of Lords a very great difference of opinion upon the question whether the Court of Exchequer, under the power given to it by sect. 26 of the Queen's Remembrancer's Act 1859 (22 & 23 Vict. c. 21) of making rules for regulating the "process, practice, and mode of pleading" of the Court in Revenue cases, could make rules applying the provisions of the Common Law Procedure Acts as to appeals to the decisions of the Court of Exchequer in Revenue cases. It was held by a majority both in the Exchequer Chamber and in the House of Lords that there was no such power, and that the creation of a right of appeal requires legislative authority. This decision is not in point in the present case, as no question arose there of altering an existing right of appeal by new procedure, but the judgments in both courts contain much learning on the differences between "error" and "appeal," and as to what is practice and procedure, and what can be done by rules, all of which throws light on the questions before us, and, as we think, justifies the conclusions at which we arrive. To apply these conclusions, it becomes necessary to consider whether it was formerly a condition precedent to a right of appeal (or perhaps we should say to a right to bring error) in respect of a misdirection in an inferior court of record that the party should have tendered a bill of exceptions, or whether tendering and getting the seal of the judge to a bill of exceptions was only machinery for the purpose of bringing the case under review in a higher court. Bills of exceptions were not known to the common law, but were introduced by the statute 13 Edw. 1, st. 1, c. 31 (in the year A.D. 1285), and, as appears from Coke's 2nd Institute, p. 426, the statute was applied in practice (though it did not in express terms extend) to all courts of record, and the case of *Thomson v. Davenport* (2 Smith L. C. 368) is one of several reported instances of error on a bill of exceptions from an inferior court being entertained. The object of the bill of exceptions was to put the matter complained of on record. Then the right to bring error followed. It must be tendered before verdict, and it was held by Holt, C.J. in *Wright v. Sharp* (1 Salk. 288), that though it may not be drawn up in form at the time it is tendered, yet, as it is to become a record, the substance of it should be "reduced to writing while the thing is transacting." When sealed by the judge both parties were concluded by it as to the truth of the matters contained in it: (Tidd's Practice, 9th edit. p. 864). The bill of exceptions was therefore, if procedure, certainly procedure of an important character; but in

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many points it much resembled a special case signed by the judge at the request of the parties for the purpose of an appeal. As it has been held in *Reg. v. Kettle* (*ubi sup.*) and *Eder v. Levy* (*ubi sup.*) that the statement of a special case was not a condition precedent to the right of appeal from the County Court and from the Mayor's Court, but was procedure only, and was abolished by the new procedure, we think we ought not to hold that the actual tendering of a bill of exceptions and getting it sealed is now a condition precedent to the right to bring under review in a superior court the matters which formerly could have been so brought by taking that course. We ought to hold that the bill of exceptions was form only, abolished now, either expressly, or, if not expressly abolished, then abolished by the substitution of new forms. At the same time we must hold that all which was matter of substance in the old form is still a condition precedent to the new appeal. The misdirection must be of a character which could be the subject of a bill of exceptions, and the old authorities on that subject would apply, and further the objection must have been taken distinctly, and brought to the judge's attention before verdict. It may be that this latter requirement adds little, if anything, to what the House of Lords has laid down in *Smith v. Baker* (65 L. T. Rep. 467; (1891) A. C. 325) is always required on an appeal from an inferior court. Further, if there were any conditions as to bail or otherwise, which were conditions precedent to the right to bring error, they will still be conditions precedent to the right to appeal: (*Kirby v. North British and Mercantile Insurance Company Limited* (*ubi sup.*)). It rather seems that bail in error was only required as a condition of a stay of execution, and not of a right to bring error (see 19 Geo. 3, c. 70, s. 5; and 7 & 8 Geo. 4, c. 71, s. 6), but that and any other questions of non-compliance with conditions precedent to the existence of the right to appeal in this case we must leave open to the argument of the appeal. Neither the notice of motion in the case before us, nor the affidavit in support of the rule, shows that there was in fact in this case anything analogous to the tender of a bill of exceptions, but that is probably owing to the fact that until Mr. Danckwerts was instructed no one had seen that the only way to support the appeal was as a substitute for error on a bill of exceptions. The notice of motion was refused in the Crown Office on the broad ground that no appeal lay in any case, and we think that we ought to direct the appeal to be entered and the appellant will have, as in a County Court appeal, to show at the hearing that he took the point of law sufficiently and took it in time. As to the materials on which the appeal has to be heard there may be some difficulty, and it may be that it will be found desirable hereafter to make some further rules of court as to appeals from inferior courts in substitution for proceedings in error, but if the rules are defective on this point it does not create any difficulty as to the jurisdiction to entertain the appeal, as Order LIX., r. 8 does, however imperfectly, provide for the case. We think the rule must be made absolute. Of course it is not a case for costs, as cause was only shown against the rule on behalf of the recorder with the view no doubt of assisting the court, and we are indebted to the counsel on both sides for the assistance given to the court in a matter of

some difficulty, and one which required considerable research. *Rule absolute without costs.* (a)

Solicitor for the plaintiff, *H. W. H. Rance*, for *James C. Milton*, Chorley.

Solicitor for the recorder, *The Solicitor to the Treasury*.

(a) April 21.—The appeals in *Darlow v. Shuttleworth* and *Darlow v. Singleton* (also from the Preston Court of Pleas) were heard before the same court.

In *Darlow v. Singleton*, which was an action on a promissory note, the verdict and judgment were for the defendant, and the ground of appeal, as stated in the notice of appeal, was that the recorder had misdirected the jury, in that he ought to have directed judgment for the plaintiff, and the notice asked for judgment for the plaintiff or a new trial. The question as to the misdirection of the judge was not taken at the trial.

Lancelot Sanderson for the respondent.—There is the preliminary objection that no question was taken at the trial of any point of law stated in the notice of appeal and now relied upon. As the point of law was not then taken it cannot be taken now, and according to the view expressed in *Darlow v. Shuttleworth* (*ante*), there is no appeal.

Firminger for the appellant.—There was error on the record itself and on the face of the proceedings in what the recorder said to the jury. [CHANNELL, J.—The plaintiff cannot go on with his appeal unless he shows that he did something at the trial analogous to or in the nature of tendering a bill of exceptions.] The question is whether we have done something tantamount to that. [CHANNELL, J.—Even if this court had been a County Court the plaintiff has not put himself in the position to appeal, according to the decision in *Smith v. Baker* (65 L. T. Rep. 467; (1891) A. C. 325) by not taking the point before the judge.] The same preliminary objection was also taken in the case of *Darlow v. Shuttleworth*. Lord Alverstone, C.J., in giving judgment upon the preliminary objection, said: 'This is an appeal from a decision of the Preston Court of Pleas in a case in which we held that an appeal lay in substance where formerly a bill of exceptions would lie. As it has been suggested that the matters are matters of form, I think it necessary to point out that a bill of exceptions was a formal document, and that an exception must have been taken at the time, and that principle has been retained as a substantial condition of an appeal from these inferior courts to the superior courts. As pointed out in *Smith v. Baker* (*ubi sup.*), in the case of appeals from County Courts it is necessary to the right of appeal that the point of law must have been taken before the County Court judge; so here the appeal can only be brought when the point has been taken before the judge. Therefore to suggest that there can be an appeal unless the point of law has been taken before the judge of the inferior court, is to lose sight of the fundamental condition of appeals from inferior courts. In *Darlow v. Singleton* no point of law was taken at the trial, and therefore there is a substantial preliminary objection in that case, and the appeal in *Darlow v. Singleton* must be dismissed on that ground. In *Darlow v. Shuttleworth* the point of law, which is stated in the notice of appeal, was taken before the judge and the preliminary objection fails.

DARLOW and CHANNELL, JJ. concurred.

[The Court then heard the appeal in *Darlow v. Shuttleworth* and allowed the appeal, sending the case back for a new trial.]

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PEARCE AND OTHERS v. BOLTON AND SHARP.

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Thursday, April 17.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PEARCE AND OTHERS v. BOLTON AND SHARP. (a)

County Court—Practice—Costs—Remitted action—Payment by defendant to plaintiff out of court—Claim reduced below 20l.—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 116.

An action of contract being brought in the High Court for over 20l., was remitted to the County Court. After the order to remit, but before the record was lodged with the registrar of the County Court, the defendants paid to the plaintiffs personally several sums which reduced the amount due on the contract to a sum less than 20l. The plaintiffs in their particulars gave credit for these sums and obtained judgment for the balance due.

Held (Darling, J. dissenting), that the plaintiffs were entitled to costs on the footing of their having recovered over 20l. in the action, and that s. 116 of the County Courts Act 1888 did not apply.

APPEAL from the County Court judge of Birmingham.

The action was brought on the 26th July 1901 in the King's Bench Division, to recover 27l. 18s. 9d. balance due on a promissory note.

On the 24th Aug. Sharp obtained unconditional leave to defend, and the action, as against him, was remitted to the County Court under the County Courts Act 1888, s. 65.

Between the 24th Sept. and the 8th Oct. three payments, amounting altogether to 8l. 15s. 3d., in respect of the amount alleged to be due on the note were made by the defendants to the plaintiffs personally.

On the 1st Nov. Bolton obtained unconditional leave to defend, and at the same time an order was made remitting the action as against him also.

On the 27th Nov. the record was lodged with the registrar of the County Court, and particulars were delivered giving credit as follows: "190l. By cash to plaintiffs 8l. 15s. 3d.," and claiming a balance of 19l. 3s. 6d.

At the trial the defendants alleged that the 8l. 15s. 3d. had been accepted by the plaintiffs in full settlement, but His Honour decided this point against the defendants and gave judgment for the plaintiffs for 19l. 3s. 6d., making no special order as to costs.

The plaintiffs brought in their bill of costs to be taxed by the registrar of the County Court, and he disallowed the whole of the items on the ground that the action was one which was founded on contract and was commenced in the High Court, but which could have been commenced in the County Court, and that according to the court records the plaintiffs had "recovered" in the action 19l. 3s. 6d., being less than 20l., and therefore the provisions of the County Courts Act 1888, s. 116, applied, and the plaintiffs were entitled to no costs of the action.

The taxation was reviewed by the judge on the application of the plaintiffs, and His Honour held that, as it appeared in the County Court particulars that the 8l. 15s. 3d. had been paid on

account of the amount claimed in the action, the plaintiffs had in substance and reality "recovered" the whole 27l. 18s. 9d., and they were entitled to costs on the corresponding scale (scale B).

The defendants appealed on the ground that the plaintiffs had recovered a sum less than 20l. by judgment or otherwise, in the action, and were therefore entitled to no costs under sect. 116 of the County Courts Act 1888 (51 & 52 Vict. c. 43).

That section provides as follows:

With respect to any action brought in the High Court which could have been commenced in a County Court, the following provisions shall apply: 1. If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds, he shall not be entitled to any costs of the action, and if he shall recover a sum of twenty pounds or upwards, but less than fifty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court.

The rest of the section deals with actions founded on tort.

Henlé for the defendants.—In this case the learned County Court judge was wrong. The judgment was for less than 20l. The word "recover" in the section means "obtain judgment for." If the 8l. 15s. 3d. had been paid into court, it would be different:

Hewitt v. Corey, 22 L. T. Rep. 666; L. Rep. 5 Q. B. 418.

He also referred to

Hughes v. Justin, 70 L. T. Rep. 365; (1894) 1 Q. B. 667;

Re Humphreys, 78 L. T. Rep. 182; (1898) 1 Q. B. 520.

J. R. Atkin for the plaintiffs.—The sum recovered in the action was substantially 27l. 18s. 9d.:

Parr v. Lillierap, 7 L. T. Rep. 425;

Keeble v. Bennett, 71 L. T. Rep. 247; (1894) 2 Q. B. 329;

White v. Headland's, &c., Company Limited, 80 L. T. Rep. 442; (1899) 1 Q. B. 507.

Henlé in reply.

CHANNELL, J.—I think that this appeal fails. In substance the plaintiffs have recovered within the meaning of the section a sum exceeding 20l. I agree that on the proceedings as they stand it does not appear that they have so recovered. There were two slips made in the proceedings. The plaintiffs brought their action first giving credit off the amount of a promissory note, and leaving a balance of 27l., which they claimed. The whole of that 27l. has in fact got into their pockets since they brought the action—that is, if they have been so fortunate as to get the proceeds of the judgment which they have obtained. After they brought their action they received out of court, and by some arrangement between the parties themselves, a sum of 8l. 15s. 3d. That reduced the sum due to 19l. 3s. 6d. When they were proceeding to give particulars in the County Court to which the action had been remitted, they gave particulars including in the sum for which they gave credit the 8l. 15s. 3d., and claiming a balance of 19l. 3s. 6d. They put the date 1901 against the 8l. 15s. 3d. The action had been brought in July of that year, therefore so far as the date given in their particulars was concerned, it was consistent with the payment having been

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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made either before or after action. Under the old system of pleading to leave the matter in doubt in this way would mean that it had been done before action, and though so far as I know there is nothing in the present rules to the effect that an undated matter is to be assumed to have taken place before action, I apprehend that that would be the ordinary rule. If they had said that that was a credit for a sum paid subsequently to action, and had then got their judgment for the 19l. 3s. 6d., it would have appeared on the face of the proceedings that they had got since action the whole sum claimed in the action. But then the proper form of the judgment would have been that they had recovered 19l. 3s. 6d. in addition to the 8l. 15s. 3d. paid since action brought. That is what the proceedings ought to show. If they had so shown, the plaintiffs would have been entitled to costs. If in that case they would have recovered 27l. 18s. 9d., then in this case they recovered 27l. 18s. 9d., but the proceedings do not show it. The real facts, however, show that the plaintiffs have recovered 27l. 18s. 9d.

DARLING, J.—In this case I regret that I am unable to agree in the conclusion at which my brother Channell has arrived. I regret it the more because the view I take may appear to be a technical one. But I think it is the natural and inevitable view of the words used in the statute. After the action was brought in the High Court, and before it was wholly remitted to the County Court, the defendants paid to the plaintiffs out of court a sum of 8l. 15s. 3d. The action went on in the County Court, and the plaintiffs recovered 19l. 3s. 6d. They got a judgment for less than 20l. The statute says that in such a case as this if the plaintiff shall recover a sum less than 20l. in the action he shall have no costs. It is said that the plaintiffs recovered more than 20l. Their judgment was for less, and the question is whether they recovered in the action the sum of 8l. 15s. 3d., which they were paid out of court. That they received it because the writ was issued is very likely. But it seems to me that they did not recover it in the action. It was not paid into court; it was not paid by any virtue of any order of the court; it was not paid upon the judgment. The amount of the judgment is the sum recovered. My brother Channell says that the 8l. 15s. 3d. was recovered in the action, because unless you gave credit for the 8l. 15s. 3d., the judgment would have been 27l. 18s. 9d. To my mind, those facts prove exactly the contrary. Because the judgment is for 19l. 3s. 6d., and not 27l. 18s. 9d., the 19l. 3s. 6d. was recovered in the action, and the 8l. 15s. 3d. was not. The whole question is whether the 8l. 15s. 3d. was recovered in the action. For this view of the statute I think there is authority. In *Parr v. Lillierap* (sup.) Martin, B. says: "If a man brings an action and declares in it and the defendant pleads and pays a sum of money into court, and the plaintiff goes to the courts and gets it, he 'recovers' in the action." What Bramwell, B. says leads to the same conclusion, and I think that the word "recover" denotes compulsion to pay by some legal process of the court. Although it is likely that the plaintiffs got the 8l. 15s. 3d. because of the issue of the writ, I think that they did not recover the 8l. 15s. 3d. in the action, and if they did not recover the 8l. 15s. 3d. in the action, they did not

recover in the action more than 19l. 3s. 6d., the amount of the judgment.

LORD ALVERSTONE, C.J.—I think that the appeal should be dismissed. It is not possible to believe that this section did not keep in view what was at that time the law applicable to defences when such an action was brought and what was the old rule as to pleas when there had been a part payment by the defendant. The law which applied to those defences was of real substance, and the now repealed County Courts Act 1867 (30 & 31 Vict. c. 142) enacted by sect. 5: "If in any action commenced after the passing of this Act in any of Her Majesty's superior courts of record the plaintiff shall recover a sum not exceeding 20l. if the action is founded on contract, or 10l. if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs." That section did bear in mind what would have been the defence if this action had been brought for the 27l. 18s. 9d. Suppose the defendant desires to answer, he must plead a plea of payment of 8l. 15s. 3d. since action brought, and defend the action in regard to the rest. I think that that principle of pleading has to be kept in view when we consider what the true rights of the parties were. It is said that the word "recover" is used in the sense of the money being obtained by some formal step in the action. I cannot think that in using the language it did use in sect. 116 of the County Courts Act 1888 the Legislature intended to confine it to that. In all these cases we must look at the substance of the matter. The judge had two documents before him. He had the writ claiming 27l. 18s. 9d., and he had the particulars, which left the matter in doubt, because they did not say that the 8l. 15s. 3d. was paid by the defendants since action brought. Speaking for myself, I must say that if the particulars had shown that the 8l. 15s. 3d. had been paid since action brought, it would have been equivalent to a plea by the defendants that money had been paid since action brought, or to a statement by the plaintiffs that with that part of the action they desired no further to proceed because the money had been paid. I think that one ought to notice that from the judgment of the registrar he seemed to think that as there was no mention of any order as to the 8l. 15s. 3d. the sum could not be said to have been recovered in the action. It is admitted that the 8l. 15s. 3d. had been paid by the defendants to the plaintiffs since action, but it is said that because the plaintiffs did not insist on the defendants paying it into court, it was not recovered in the action. In substance, however, this is a judgment for 19l. 3s. 6d. beyond the amount paid by the defendants to the plaintiffs since action brought, and therefore in the action they have recovered more than 20l. I agree with my brother Channell that the judgment ought to have been differently drawn up. The order ought to have appeared as it would have appeared under the old law if there had been a plea of payment after action brought. *White v. Headland's, &c., Company Limited* (sup.) and *Keeble v. Bennett* (sup.) show that you are entitled to add together

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the amounts recovered in the High Court and the County Court to ascertain what was recovered. Therefore the 27l. 18s. 9d. was discharged partly by payment since action brought and partly by the judgment for 19l. 3s. 6d. I should be sorry to decide this case on a mere question of form, and therefore I have assumed that any necessary amendments have been made. I think the appeal should be dismissed with costs.

Appeal dismissed. Leave to appeal.

Solicitors: *T. Haynes Duffell*, Birmingham, for the plaintiffs; *Ralph, Raphael, and Co.*, for *Blackham* and *Taylor*, Birmingham, for the defendants.

Wednesday, March 5.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MOORE (app.) v. KEYTE (resp.) (a)

Vaccination — Failure to vaccinate — Power of vaccination officer to prosecute without the authority and against the order of guardians — Power of justices to convict without proof that notice was sent to, and public vaccinator visited, the child's home — Vaccination Acts 1867 to 1898 (30 & 31 Vict. c. 84; 34 & 35 Vict. c. 98; 37 & 38 Vict. c. 75; 61 & 62 Vict. c. 49) — General Order of Local Government Board, 18th Oct. 1898, arts. 26, 27.

A vaccination officer is entitled, as vaccination officer, to prosecute a parent who has failed to have his child vaccinated according to law, though the guardians have not instructed or have forbidden him to prosecute.

In such a prosecution it is not a condition precedent to a conviction that the vaccination officer should prove that the notice to the parent and the visit of the public vaccinator to the home of the child directed by sect. 1 (3) of the Vaccination Act 1898 were in fact sent and made.

CASE stated by the Justices of Leicester.

On the 8th Oct. 1901 an information was preferred by the vaccination officer appointed by the guardians of Leicester against one Moore, that he, being the parent of a certain child residing in Leicester, had unlawfully neglected to cause the child to be vaccinated within six months of its birth.

At the hearing before the justices the clerk to the guardians produced a letter from the Local Government Board sanctioning the appointment of Moore as vaccination officer. He also put in evidence the following resolutions of the Leicester guardians:

That the board strongly condemns the action of the vaccination officer in prosecuting defaulters under the Vaccination Acts, and incurring law expenses, without consulting the guardians, and instructs him in future to report defaulters to the board, so as to afford them an opportunity to offer a reasonable excuse, as provided by sect. 29 of the Vaccination Act 1867. The guardians also point out to the vaccination officer that he is appointed (*inter alia*) subject to sect. 5 of the Vaccination Act 1871 to enforce the provisions of the Vaccination Acts 1867 to 1898, and to prosecute such persons as are charged as defaulters under the said Acts, and the guardians will specially authorise him in writing under their common seal to prosecute such defaulters as

they desire to be prosecuted; and that a copy of this resolution, signed by the chairman, and sealed with the common seal of the board, be forwarded to the vaccination officer.

The clerk to the guardians further gave in evidence that pursuant to this resolution the vaccination officer submitted to the guardians a list of twelve persons on the 4th June 1901, and another list of ten persons, including the name of Moore, on the 1st Oct. 1901, and he also read from the minute-book of the guardians a resolution passed by the guardians at meetings held on the 4th June and the 1st Oct. 1901, which was as follows:

That the vaccination officer be and hereby is instructed to take no further steps in instituting proceedings against those persons whose names are included in the list submitted to the guardians to-day until he receives the instruction of the guardians to do so.

Copies of the above resolutions were sent to the vaccination officer, and there was no resolution of the guardians requiring him to take proceedings against Moore or generally.

It was proved by the production of the certificate of birth that the child in question was born on the 13th Jan. 1901.

The vaccination officer had received no certificate of excuse under the Vaccination Acts from Moore, nor a certificate of successful vaccination.

The vaccination officer admitted that he was aware of the above resolutions, but that notwithstanding them he had taken proceedings as vaccination officer of the parish of Leicester, and that he prosecuted as vaccination officer as he contended that his appointment as such gave him impliedly power to enforce the Vaccination Acts 1867 to 1898, and to take the present proceedings without the authority or directions of the guardians.

It was contended on the part of Moore that the onus lay on the prosecution to prove as a condition precedent to a prosecution under sect. 29 of the Vaccination Act 1867 (a) that the vaccination officer had received the authority or directions of the guardians to prosecute in the case if he prosecuted as vaccination officer; (b) that the public vaccinator had visited Moore's house for the purpose of vaccinating the child in accordance with sect. 1 (3) of the Vaccination Act 1898, and that the public vaccinator had previously served notice of his intention so to do.

For the vaccination officer it was contended that the vaccination officer as such was not in law bound to receive any authority or directions whatever from the guardians before he took proceedings under the Vaccination Acts 1867 to 1898, and that resolutions passed by the guardians purporting to limit the powers of the vaccination officer under the Acts were *ultra vires* and of no avail, and that the vaccination officer when once appointed had, as such, full powers, independently of the guardians, to take such proceedings under the Vaccination Acts, and that proof of notice and visit by the public vaccinator was not a condition precedent to a prosecution by the vaccination officer under the said Acts.

The justices convicted Moore, and fined him 1s. with 6s. 6d. costs.

Moore appealed.

The questions on which the opinion of the court was sought were as follows: (1) Whether

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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the vaccination officer, by virtue of his appointment as vaccination officer, without directions, general or special, from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in certain specified cases, could institute proceedings under the Vaccination Acts 1867 to 1898 as vaccination officer of the guardians; (2) whether it was a condition precedent to a prosecution by the vaccination officer under sect. 29 of the Vaccination Act 1867 that due proof must be given of the public vaccinator having previously given to the parent the notice mentioned in the Vaccination Acts 1867 to 1898, and visited the house of the child as therein prescribed.

Vaccination Act 1867 (30 & 31 Vict. c. 84):

Sect. 16. The parent of every child born in England shall within three months after the birth of such child, or where, by reason of the death, illness, absence, or inability of the parent or other cause, any other person shall have the custody of such child, such person shall take it or cause it to be taken to the public vaccinator of the vaccination district in which it shall be then resident, according to the provisions of this or any other Act, to be vaccinated, or shall within such period as aforesaid cause it to be vaccinated by some medical practitioner; and the public vaccinator to whom such child shall be so brought is hereby required with all reasonable dispatch, subject to the conditions hereinafter mentioned, to vaccinate such child.

Sect. 29. Every parent or person having the custody of a child who shall neglect to take such child or to cause it to be taken to be vaccinated, or after vaccination to be inspected, and shall not render a reasonable excuse for his neglect shall be guilty of an offence and be liable to be proceeded against summarily.

Vaccination Act 1898 (61 & 62 Vict. c. 49):

Sect. 1 (1). The period within which the parent or other person having the custody of the child shall cause the child to be vaccinated shall be six months from the birth of the child instead of the period of three months mentioned in sect. 16 of the Vaccination Act 1867, and so much of that section as requires that the child shall be taken to a public vaccinator to be vaccinated shall be repealed. . . . (3) If a child is not vaccinated within four months after its birth the public vaccinator of the district after at least twenty-four hours' notice to the parent shall visit the home of the child and shall offer to vaccinate the child with glycerinated calf lymph, or such other lymph as may be issued by the Local Government Board.

Bawlinson, K.C. (Schultess Young with him) for the appellant.—Under sect. 1 (3) of the Vaccination Act 1898 the public vaccinator must give the parent of the child notice, and must visit the house and offer to vaccinate it. Until he has done this there is no neglect to vaccinate on the part of the parent, and there is, therefore, no offence against the Vaccination Acts. In other words, the notice and the visit are both conditions precedent to an offence, and, as such, must be proved before there is evidence to support a prosecution. This view is supported by sched. 5 to the general order under the Vaccination Acts 1867 to 1898, made the 18th Oct. 1898. Par. 5 of form A in that schedule says: "The public vaccinator will give you at least twenty-four hours' notice of his intention to visit the home of the child as mentioned above in pars. 3 and 4, and the visit will, in the absence of any sufficient reason for delay, be made within two weeks after

the receipt of the notice from you or from the vaccination officer as the case may be. If when the public vaccinator visits the home of the child," and so on. This I submit clearly shows that the parent is not in default until the vaccination officer has sent notice, and has visited the child's home. My second point arises on the construction of sect. 29 of the Act of 1867. That section makes neglect to vaccinate an offence only when the parent shall not render a reasonable excuse. To whom is he to render the reasonable excuse? I submit clearly to the guardians. They are the only authority who have to make inquiry into it under sect. 27, to whom he can make the reasonable excuse. [Lord ALVERSTONE, C.J.—I should have thought it must be rendered to the persons who were to convict him of the penalty.] I submit not, my Lord. Before a prosecution is commenced it must be established by inquiries that the parent had no reasonable excuse. No doubt the same defence can be set up before the justices, but my point is that there can be no prosecution until it is ascertained that the parent has no reasonable excuse. Sect. 27 is repealed, but the law on this point is not altered. Unless he neglects without reasonable excuse no crime is committed; and if the guardians, having inquired into the matter, and having found that the parent has a reasonable excuse, directs the vaccination officer not to prosecute, the vaccination officer has no right or power to prosecute *qua* vaccination officer. No doubt, by the Vaccination Act 1871, the appointment of vaccination officers which had been merely permissive before was made compulsory on the guardians, and the duties and powers given to registrars by the Act of 1867 were transferred to them. But there is nothing in that Act to enable the vaccination officer to disregard the orders of the guardians, whose officer he is. It is true that by art. 17 of the General Vaccination Order 1874 power was given to the Local Government Board to interfere between the guardians and their officer, and to order the latter to prosecute. But that order has been rescinded by the order of 1898, which contains no such provision. It must be assumed then that it is the deliberate intention of Parliament to leave the matter of inquiry and initiation of prosecutions to the guardians, whose officer prosecutes, and who are responsible for the costs of the prosecution. The order of 1898 contains an express provision that the vaccination officer shall, "when required by the guardians, give them full information as to any legal proceedings taken by him as vaccination officer, and subject to the provisions of the Vaccination Acts 1867 to 1898, and of this order, shall obey all lawful orders of the guardians which are applicable to his office." As to the cases bearing on the point, in *Robinson v. Lowe* (13 Times L. Rep. 19) Wright, J. condemned the general directions to prosecute given by the guardians in that case. It is true that in *Bramble v. Lowe* (1897) 1 Q. B. 283 he qualified his remarks in *Robinson v. Lowe* (*sup.*), and held that a general direction was sufficient, and seemed to be of opinion that proceedings might be taken by the vaccination officer without any orders from the guardians. That decision, however, was upon sect. 31 of the Act of 1867—not upon sect. 29—and, moreover, there no question arose as to the authority of a vaccination officer to prosecute in specific cases, where he had

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received orders not to prosecute from the guardians, whose servant he is.

The *Attorney-General* (Sir R. B. Finlay, K.C.) (with him *H. Sutton*) obtained leave to intervene on behalf of the Local Government Board.—The question as to the right of vaccination officers to prosecute in proper cases without the authority or even against the directions of their guardians is a matter of much public importance, and the Local Government Board are anxious to have the decision of the court upon it. As to the first point, it turns upon sect. 1 (3) of the Act of 1898. I submit with regard to it, firstly, that on the construction of that sub-section it is clear proof of the service of the notice, and the visit of the public vaccinator is not a condition precedent to the initiation of prosecution. It may be that if in a prosecution it is shown that no notice was sent and no visit paid the court might consider this a reasonable excuse for the parent's failure to have the child vaccinated; but, I submit that the offence is not having the child vaccinated within the period fixed by law, and that the notice and visit are not a condition precedent to the offence nor proof of them a condition precedent to a prosecution. As to the second and more important point, the facts set out in the case show clearly that there was no real inquiry here. The names of the persons in default were sent up to the guardians, and the same day the guardians passed a resolution forbidding prosecution. The result, of course, is to nullify the order recently made by this court directing them to appoint a vaccination officer who would enforce the Vaccination Acts. But I respectfully ask the court for a decision on the question of principle. Is the vaccination officer entitled without the authority or contrary to the orders of his guardians to commence prosecutions as vaccination officer in proper cases? I submit that he is, that the duty of enforcing the vaccination laws is on him and not on the guardians. The only section placing that duty on the guardians is sect. 27 of the Act of 1867, and it is now repealed. And the question of reasonable excuse referred to in sect. 31 of the same Act is for the court which hears the prosecution. The General Vaccination Order 1898 clearly recognises that the duty to prosecute is now on the vaccination officer, and that order has statutory force. By art. 26 the vaccination officer must observe the instructions given in the 4th schedule to the order. Among the instructions in that schedule is the following: (6, d) "If the vaccination officer has not received in respect of any child a certificate under sect. 2 of the Vaccination Act 1898 within the time limited by that section, and at the end of seven days after the expiration of six calendar months from the birth of the child has not received any other of the certificates mentioned in sub-division (a) of this paragraph, the vaccination officer shall forthwith give a notice in the form K, set out in the 5th schedule to this order . . . to the parent. . . . If that notice is not duly complied with within the time specified therein it will become the duty of the vaccination officer, under the Vaccination Act 1871, to take proceedings for the enforcement of the law." This clearly recognises that it is the duty of the vaccination officer to take proceedings in proper cases. It is true that under art. 29 of this order the guardians are liable to pay their vaccination officer's costs of prosecutions, and by

art. 26 their vaccination officer is to give the guardians information as to legal proceedings and obey the orders of the guardians; but the costs the guardians are to pay are confined to "reasonable costs and expenses," and the orders the vaccination officer is to obey are confined to "all lawful orders." Here I contend the guardians' orders were not lawful, having regard to the vaccination officer's duties under the Vaccination Acts, and the costs were reasonable, since the person proceeded against had failed to have his child vaccinated without reasonable excuse. The case of *Bramble v. Lowe* (*sup.*) decides that a general direction to prosecute is sufficient, but Wright, J. expressly says that the vaccination officer, in his opinion, was entitled to prosecute without any direction at all. In *Knight v. Halliwell* (30 L. T. Rep. 359, at p. 361; L. Rep. 9 Q. B. 412), Blackburn, J. says, the vaccination officer was right in proceeding without special instruction.

Parfitt, for the respondent, was not heard.

Rawlinson, K.C. in reply.—The guardians made no real inquiry in this case because their orders to the vaccination officer were not final. They merely directed him not to prosecute until further orders. Again *Bramble v. Lowe* (*sup.*) is a decision on sect. 31, and I contend it goes no further than to decide that special instructions are not necessary to enable a vaccination officer to apply for an order when a child shall be vaccinated; that is not a criminal proceeding.

Lord ALVERSTONE, C.J.—The points raised in this case are no doubt questions of great public importance, and it was for that reason, and that reason only, that we thought it right to hear the *Attorney-General*, and we should if necessary have heard Mr. Parfitt, in order to see that we had before us all the materials on which the judgment should be formed, and not that we have any doubt, notwithstanding the very able argument of Mr. Rawlinson, as to what the judgment should be that we are about to pronounce. The first point taken was that in every prosecution the prosecution must prove the notice and the domiciliary visit of the public vaccinator before the prosecution can be launched at all. That depends upon three sections of the Act of Parliament which, I think, make the matter abundantly clear. Sect. 16 of the Act of 1867 now stands in these terms: "The parent of every child born in England shall, or where, by reason of the death, illness, absence, or inability of the parent or other cause, any other person shall have the custody of such child, such person shall cause it to be vaccinated by some medical practitioner." The reason for the omission from the section of all the other words, which I need not refer to now, is because by reason of sect. 1 of the Act of 1898 provision is made, not that the child shall be taken to the vaccination officer, but by a new and a most salutary provision—as I think, one of the greatest amendments of the Vaccination Acts—that the medical man must visit the home of the parent of the child, it being the duty of the parent to cause the child to be vaccinated, and the medical man has to go to the house. Sect. 29, under which the prosecution was launched, is now in these terms: "Every parent or person having the custody of a child who shall neglect to cause it to be vaccinated, or after vaccination to be inspected,

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and shall not render a reasonable excuse for his neglect, shall be guilty of an offence." Now, it seems to us absolutely plain that when the magistrates have the case before them they will have to consider, and must consider under the question of whether there is a reasonable excuse shown, whether there has been a visit or whether there has not been a visit by the public vaccinator; but, assuming no such point is raised, it would be involving the parties in an absolutely useless and unnecessary expense if there should be required to be formal proof in every prosecution of those conditions, without which, of course, one cannot reasonably imagine that any prosecution would have taken place. The statute imposes upon the public vaccinator the duty of going there, and imposes on the parent the duty of causing his child to be vaccinated under those conditions, and to say that the prosecution must prove that the public vaccinator did visit, or that the matter is at all relevant except in connection with the consideration of what is a reasonable excuse, appears to us putting forward an argument in which there is nothing substantial, and we are of opinion that it is not necessary to give this formal proof, though it may be very material to consider what has happened in the event of it arising under some question of reasonable excuse. The next question, though it does not present any greater difficulty, is of some public importance, and I may say, speaking for myself, that I answer this question because we have been asked to answer it. It is a point of law which is capable of argument and has been argued before us, and I must not be thought to indorse the opinion that such a kind of condition can possibly be a condition for a prosecution under sect. 29. I will refer to that before I deal with the merits of the questions that have been argued before us. Sect. 29 says that every parent or person who does not cause a child to be vaccinated shall be guilty of an offence, unless he shows a reasonable excuse. Now, the real point which arises with regard to a prosecution, apart from the question which is stated to us, is whether it is necessary to show that the guardians have authorised a prosecution before the magistrates could entertain it. I am of opinion that there is nothing of the kind necessary. My brother Channell referred, in the course of the argument, to cases in lunacy, and there are many other cases where the fiat of the Attorney-General has to be obtained, as in the case of criminal proceedings against trustees, where you have to prove the fiat, and the officer goes down to prove it. In my opinion there is no ground for saying that the consent of the guardians is, on the face of the statute, on the ground of any consideration supposed to be involved in the statute to be made a condition precedent to this prosecution. But the case goes further, and we are asked to say whether the vaccination officer, by virtue of his appointment as such, without directions, general or special, from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in certain specified cases, can institute proceedings under the Vaccination Acts 1876 to 1898, as vaccination officer of the guardians. Now, I do not deal with any question between the guardians and the officer as to any question of expense he has incurred, or anything else which will arise as between the officer

and the guardians; I deal with the question of what are the public duties of the vaccination officer. We have again to go back and see the scheme of the Legislature. Sect. 16 I have already read. The parent is to cause the child to be vaccinated. Sect. 29 creates the offence. Sect. 31 was a section which gave an alternative method of getting the child vaccinated, which was a duty undoubtedly imposed originally upon the registrar or any officer appointed by the guardians, and which was subsequently by the Act of 1874 imposed upon the vaccination officer. Now, in my judgment, having regard to the provisions of the Act, and the duty which the vaccination officer has to perform, the vaccinating officer has the duty of taking proceedings. I should have come to this conclusion quite independently of the order, but I think that, most properly, the order of 1898 makes the matter, if I may use the expression, more abundantly clear. It is not as if this kind of order was passed for the first time. From the year 1874, when the Vaccination Act 1874 (37 & 38 Vict. c. 75) removed any doubt upon the point as to the powers of the Local Government Board, these orders have been made. For the purpose of to-day, I think the Attorney-General is right in saying this order is in the position of a statute. There had been in the order of 1874 arts. 16 and 17, which were under consideration in the case of *Bramble v. Lowe (sup.)*, where my brother Wright had expressed his opinion, for the purpose of sect. 31 (I agree for no more than that), that, notwithstanding the provisions of the then existing order as to the power of the guardians to direct prosecutions, the vaccination officer had the duty to proceed. I agree with Mr. Rawlinson that that is not a decision upon these sections which we are considering, but it is a decision upon analogous matter. Now, I need not read again the provisions of the order of 1898, referred to by Mr. Rawlinson and the Attorney-General; but there is a positive direction that the instructions contained in the 4th schedule are to be obeyed by the vaccination officer. The instructions are that the vaccination officer shall give a certain notice, and if it is not complied with it will become the duty of the vaccination officer, under the Vaccination Act of 1871, to take proceedings for the enforcement of the law, and form K (which he is directed to serve) tells the person that, failing the vaccination of the child, it will be his duty to take the proper steps for securing the enforcement of the law. Now, in my opinion, that order cannot, having regard to the previous legislation and the previous orders, and the powers of the Acts of 1871 and 1874, be said to be *ultra vires*. Mr. Rawlinson does not go as far as saying it is *ultra vires*, but argues that if the vaccination officer affects to take proceedings which are either generally prohibited or specially prohibited by the guardians he is bound in that respect to obey what are supposed to be lawful directions of the guardians. I think he is bound to obey the order of the Local Government Board, and any direction of the board of guardians which interferes with that order of the Local Government Board would be illegal, and he is not bound to obey it; but in my opinion there is the duty of the vaccination officer, as such, to take these proceedings. Mr. Rawlinson has said that we ought to assume in this case there was a *bona fide* investigation by the guardians into each of these cases,

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and that they thought there ought not to be a prosecution upon the merits. I cannot come to that conclusion; but I do not wish to be thought to base my judgment on any such narrow ground, I base my judgment on the ground of its being the duty of the vaccination officer under the statutes and orders to see that the provisions of the Act are observed, and to take proceedings if those provisions are not observed; and I answer the question, therefore, in the way I have said, not because it could be alleged it was a condition precedent to the prosecution being entertained, but because we have been asked to express an opinion on the point before us, and I am therefore of opinion that the appeal should be dismissed with costs.

DARLING, J.—I am of the same opinion. On the first point raised, whether it was necessary to prove that the doctor had attended at the house, I do not desire to say anything. The other point raises a legal question. The question that we are asked upon that head is this: Whether the vaccination officer can legally prosecute for breaches of the law, if ordered by the guardians not to do so, and so ordered by them for no reason given whatever? In effect, that question, if you look at the case and the documents set out in it, and on which it is founded, comes to this: that the question we are asked is whether guardians, who have been compelled by *mandamus* to appoint an officer to enforce the vaccination laws, can obey the law by appointing a vaccination officer, paying his salary, and then ordering him never to prosecute anyone unless he has their sealed order to do so, and then never issuing any sealed order, nor, so far as I can see, ever intending to issue one? Now, that is the question. To act in such a way as these guardians show, upon these resolutions that they pass, they intend to act, is simply to claim a right to reduce the vaccination laws to an absolute nullity. They pass a resolution in which they condemn the vaccination officer for prosecuting defaulters. They bring up a list of ten people—defaulters—and another list of twelve people—defaulters. They passed a resolution that he is hereby instructed to take no further steps instituting proceedings against those persons until he receives instructions from the guardians to do so, and it was very well known that they had not investigated the cases for a moment. They do not intend to issue instructions, and they set out in their resolution that the guardians will specially authorise him in writing under their common seal to prosecute such defaulters, not “as have broken the law,” but the words they use are very significant, “as they desire to be prosecuted.” I do not want to use any words which may seem disrespectful to this elected public body—the Leicester Guardians—but when I put this claim in words it irresistibly occurs to me—and I should think it would irresistibly occur to anybody who might not choose to say it, but I think I will—that this claim of the guardians is to liken the vaccination laws, and to hold that Parliament meant them to be like a very celebrated recipe for dressing cucumber, which was that you were to choose it very carefully, just as though it were a vaccination officer, peel it and cut it up into delicate slices, add to it expensive things like vinegar, pepper, salt, and the best Lucca oil, and then throw the whole mixture out of window.

In simple language, that is what the claim of these guardians comes to, and I cannot believe that Parliament devoted a whole session and worlds of trouble to reduce the vaccination laws to any such ridiculous basis. I think the argument put before us by the Attorney-General really was not necessary, but it made the matter so plain that it was to the public advantage it should be put forward, and I agree in the judgment and in the language in which it has been expressed by my Lord.

CHANNELL, J.—I agree, and I do not think it is necessary to add anything to my Lord's judgment.

Appeal dismissed.

Solicitors for the appellant, *Crowders, Vizard and Oldham*, for *Owston, Dickinson, and Simpson*, Leicester.

Solicitors for the respondent, *Fowler and Fowler*, Leicester.

Solicitors for the Local Government Board, *Sharpe, Parker, Pritchard, Barham, and Lawford*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Wednesday, Jan. 29.

(Before Sir F. JEUNE, President.)

KENT v. KENT AND OTHERS. (a)

Probate—Two wills—Power of appointment—Exercise by will—Subsequent will—No clause of revocation—No reference to power—By what words power held to be exercised—Implied revocation.

A testator made a will, reciting therein a power of appointment, and purporting to exercise that power. He subsequently made a second will. The second will contained no clause of revocation, and no reference to the power, but the testator purported to “give, devise, bequeath, and appoint,” all his real and personal estate.

It was held, under the circumstances of the case, that the power was sufficiently exercised by the use of the word “appoint,” and that the first will was, by implication, revoked by the second.

THIS was a probate action arising out of the testamentary dispositions of Edmund Jackson Kent, of Richmond, who died on the 13th June 1900.

The plaintiff was Francis Addenbrook Kent, and he, as one of the executors of the deceased, propounded two testamentary documents, dated respectively the 16th Oct 1894 and the 4th Dec. 1896, as together constituting the last will of the testator. The defendants were Mrs. Louisa S. Kent, Robert Jackson Kent, and Ernest Charles Thurgood, the last named being the person appointed by the later document as co-executor with the plaintiff. They pleaded that the earlier document was not duly executed, and that it had been revoked by the later one. They also propounded this later document as being alone the true last will of the testator.

In the document of 1894 the material words were as follows:

I hereby devise, bequeath, and appoint all my real and personal estate whatsoever belonging to me or over

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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which I have a power of appointment under the will of my late father unto my trustees upon trust, &c.

The document of 1896 contained no clause of revocation, but named the same persons trustees and executors as had been appointed in the document of 1894. It contained these words:

I give, devise, bequeath, and appoint all my real and personal estate whatsoever unto my trustees upon trust, &c.

There was no recital of the power of appointment conferred by his father's will.

Alan Stewart for the plaintiff.—The real question was whether the two documents were to be taken together, or the latter alone was to stand. The testator had little property of his own. Under the will of his father he took a life interest in a considerable estate with a limited power of appointment. The will of 1894 was undoubtedly in exercise of that power of appointment. The second will of 1896 was not an exercise of the power. It merely disposed of the private property of the testator. To arrive at the true intention of the deceased both documents should be admitted to probate. He cited

Cadell v. Wilcocks, 78 L. T. Rep. 83; (1898) P. 21; *Re Mayhew*; *Spencer v. Cutbush*, 84 L. T. Rep. 761; (1901) 1 Ch. 677.

Pritchard for Mrs. Helena Louise Hinton, a daughter and one of the next of kin of the deceased, supported the claim of the plaintiff. He referred to

Lemage v. Goodban, 13 L. T. Rep. 508; L. Rep. 1 P. & M. 57.

Inderwick, K.C. and *Beddall* for the defendant.—The will of 1894 was revoked by the will of 1896. The use of the word "appoint" by the testator, as he had only one power of appointment to exercise, was a clear indication of his intention to exercise that power when he executed the will. This was the true construction to be placed upon the judgment of Farwell, J. in *Re Mayhew*; *Spencer v. Cutbush* (*ubi sup.*). They cited the cases of

Hartley v. Tribber, 16 Beav. 510;
Hill v. Chapman, 1 Ves. Jun. 405;
Reeves v. Newenham, 2 Bidgway, 11;
Dempsey v. Lawson, 36 L. T. Rep. 515; 2 P. Div. 98.

Stewart in reply.—The mere use of the word "appoint" was not an exercise of a power, but was merely used in common form. In *Re Mayhew*; *Spencer v. Cutbush* (*ubi sup.*) Farwell, J. said that the case was very near the line.

The PRESIDENT.—The principle upon which this case depends has been already laid down in the case of *Cadell v. Wilcocks*, and I see no reason for departing from what I then said—viz., "I think that this case is governed by the familiar principle of law stated in Williams on Executors, 9th edit., p. 138, and approved by Lord Penzance in *Lemage v. Goodban*, that the mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together, and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such latter instrument will revoke the former as to those points only where they are inconsistent." Now, in this case it is clear that the second document does not revoke

the first in terms; but the question is whether it does not do so in effect. As to the property of the testator other than that over which he had a power of appointment, there is no doubt that there was a revocation. But as to the power of appointment the answer must depend upon the effect to be given to the word "appoint" used in the second will. At first I was inclined to think that the mere use of the word "appoint" would not be sufficient to execute the power; but, having regard to the decision of Farwell, J., in the case of *Re Mayhew*; *Spencer v. Cutbush*, I have come to the conclusion that as the testator had no other power of appointment than the one given him by his father's will, he must have intended to refer to that power when he made use of the word "appoint" in the will of 1896. To me it seems that it is not possible to read the will of 1896 in any other light, and I am clear that it must be admitted to probate. I have come to the conclusion, therefore, that the testator did not make use of the word "appoint" as a mere conventional term, but that he did really intend to exercise his power of appointment. Under all the circumstances, it appears to me that the second will, although there are no words of revocation, does constitute the whole expression of the intentions of the testator. The second will alone will be admitted to probate.

Solicitors for the plaintiff, *Kent and Son*.

Solicitor for Mrs. Hinton, *J. E. Churcher*.

Solicitors for the defendants, *Booth and Smes*.

Monday, March 3.

(Before Sir F. JEUNE, President.)

In the Goods of PAMELA COOK. (a)

Will—Direction to pay debts—Executor according to the tenor—Consent of residuary legatees—Grant of probate.

A testatrix by her will directed G. to pay all her just debts, and made M. her residuary legatee. G. applied for probate of the will as executor according to the tenor. This was refused in the registry on the ground that the person who claims to be executor according to the tenor must not only have some duty to perform, but there must also be a gift to him.

On application to the court, and with the consent of the residuary legatee, the grant was made.

THIS was a motion for a grant of probate to John Goodrich as an executor according to the tenor.

The testatrix, Pamela Cook, late of Shelley Cottage, Maresfield, in the county of Sussex, widow, died on the 24th Nov. 1901, leaving a will dated the 19th March 1897, which ran as follows:

This is my last will and testament. I, Pamela Cook, bequeath to my niece Mary Ann Ray, my deceased brother Henry's daughter, also to my nephew Joseph Charles Ray, son of my deceased brother Joseph Ray, also to Ellen Martha Martin, stepdaughter of my deceased sister Lucy Martin, the sum of ten pounds each; also to Harriett Martin, daughter of my deceased sister Lucy Martin, the sum of ten pounds; also to my brother Richard Ray's grandchildren each ten pounds, Ada Ray, Kate Louisa Ray, Wallace Ray, Jane Ray, Pamela Ray, George Edgar Hurst Ray. I desire John Goodrich, of 4, Camden-grove, Kensington, to pay all

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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my just debts, and I bequeath to my niece Pamela Martin all my furniture and effects and all money I possess.

The registrar refused probate on the ground that the person who claims to be executor according to the tenor must not only have some duty to perform, but there must also be a gift to him.

Various affidavits were put in, setting out the facts, verifying the due execution of the will (as there was no attestation clause) and one by Pamela Martin, the residuary legatee, consenting to a grant of probate being made to Goodrich.

The gross value of the estate was 220l.

Barnard for the motion.—A grant might be made according to the tenor. A direction in a will to a certain person to pay debts is sufficient to constitute that person an executor according to the tenor of the will. The practice of the court does not require both a gift and a duty. There is no direct authority, as in all the reported cases on the point the person directed to pay debts has had a legacy as well. It was entirely a question of construction. The debts and legacies would have to be paid out of the property.

The PRESIDENT.—The case does not appear to be covered by authority. It is possible that a person appointed to pay debts might be an agent for the legatees. But as the residuary legatee consents, I think the grant may be made to the applicant, as executor according to the tenor.

Solicitors: *Burchell, Wilde, and Co.*

Judicial Committee of the Privy Council.

March 5, 11, and April 18.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.)

MAYOR OF WELLINGTON v. JOHNSTON AND ANOTHER; SAME v. LLOYD AND ANOTHER. (a)

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Public Works Act 1894—Land taken for public purposes—Compensation—Omission to challenge amount of claim—Power of court to grant relief.

Under the New Zealand Public Works Act 1894 (58 Vict. No. 42), if land is required for public purposes, the Governor may, after the preliminary requirements of the Act have been complied with, declare by proclamation that the land is taken for the public work therein named, and the land thereupon becomes absolutely vested in the local authority. Any person claiming compensation may serve a notice of the claim upon the local authority, and "if the respondent does not, within sixty days after receiving such claim, give notice in writing to the claimant that he does not admit it the claimant may file a copy of his claim . . . in the Supreme Court; and such claim when so filed shall be deemed to be, and shall have the effect of, an award filed in the Supreme Court, and may be enforced in the manner provided": (sect. 44).

In a case in which the local authority had by

inadvertence omitted to challenge a claim within the period prescribed by the Act:

Held (affirming the judgment of the court below), that the court had no power to give them relief against the statutory consequences of such omission.

THESE were appeals from a refusal of the Court of Appeal of New Zealand (Stout, C.J., Denniston and Cooper, J.J., Edwards, J. dissenting) to set aside the filing of claims for compensation for lands of the respondents taken compulsorily by the appellants for the purpose of a public improvement in the city of Wellington, so that the claims might become void and of no effect, on motion to that effect. The motion was discharged with costs on the highest scale.

The respondents Johnston and Lewis were the owners of one undivided moiety of the fee simple of a piece of land fronting on Willis-street, Wellington, as tenants in common with Elizabeth Sarah Clark and Charles Edward Lloyd and Charles Simmers Ogg, the respondents in the second appeal.

The respondents Johnston and Lewis who both resided in England, by two powers of attorney, dated respectively the 13th July 1900 and the 30th Nov. 1900, appointed Alfred Abram Barnett, of Wellington, their attorney.

On the 5th Nov. 1900 Mr. Barnett was duly served by the appellant corporation with a copy of a proclamation by the Governor, bearing the same date, whereby the corporation did take under the provisions of the City of Wellington Empowering Act 1897 and the Public Works Act 1894 the whole of the lands before described for the purpose of widening Willis-street, in the city of Wellington, and thereupon the said lands became vested in fee simple in the appellants.

Mr. Barnett on the 8th Dec. 1900 instructed his solicitors, Messrs. Hall and Knight, to serve the appellant corporation with a claim for 12,500l., being one-half part of the sum of 25,000l., the estimated value of the lands.

On the 8th Dec. 1900 Alfred Overend, a clerk of Messrs. Hall and Knight, met the town clerk of the appellant corporation, Mr. Page, on the steps at the main entrance of the corporation office and served him with the claim for compensation and asked for a receipt. Mr. Page asked him to come to his office.

On arriving in the ante-room of the town clerk's office, Mr. Page handed the claim to Robert Tait, his clerk, who was sitting at a desk in the ante-room, and asked him to make out a receipt for the claim.

Robert Tait prepared a receipt and signed it "Robert Tait for the town clerk" and handed it to Alfred Overend. The latter asked for the town clerk's receipt, as he had personally received it. Robert Tait said that his receipt was sufficient. The town clerk came out of his room, read the receipt, and handed it to Alfred Overend.

On the 21st Feb. 1901 (being seventy-five days after the claim for compensation had been served upon him), the town clerk, Mr. Page, came to the office of the respondents' solicitors and asked Mr. Knight if he would consent to the corporation having further time to reply to the claim. Mr. Knight replied that he must consult Mr. Barnett.

(a) Reported by O. E. MALDEN, Esq., Barrister-at-Law.

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After communicating with his client Mr. Barnett, Mr. Knight, on the 21st Feb. 1901, duly filed the claim for compensation and the receipt in the Supreme Court, pursuant to sect. 44 of the Public Works Act 1894, more than sixty days having elapsed since the same had been served upon the corporation, and no notice in writing of non-admission of the claim having been received. Thereupon the claim was, pursuant to the section, deemed to be and had the effect of an award in the Supreme Court, and was enforceable in manner provided by sect. 78 of the same Act.

The claim and receipt having been duly filed, the town clerk was on the same day duly notified that this had been done.

On the following day, the 22nd Feb., the town clerk wrote to the respondents' solicitors asking them to withdraw the claim on payment of costs, and stating that the failure of the council to give notice that the claim of the respondents was not admitted was due to an omission on his part.

Mr. Barnett, being unable to communicate with his principals, instructed his solicitors to inform the town clerk that he could not withdraw the claim from the file of the Supreme Court. These instructions were carried out by a letter dated the 25th Feb. 1901, addressed to the town clerk by Mr. Barnett's solicitors.

On Tuesday afternoon, the 13th March, nineteen days after the filing of the claim, the respondents received notice of a motion to set aside the filing of the claim so that the same might become void and of no effect.

On the 15th March the motion came on for hearing before Edwards, J., and was by consent of all parties removed into the Court of Appeal.

The motion was heard on the 2nd, 3rd, and 4th April 1901 in the Court of Appeal before Sir Robert Stout, C.J., Denniston, Edwards, and Cooper, JJ.

On the 1st May judgment was delivered dismissing the motion with costs on the highest scale, Edwards, J. dissenting.

Up to this time the respondents had had no notice in writing of non-admission of the amount of their claim.

Sect. 7 of the Wellington City Empowering Act 1897 is as follows:

For the purpose of widening, diverting, altering the course of, or extending any street in the city, the council shall have the following powers: (1) To take under the Public Works Act 1894, or purchase, or otherwise acquire the land required for widening, diverting, altering the course of, or extending the street, together with land to any depth on either or both of the sides of such widened, diverted, or altered street, or of such extension of street.

By sect. 42, sub-sect. 1, of the Public Works Act 1894 (being a statute for regulating the proceedings for obtaining compensation for lands taken compulsorily by a municipal corporation or other local authority) it is provided that in order to obtain compensation the claimant shall serve upon the local authority a claim in writing in a prescribed form.

Sub-sects. (2) and (3) of the same section are as follows:

(2) Such claim shall be served, in the case of the Minister, by being delivered at the Public Works Office

at Wellington, or by being sent by registered letter addressed to the Minister at such office, and in the case of the local authority, by being left at its office, or sent by registered letter to its office; and the claimant shall be entitled to receive from the officer for the time being in charge of any such office a receipt, stating the day on which such claim was delivered or received; and any officer refusing to give such receipt on demand shall be liable to a penalty not exceeding five pounds. (3) In order to prove the service of claim as aforesaid it shall be necessary to produce the receipt of the officer receiving the same.

Sect. 44 of the Public Works Act 1894 is as follows:

If the respondent does not, within sixty days after receiving such claim, give notice in writing to the claimant that he does not admit it, the claimant may file a copy of his claim, together with the receipt for the service thereof, in the Supreme Court; and such claim, when so filed, shall be deemed to be, and shall have the effect of, an award filed in the Supreme Court, and may be enforced in the manner provided in section 76.

Sect. 76 of the Public Works Act 1894 is as follows:

(1) The court (being the compensation court defined by section 49 of the same statute) shall make its award in writing, which shall be drawn up and signed by the president as soon as conveniently may be after the making thereof; and the president shall deliver or transmit the same to the registrar of the Supreme Court, to be by him filed in the said court. (2) The court may, within one month after making the award, reverse, alter, or modify the same; and may hear such evidence and make such order as to costs or otherwise as the court may deem just. (3) Such award shall be final as regards the amount awarded, but shall not be deemed to be final as regards the right or title of the claimant or any other person to receive the same, or any part thereof. (4) But if the sum awarded be not paid into the Public Trust Office, under sub-section 1 of section 77, within sixty days after the filing of the award in the Supreme Court, the award so made and filed shall have the effect of a judgment of the Supreme Court, and may be enforced accordingly, subject, however, to the provisions of this Act.

The facts in the case of the respondents Lloyd and Ogg, the owners of one fourth share of the property, were practically the same, except that no question was raised as to the effect of the power of attorney.

The appeals were heard together.

Sir *B. Reid*, K.C. and *G. R. Northcote* appeared for the appellants.

English Harrison, K.C. (*C. P. Knight* with him) for the respondents Johnston and Lewis.

Haldane, K.C. (*L. M. Richards* with him) for the respondents Lloyd and Ogg.

The arguments appear sufficiently from the judgment of their Lordships.

The following authorities were referred to:

Williams v. Corporation of Wellington, O. B. & F. 34; on appeal, 3 N. Z. L. Rep. (C. A.) 210;

Koertz v. Waverley Town Board, 3 N. Z. L. Rep. (S. C.) 48;

Henson v. Mayor of Cambridge, 12 N. Z. L. Rep. 251;

Cocker v. Tempest, 7 M. & W. 502;

Barker v. Palmer, 45 L. T. Rep. 480; 8 Q. B. Div. 9.

Sir *B. Reid*, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

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April 18.—Their Lordships' judgment was delivered by

LORD MACNAGHTEN.—These two appeals were heard together. They raise one and the same question: Can a local authority, having taken land under the Public Works Act 1894, having received a claim for compensation from the late proprietor, and having omitted to challenge the amount of the claim within the period prescribed by the Act, obtain relief in a court of law against the statutory consequences of such omission? In New Zealand, under the Public Works Act 1894, the expropriation of lands required by a local authority for public works is rather a summary process. A survey is made and a plan prepared and deposited and then notices are gazetted calling "upon all persons affected" to set forth in writing any "well-grounded objections" to the taking of the lands. An "objection to the amount or payment of compensation" is not to be deemed a well-grounded objection. If no objection is made within the prescribed time, or if after due consideration of all objections the local authority is of opinion that it is expedient that the proposed works should be executed, the land is to be taken in the manner set forth in sect. 18. That section authorises the Governor, after the preliminary requirements of the Act have been complied with, to declare by proclamation that the lands (a list of which is to be contained in or annexed to the proclamation) are taken for the public work therein mentioned. And then, from and after a day named in the proclamation, the land becomes absolutely vested in the local authority, "discharged from all mortgages, charges, claims, estates, or interests, of what kind soever, for the public use named in the proclamation." Part 3 of the Act, beginning with sect. 34, deals with the subject of compensation. Any person claiming compensation (in the Act styled "the claimant") is to serve upon the local authority (styled "the respondent") a claim in writing in one of the forms in the 2nd schedule to the Act, stating among other things the total amount claimed and the name and address of the claimant. It is provided (sect. 42 sub-sect. 2) that the claim shall be served by being left at the office of the local authority, or sent by registered letter to its office, and that "the claimant shall be entitled to receive from the officer for the time being in charge of any such office a receipt, stating the day on which such claim was delivered or received." Sect. 44, on which the question at issue in this case depends, is in the following words: "If the respondent does not, within sixty days after receiving such claim, give notice in writing to the claimant that he does not admit it, the claimant may file a copy of his claim, together with the receipt for the service thereof, in the Supreme Court; and such claim when so filed, shall be deemed to be and shall have the effect of an award filed in the Supreme Court and may be enforced in the manner provided in section seventy-six." If the respondent give notice in writing within the said sixty days that he does not admit the claim, or if the claimant does not accept the respondent's offer, assuming that an offer is made by the respondent, provision is made for having the question determined by a court styled "the compensation court." Where the claim exceeds 250*l.* the compensation court consists of two

assessors, one named by each party, and a judge of the High Court as president. Then follow provisions as to the hearing of the case and the making of the award. Sect. 76, which is referred to in sect. 44, is in the following terms: "76. (1) The court shall make its award in writing, which shall be drawn up and signed by the president as soon as conveniently may be after the making thereof; and the president shall deliver or transmit the same to the registrar of the Supreme Court, to be by him filed in the said court. (2) The court may, within one month after making the award, reverse, alter, or modify the same; and may hear such evidence and make such order as to costs or otherwise as the court may deem best. (3) Such award shall be final as regards the amount awarded, but shall not be deemed to be final as regards the right or title of the claimant or any other person to receive the same or any part thereof. (4) But if the sum awarded be not paid into the Public Trust Office, under sub-section one of section twenty-seven within sixty days after the filing of the award in the Supreme Court, the award so made and filed shall have the effect of a judgment of the Supreme Court, and may be enforced accordingly, subject, however, to the provisions of this Act." The facts in both the cases under appeal are very simple and not in dispute. Certain lands belonging to the respondents were required by the corporation of the city of Wellington for public improvements. They were taken under the Act of 1894, and the respondents were dispossessed. In due course they sent in a claim in accordance with sched. 2 of the Act, stating amongst other things the total amounts of their respective claims. The period of sixty days mentioned in sect. 44 of the Act expired without notice being given by or on behalf of the corporation that they did not admit the claim. In due course the respondents filed copies of their claims, together with receipts for the service thereof, in the Supreme Court. Thirty-one days in the one case, and fifteen days in the other, after the expiration of the statutory period the town clerk discovered that he had allowed the time prescribed by the Act to elapse. He applied to the solicitors of the respondents, stating that the failure of the council to give notice that the claim was not admitted was due to an omission on his part, and begging them to ask their clients to withdraw the claim and allow the matter to go to the compensation court. This proposition was declined. Thereupon the council gave notices of motion in the Supreme Court asking in each case for an order to set aside the claim, "so that the same might become void and of no effect as an award within the meaning of the Act of 1894 notwithstanding the provisions of sect. 44 of the Act." The first and principal ground alleged in each case was "that the corporation did not admit the said claim, and that the omission of the corporation to give notice to that effect to the claimants within sixty days after the receipt of such claim was accidental and entirely due to inadvertence." The motions were by consent removed into the Court of Appeal. That court (*dissentiente* Edwards, J.) discharged both motions with costs. The case was argued before this board on behalf of the appellants with great ability and earnestness; but, notwithstanding the opinion of the learned judge who differed from

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his colleagues, the question appears to their Lordships to be too plain for argument. Edwards, J. described the conduct of the respondents, who did no more than what the Act of Parliament authorised and directed them to do as "an attempt to snatch a judgment" and "an abuse of the process of the court." The learned counsel for the appellants did not use language so inappropriate. Everybody, he said, was liable to make a mistake; the slip in the present case was one which a hard-worked official in the pressure of business might be excused for making; after all no injustice would be done if claims which his clients on sworn testimony regarded as extravagant were referred to the court specially constituted to take cognisance of such questions. So far, their Lordships are not concerned to differ from the view presented to them, and it may be taken for granted that the respondents' claims, whether they are or are not so extravagant as the appellants represent them to be, are probably in excess of any amount which could be established on reference to arbitration. An evicted proprietor demanding compensation from a wealthy corporation may be trusted to make the most of his claim. But this is not the question. The question is, has any court the right to deprive the respondents of the advantage which the law of the land gives them. The scheme of the Act is not unreasonable. The local authority initiate the proceedings. They dispossess the person whose land they want. They dispossess him without paying down or securing anything in the shape of compensation. They leave him to make his claim. Is the period of sixty days too short a time to enable the local authority to make up their minds whether they will admit his claim or not? If they do not admit it they have nothing to do but to say so. It was said that Parliament has overlooked the possibility of a slip. It has certainly made no provision for a slip in the case of a local authority setting the Act in motion. It has made provision for a slip in the case of a claimant who has received notice that his claim is not admitted failing to make the next move in due time. But that is a different case altogether. It is not unreasonable to require that public bodies putting in force an Act of Parliament for their own purposes should attend to its provisions. It would be contrary to natural justice to deprive a claimant whose land has been taken from him of all compensation because he makes a slip which cannot prejudice the other side. But even in that case the claimant is not allowed to prosecute his claim without the leave of the compensation court and upon such terms and conditions as that court thinks fit. This special provision in the case of a claimant tells against rather than for the appellants' contention. Then it was asked, suppose the claimant has been guilty of fraud—Would there be no remedy in that case? Certainly there would be a remedy. Courts of justice have an original and inherent jurisdiction to relieve against every species of fraud, but it may be that the relief would have to be sought in an independent action. It was admitted by Sir Robert Reid that the slip which occurred in this case was not a mistake against which relief could be obtained in a court of equity. His argument was that when the claim was filed in the Supreme Court it came under the control of the court, and that just as courts of

law and equity before the days of statutory rules and orders could deal with their own procedure and enlarge the time for taking any step in an action and set aside on such terms as they thought fit a judgment obtained by default, so the Supreme Court in such a case as this ought to set aside the award and enlarge the time, and by some process which was not clearly explained, remit the case to a compensation court. Their Lordships, however, cannot find in the Act any authority for such a course. The rights of the claimants were fixed by statute before the Supreme Court had anything to do with the matter. The only function of the Supreme Court was to enforce the claim as an award and see that the money reached the proper hands. The circumstance that an award made by a compensation court seems to be only provisional for the space of a month under sect. 76 sub-sect. 2 does not assist the argument or afford any analogy for the course suggested on behalf of the appellants. In that case the court to deal with the award during the month of grace is not the Supreme Court but the Compensation Court. Failing the principal ground of appeal, two other points were put forward on behalf of the appellants. In one of the cases it was said that the claim was not made as directed by the Act. The claimants were absent. Two powers of attorney were produced, one of which, it was argued, did not on its true construction authorise the attorney to make the claim, while the other, it was suggested, was too late. But in fact no power of attorney was required. The claim was made by an agent in the name and avowedly on behalf of the respondents, and they have ratified the action of their agent. The other objection was not more substantial. It was said that the receipt filed on behalf of the claimants was not given by the officer for the time being in charge of the office, but by an assistant or subordinate. It appears that it was in fact signed by an assistant in the office for the officer in charge and by his direction. Their Lordships are of opinion that this was a sufficient compliance with the Act. But if it was not, the respondents are now entitled to demand a proper receipt in conformity with the Act. Their Lordships are of opinion that the appeals fail, and they will humbly advise His Majesty that they ought to be dismissed. The appellants will pay the costs of the appeals.

Solicitors for the appellants, *Bowerman and Forward*.

Solicitors for the respondents *Johnston and Lewis, Budd, Johnsons, and Jacks*.

Solicitors for the respondents *Lloyd and Ogg, Flower and Flower*.

CT. OF APP.]

Re HOLLAND; GREGG v. HOLLAND.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

March 17, 18, 24, 25, and April 29.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re HOLLAND; GREGG v. HOLLAND. (a)

APPEAL FROM THE CHANCERY DIVISION.

Post-nuptial settlement — Recital of ante-nuptial parol agreement — Husband's interest determinable on bankruptcy — Statute of Frauds (29 Car. 2, c. 3), s. 4 — 13 Eliz. c. 5.

In Aug. 1872 A., being then an infant, married B. In Feb. 1873 a post-nuptial settlement was executed by A., who was still an infant, and B. The settlement was by deed, and contained a recital that previously to the marriage the husband agreed to make such settlement of the fortune of his wife as was thereafter contained; and a covenant by the husband with the trustees of the settlement that he and the wife, or the survivor of them, and all other necessary parties, would transfer to them, upon the trusts of the settlement, a share in certain residuary estate to which his wife was entitled under the will of her father, in remainder expectant upon the death of the testator's widow, immediately it became an interest in possession. The trusts of the settlement were to pay the income of the trust fund to the wife for life for her separate use without power of anticipation, and after her death, if the husband should survive her and should not have become bankrupt or assigned or incumbered the income, to pay the income to the husband for life or until he should become bankrupt or assign or incumber the income, with remainder to the children or other issue of the marriage as the husband and wife jointly or the survivor of them should by deed appoint, with remainder in default of appointment as therein mentioned.

In 1877 the wife died intestate, having attained the age of twenty-three years, leaving the husband and three sons her surviving.

In 1897 the husband purported to appoint two-thirds of the trust fund in favour of two of the sons, and at the same time surrendered to them his life interest in those two-thirds.

In 1898 a receiving order was made against the husband, and he was adjudicated bankrupt.

In 1899 the testator's widow died, and the fund accordingly fell into possession and was claimed by the official receiver as trustee in the husband's bankruptcy.

Held, that there was nothing to show that the settlement was executed with intent to delay or defraud creditors; and that, disregarding the recital and treating the settlement as a voluntary settlement, it was not fraudulent within 13 Eliz. c. 5.

Re Pearson; Ex parte Stephens (35 L. T. Rep. 68; 3 Ch. Div. 807) disapproved.

But held that, with regard to the recital, although not sufficiently definite and precise to create an estoppel, it was as against the settlor and anybody claiming under him evidence of a parol

agreement before marriage between the settlor and his intended wife that such a settlement should be executed as was in fact executed, and was sufficient to satisfy sect. 4 of the Statute of Frauds.

Decision of Farwell, J. (85 L. T. Rep. 304) reversed.

By his will, dated the 26th April 1871, Henry Holland devised and bequeathed his residuary real and personal estate upon trusts for the benefit of his widow for life and his children after her decease, sons upon attaining the age of twenty-one years and daughters upon attaining that age or marrying.

The testator died on the 12th Dec. 1871.

On the 27th Aug. 1872 one of the testator's eight children, Charlotte Fanny Holland, intermarried with Isidore McWilliam Bourke, she being at that time an infant.

On the 8th Feb. 1873 a post-nuptial settlement was executed by deed made between Isidore Bourke and Charlotte Fanny Bourke (still an infant) of the first part, the testator's widow and the trustees of his will, who were also the infants' guardians, of the second part, and Henry Holland, W. M. Bourke, and John Aldwinckle, as trustees of the settlement, of the third part.

The settlement contained the following recital:

Whereas the said parties hereto of the first part intermarried on the 27th day of August 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained.

And the indenture witnessed that, in pursuance of such agreement and in consideration of the marriage, Isidore M. Bourke covenanted for himself and his wife with the trustees that immediately upon the share and interest of and in the residuary estate and effects of Henry Holland to which the husband and wife, or the husband in her right, or either of them then were or was or thereafter might become entitled, should become an interest in possession, the husband and wife, or the survivor of them, and all other necessary parties would assign or transfer the same share and interest and every part thereof unto the trustees of the settlement upon the trusts and subject to the powers and provisions thereof.

The trusts declared by the settlement were to pay the interest, dividends, and income of the trust fund to the wife for life for her separate use without power of anticipation, and after her death if the husband should survive her, and shall not be outlawed, or have been or become bankrupt, or have made or make any arrangement by way of liquidation, composition, or otherwise with his creditors, and should not have assigned, charged, or incumbered, or attempted or affected to assign, charge, or incumber the interest, dividends, and income, or any part thereof, or have done or suffered anything whereby the same or any part thereof would through his act or default, or by operation or process of law or otherwise if belonging absolutely to him have become vested in or payable to some other person or persons to pay the interest, dividends, and income to the husband during his life or until he should be outlawed or become a bankrupt or make any arrangement by liquidation, composition, or otherwise with his creditors, or should assign, charge, or incumber, or attempt or affect to assign, charge, or incumber the interest,

(a) Reported by E. A. SUBATCHEY, Esq., Barrister-at-Law.

dividends, and income, or some part thereof, or should do or suffer anything whereby the same or any part thereof would through his act or default, or by operation or process of law or otherwise if belonging absolutely to him to become vested in or payable to some other person or persons. And after the death of the wife and the determination of the trusts in favour of the husband trusts were declared for the benefit of all or such of the children or other issue of the marriage as the husband and wife jointly, or the survivor of them, should by deed appoint, with remainder, in default of appointment, to all and every the children of the marriage who should, being sons, attain the age of twenty-one years, or being daughters, should attain that age or marry under that age with the consent of their guardians, in equal shares, with the usual hotchpot clause.

The wife died intestate in 1877, having attained the age of twenty-three years, leaving the husband and three sons her surviving.

The joint power of appointment was not exercised.

By a deed dated the 25th Oct. 1897 the husband purported to appoint, in exercise of the power contained in the settlement, two-thirds of the trust fund in favour of two of the sons, and at the same time surrendered to them his life interest in those two-thirds.

The husband subsequently became insolvent, and on the 18th March 1898 he was adjudicated bankrupt, the official receiver being appointed his trustee.

On the 11th Dec. 1899 the testator's widow died and the fund accordingly fell into possession.

Thereupon the trustees of the will of the testator took out an originating summons to have it determined to whom the eighth share of Charlotte Fanny Bourke was payable—whether it was bound by the settlement or belonged to the official receiver.

The summons was adjourned into court and came on to be heard before Farwell, J. on the 14th March 1901, when his Lordship reserved judgment.

On the 21st March 1901 his Lordship delivered a written judgment, deciding (85 L. T. Rep. 304) that a recital of an ante-nuptial parol agreement in a post-nuptial settlement was not sufficient to satisfy sect. 4 of the Statute of Frauds; that the post-nuptial settlement was therefore voluntary and void against creditors; and that, though it would work an estoppel against the husband, it could not against his trustee in bankruptcy.

From that decision the trustees and beneficiaries under the settlement now appealed.

Herbert Reed, K.C. and St. John Clerke for the appellants.—As between the parties to the settlement, the recital of the ante-nuptial parol agreement is good evidence thereof, and a sufficient memorandum to satisfy sect. 4 of the Statute of Frauds:

Dundas v. Dutens, 1 Ves. Jun. 196, at p. 199; 2 Cox, 235; 1 R. E. 112;

Codrington v. Lindsay, 28 L. T. Rep. 177; L. Rep. 8 Ch. App. 578, at p. 588.

The recital operates by estoppel, and the parties cannot deny the truth of the recital, and that there was such an agreement. The intention being clearly expressed, the parties were bound to do all things necessary to carry it into effect.

In specific performance of that agreement the husband was bound to make a settlement:

Young v. Smith, L. Rep. 1 Eq. 180, at p. 184; *Buckland v. Buckland*, 82 L. T. Rep. 759; (1900) 2 Ch. 534.

The official receiver stands in the shoes of the bankrupt, and is bound by all his equities. He is, therefore, estopped from denying the truth of the recital:

Harris v. Truman, 46 L. T. Rep. 844; 9 Q. B. Div. 264.

It is admitted that the settlement rests in fieri, and requires the consideration of marriage to support it, but that is supplied by the recital of the ante-nuptial parol agreement. If the settlement is binding the surrender of the husband's life interest operated as a forfeiture, and he had no interest under the settlement to pass to the official receiver:

Re Detmold; *Detmold v. Detmold*, 61 L. T. Rep. 21; 40 Ch. Div. 585;

Re Brewer's Settlement; *Morton v. Blackmore*, 75 L. T. Rep. 177; (1896) 2 Ch. 503.

Then as to whether the settlement is void against creditors because it is a voluntary settlement, we submit that it is not to be treated as voluntary at all, and it is not in any way fraudulent against creditors within 13 Eliz. c. 5. A settlement executed after marriage, in consideration of an interest given to the wife, is not fraudulent against the creditors of the husband:

Wheeler v. Caryl, Amb. 121.

It would have been impossible to say at the date of the settlement that it would defeat or delay creditors of necessity, and if it was not void in its inception events cannot make it void afterwards. Farwell, J. decided this case mainly upon the authority of one case, which, however, is not of general application, and until the present case had never been actually applied:

Re Pearson; *Ex parte Stephens*, 35 L. T. Rep. 68; 3 Ch. Div. 807.

In that case the husband settled his own property; in the present case he settled his wife's chose in action. There is no case, save *Re Pearson*; *Ex parte Stephens* (*ubi sup.*), which decides that a defeasance clause of this kind—the fact that the settlor's interest is made determinable upon bankruptcy—is sufficient of itself to render the settlement fraudulent within the statute of Elizabeth, and to void the whole settlement. [COZENS-HADY, L.J.—In *Re Detmold*; *Detmold v. Detmold* (*ubi sup.*) North, J. appeared to accept *Re Pearson*; *Ex parte Stephens* (*ubi sup.*) as good law.] He did not apparently think it necessary to consider that part of the decision in *Re Pearson*; *Ex parte Stephens* (*ubi sup.*) to which we are referring. In *Re Detmold*; *Detmold v. Detmold* (*ubi sup.*) the decision of *Knight v. Brown* (4 L. T. Rep. 206) was referred to. [WILLIAMS, L.J.—It does not seem to me that *Re Detmold*; *Detmold v. Detmold* (*ubi sup.*) assists us much. It turned exclusively upon the difference between a gift over in the event of bankruptcy and a gift over upon voluntary alienation.] It turned upon the phrase “until he shall become bankrupt.” The argument was that it made the gift over invalid; but it was decided by North, J. that a gift over of property of a settlor upon voluntary alienation, or involuntary alienation by process of law, in favour

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of a particular creditor was not void. The principle established with regard to the statute of Elizabeth is that the court must look at all the facts and must consider all the circumstances of the case:

Ex parte Mercer; *Re Wise*, 54 L. T. Rep. 720; 17 Q. B. Div. 290;

Thompson v. Webster, 4 Drew, 628.

They referred also to

Higinbotham v. Holme, 19 Ves. 88; 12 R. P. 146; *Mackintosh v. Pogoss*, 72 L. T. Rep. 251; (1895) 1 Ch. 505;

Re Tetley; *Ex parte Jeffery*, 75 L. T. Rep. 166;

Freeman v. Pope, 23 L. T. Rep. 208; L. Rep. 5 Ch. App. 538;

Re Lane-Fox; *Ex parte Gimblett*, 83 L. T. Rep. 176; (1900) 2 Q. B. 508.

Upjohn, K.C. and *Alfred Adams* for the respondent, the official receiver.—[WILLIAMS, L.J.—Will you deal in the first place with the point arising on *Re Pearson*; *Ex parte Stephens* (*ubi sup.*).] If we are right in saying that this settlement is a purely voluntary deed, it is unnecessary to go on to show that it is void under the statute of Elizabeth. But in *Re Pearson*; *Ex parte Stephens* (*ubi sup.*) the facts were these: In 1858 a man who was not then engaged in trade, and who owed no debts, made a voluntary settlement of a fund which he possessed, thereby giving himself a life estate determinable on bankruptcy, then a life estate to his wife for her separate use, then trusts for his children, and an ultimate remainder to the settlor. In 1873 he for the first time became engaged in trade. In 1875 he was adjudicated bankrupt. It was decided by Bacon, C.J. that the settlement was void *in toto* as against the trustee in bankruptcy. Therefore we submit that, as Farwell, J. decided, the covenant is void as being a fraudulent conveyance or alienation within the statute of Elizabeth. Quite apart from *Re Pearson*; *Ex parte Stephens* (*ubi sup.*), however, it is of the utmost importance for the appellants to establish that a settlement, not made in contemplation of marriage, but after marriage, cannot be invalidated against a trustee in bankruptcy merely because there has been inserted therein the recital of an ante-nuptial parol agreement to execute a settlement. We say that a voluntary covenant to settle does not bind the official receiver; and that therefore the only right of the trustees and beneficiaries under the settlement is to come in and prove with the other creditors:

Mackay v. Douglas, L. Rep. 14 Eq. 106.

The case of *Re Detmold*; *Detmold v. Detmold* (*ubi sup.*), and that class of authority, including *Higinbotham v. Holme* (*ubi sup.*), were all cases of marriage settlements. The court always looks at a marriage settlement in a different way from that in which it considers a post-nuptial settlement. The interests of unborn children have to be guarded. In one case the children supply a consideration for the settlement; in the other they do not. [WILLIAMS, L.J.—Whatever our view may be upon this point we must hear you upon the other.] Is this a voluntary deed or not? That is what the court has to determine. As to this point, we say that notwithstanding the recital, even assuming that the settlement is not fraudulent within the statute of Elizabeth, yet it is a voluntary deed. It does not pass the interest in

the fund. It rests *in fieri*, and the court would not grant specific performance of the covenant, which does not do what a covenant based upon valuable consideration would do:

Ellison v. Ellison, 6 Ves. 656; 6 R. R. 19.

[WILLIAMS, L.J.—You are arguing upon the assumption that this settlement is a voluntary deed. You had better first argue the point whether or not it is a voluntary deed.] We submit that it is a voluntary deed, and not founded on the consideration of marriage, first, because there is no evidence which affects the official receiver as to there being a marriage; and, secondly, because there is no memorandum in writing of the alleged agreement to execute a settlement sufficient to satisfy sect. 4 of the Statute of Frauds. If either of those contentions is right, then this is a voluntary deed. The principle of estoppel ought not to be applied. But whether by estoppel or otherwise, the recital cannot bind the official receiver:

Battersbee v. Farrington, 1 Swanst. 106, at p. 118; 18 R. R. 32;

Onward Building Society v. Smithson, 68 L. T. Rep. 125; (1893) 1 Ch. 1.

[WILLIAMS, L.J.—The case of *Battersbee v. Farrington* (*ubi sup.*) seems to be rather an authority against you so far as it goes.] We were relying upon passages in the judgment. Although we can refer to no direct authority, yet it depends, we submit, upon the policy of the bankruptcy law that such a covenant as in the present case cannot be supported. [WILLIAMS, L.J.—Then you are asking us to invent a policy, which we must be careful about doing.] The effect of recitals in a settlement was considered in

Kevan v. Crawford, 6 Ch. Div. 29.

Our propositions are, first, that there is no evidence of an agreement to settle, and that therefore the court cannot enforce it; and, secondly, that in the case of a marriage consideration you cannot have a good memorandum after the marriage is celebrated. Notwithstanding the dictum in *Dundas v. Dutens* (*ubi sup.*) the mere recital in a post-nuptial settlement of an ante-nuptial agreement is not sufficient; and, therefore, the post-nuptial settlement must be treated as voluntary and cannot bind creditors:

Spurgeon v. Collier, 1 Eden 55, at p. 61;

Warden v. Jones, 2 De G. & J. 76, at p. 85;

Randall v. Morgan, 12 Ves. 67; 8 R. R. 289;

Trouwell v. Shenton, 38 L. T. Rep. 360; 8 Ch. Div. 318, at pp. 324, 326;

Sugden on Powers, 8th edit., p. 647;

Hodgson v. Hutchenson, 5 Vin. Abr. 522, pl. 36;

Montacute v. Maswell, 1 Strange 236; *Proc. Ch.* 526; 1 Eq. Cas. Abr. 19, pl. 4; 1 P. Wms. 618;

Taylor v. Beach, 1 Ves. Sen. 297;

Barkworth v. Young, 4 Drew, 1, 12;

De Beil v. Thomson, 3 Beav. 469;

Hammersley v. De Beil, 12 Cl. & F. 45, 61 n., 64 n.;

Lassence v. Tierney, 1 Mac. & G. 551, at p. 571.

[WILLIAMS, L.J. referred to *Bird v. Blosse* (2 Vent. 361) and *Moore v. Hart* (1 Vern. 110).] The case of *Dundas v. Dutens* (*ubi sup.*) does not show that a deed of this kind is not voluntary. *Non constat* because a deed is voluntary it is fraudulent within the statute of Elizabeth. Lord Thurlow in that case was considering whether the settlement there was fraudulent

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within the statute of Elizabeth. Under that statute it is not necessary to show that there was an actual intention to delay or defraud creditors, but it is enough if the settlement is shown to be of such a nature as to necessarily do so:

Freeman v. Pope (ubi sup.).

The fact that the settlor's interest is made determinable on bankruptcy is sufficient in itself to render the settlement fraudulent within the statute:

Re Pearson; Ex parte Stephens (ubi sup.).

[WILLIAMS, L.J.—The mere fact that a settlement is voluntary does not, standing alone, bring it within the statute of Elizabeth. You must show something else, although it is one of the points to be taken into consideration.] Then we say that, looking at the recital in this settlement, it does not comply with sect. 4 of the Statute of Frauds. It does not give the name of the parties to the agreement. It does not state the consideration and it does not contain the whole agreement. It is not therefore a good memorandum to satisfy the provisions of that section.

Cosens-Hardy for the respondents, the trustees of the will.

St. John Clarke, in reply, referred to

May on Voluntary Settlements, p. 68:

Montefiore v. Behrens, L. Rep. 1 Eq. 171.

Cur. adv. vult.

April 29.—The following written judgments were delivered:

WILLIAMS, L.J.—The facts of this case are thus stated by Farwell, J. in his judgment: [His Lordship read them, and continued:] The fund is claimed by the trustees and beneficiaries under the settlement of the 8th Feb. 1873, and their claim is resisted by the official receiver, as trustee of Isidore Bourke. It is conceded by counsel for the trustees and beneficiaries that the settlement rests *in fieri*, and cannot be enforced unless it can be supported by the consideration of marriage, and he relies on the recital of an ante-nuptial contract. Now, as I understand, the official receiver shapes his case in two ways. First he says that the covenant is void as being a fraudulent conveyance or alienation within the statute 13 Eliz. c. 5; secondly, he says that, even assuming that the settlement is not fraudulent within the statute, yet the settlement is a voluntary settlement resting *in fieri* of which a court of equity would not grant specific performance, and that, therefore, the only right of the trustees and beneficiaries under the marriage settlement is to come in and prove with the other creditors. Now, as to the first point, Farwell, J. has decided, on the authority of the case of *Re Pearson; Ex parte Stephens* (35 L. T. Rep. 68; 3 Ch. Div. 807), that, having regard to the fact that Mr. Isidore Bourke was at the date of the execution of the post-nuptial settlement entitled *jure mariti* to the property the subject of the settlement, the fact that the settlement contains a clause providing that his beneficial interest should continue until he should become bankrupt or assign or attempt or affect to assign is conclusive to make the settlement fraudulent within the statute of Elizabeth. I agree that this is the effect of the decision in the case of *Re Pearson (ubi sup.)*, and the court's decision bound Farwell, J., but the decision does

not bind us, and I shall therefore consider whether or not it is right. I do not think that the decision in *Re Pearson (ubi sup.)* is right. I think that in each case you must look at the whole of the circumstances surrounding the execution of the conveyance, and then ask yourself the question whether the conveyance was in fact executed with the intent to defeat and delay creditors: (*Ex parte Mercer; Re Wise*, 54 L. T. Rep. 720; 17 Q. B. Div. 290). In my judgment in the present case one ought not on the evidence before us (even excluding the recital of the ante-nuptial promise) to find such intent. The property the subject of the settlement had been reversionary property in the right of the wife, and only came to the husband in her right. Under these circumstances it was right and proper that the husband should make some settlement, and the settlement which he in fact did make seems to me to have been a right and proper settlement for the husband to make of property coming to him in the right of his wife, provided only he was not at the time of the execution of the settlement unable to pay his creditors or contemplating, entering upon, or continuing in a business of such a speculative nature as to be likely to land him in financial embarrassments. In the present case the settlement gives to the wife a first life interest, and then to the husband if he survives the wife, but not otherwise, a life interest until he should become bankrupt or should assign or incur or attempt to assign or incur his life interest, and after the failure and determination of the trusts declared in favour of the husband, the trustees were to stand possessed of the trust premises in trust for the children as the parents or their survivor might appoint. I cannot draw the inference that this settlement was fraudulent, or made with intent to defeat or delay creditors, in the absence of evidence of either indebtedness by the husband at the date of the settlement or of an intention by the husband at the date of the settlement to enter upon a speculative business likely to result in insolvency. There is no such evidence, and I have no reason to doubt but that as a fact the husband had no intention of defeating or delaying creditors, but only intended to reserve to himself out of the property coming to him in the right of his wife such an interest as after her death he could receive without prejudice to the welfare of her children; as long as he could so receive it he was to do so, but no longer. Suppose that the husband, being perfectly solvent, and not contemplating a speculative business, had settled the whole of his property coming to him in the right of his wife on his wife for life, and after her death, in trust for the children, would it have been possible to have drawn the inference that such a settlement was intended to defeat and delay creditors? If not, why is one to infer fraud because the husband gives himself a life interest so long as he can receive the income of the money coming to him in right of the mother, without prejudice to the welfare of her children? I decline to draw any such inference. The case of *Montefiore v. Behrens* (L. Rep. 1 Eq. 171), although it differs from the present case in that the wife's property was in possession and not in reversion, is yet an authority that the settlement by the husband of property coming to him in right of his wife is not made fraudulent by a clause making the husband's life estate there-

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under determinable on his bankruptcy. It seems to me that the case of *Middlecombe v. Marlow* (2 Atk. 518) goes far to show that in the opinion of Lord Hardwicke a post-nuptial settlement by a husband of property coming to him in right of his wife is, *prima facie*, good where there is no proof of his being indebted at the time, and is upon such consideration as to prevail against creditors, and it is to be observed that the settlement was held not to be fraudulent within the meaning of 13 Eliz., although it contained a proviso empowering the trustee to lend a part or the whole to the husband. The trustee lent the husband the whole, and fourteen months after he became a bankrupt. The trustee brought his bill to be admitted a creditor, Lord Hardwicke decreed he should come in as a creditor under the commission for the money he paid to the husband. If the money settled had not come to the husband in the right of his wife I cannot but think that the decision would have been different. Lord Hardwicke distinctly founds his decision on the money having come to the husband in right of his wife, and on the deed doing no more than the court would have done in a case where the husband had no estate of his own to settle. Now, as to the other points—viz., as to the Statute of Frauds, and the effect, if any, of the recital in the deed of the ante-nuptial contract, which recital runs thus: "And whereas the said parties hereto of the first part, intermarried on the 27th Aug. 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained." I propose as there seems to be some little conflict in the authorities, or rather the dicta, to examine the reason of the matter. It will be observed that the husband and the wife, still being an infant, the mother of the infant, the guardians of the infant, and two trustees—one of whom, I think, was an executor of the father's will—are all parties to the settlement, John Brown being one of the trustees under the father's will. The recital in the deed of the ante-nuptial contract, it is true, only recites the ante-nuptial agreement, and does not in terms state who were the parties to the agreement, but I think that it means, upon a reasonable construction, agreed with Miss Holland and her guardians: (see *Codrington v. Lindsay*, 28 L. T. Rep. 177; L. Rep. 8 Ch. App. 578). Now, if this is the parol agreement recited, the recital, if contained in a writing outside the deed of settlement, would be a sufficient writing to satisfy the 4th section of the Statute of Frauds. But it is said that the recital in the settlement is not enough to satisfy the statute. I confess I cannot understand this. The recital is not the agreement to settle, it is evidence of a fact, and that fact is an agreement made antecedently to the marriage. Suppose the settlement had contained no recital and the trustees had brought an action for specific performance and had alleged that the agreement to enforce which they were bringing their action was an agreement made in pursuance of an antecedent agreement, it would have been sufficient if the plaintiff had produced at the trial a memorandum in writing of the contract signed by the party to be charged therewith, though none existed at the time of making the contract, provided only it must have been a memo-

randum signed before the commencement of the action. The Statute of Frauds does not deal with the validity of agreements (*Alderson v. Maddison*, 49 L. T. Rep. 303; 8 App. Cas. 467), but only with the evidence to prove the agreement requiring that the agreement shall be evidenced by a writing signed by the party thereto against whom the action is sought to be enforced. There is no difference as far as I know between an agreement in consideration of marriage and any other agreement within the 4th section of the Statute of Frauds. It cannot be doubted but that if there were a parol agreement to answer the debt, default, or miscarriage of another, and an action were brought on such agreement, and the plaintiff produced a memorandum of the agreement signed by the defendant just before action brought, the plaintiff would succeed. It is argued that the claim of the beneficiaries in this case, which is in effect for specific performance of a contract to convey property, could only be enforced if there were an ante-nuptial contract in consideration of a future marriage, and that apart from the proof of the existence of such a contract the settlement would be a voluntary settlement, not enforceable by an action for specific performance. This is true, and it is also true that the Statute of Frauds requires that such ante-nuptial contract should be evidenced by writing. The settlement apart from the recital is only evidence of a post-nuptial contract. But I cannot understand why the statute is not satisfied by the recital. Suppose the recital had been contained in a separate document, executed after marriage, but before the execution of the settlement, surely the statute would have been satisfied, and specific performance of the settlement could not have been refused on the ground that there was no proof of the ante-nuptial contract satisfying the requirements of the Statute of Frauds. Can it make any difference that the recital, which is the memorandum satisfying the statute, is contained in the settlement itself? I think not. The real foundation of such an objection would not be the want of evidence within the statute, but an objection to the weight of the evidence as being the sort of evidence easily manufactured by fraudulent persons wishing to defeat creditors. Upon the reason of the thing I think the recital gets over any objection based on the Statute of Frauds, and I do not conceive that we can give any effect to the argument that it would be to open a door to frauds on creditors to give this effect to a recital of an ante-nuptial agreement. No doubt the fact that the agreement is first mentioned in a recital in a post-nuptial agreement is an element to be taken into consideration in considering whether the deed is fraudulent, and, coupled with other circumstances, it may prove the fraud, but this to my mind does not touch the question on the Statute of Frauds. In my judgment, the court ought not to say that a post-nuptial agreement is voluntary if there is written evidence sufficient to satisfy the Statute of Frauds of an ante-nuptial agreement having been made for a good consideration before the marriage and in consideration of the marriage, and this, in my opinion, is the case here, the only difficulty being on the question whether the agreement acknowledged by the recital sufficiently indicates the parties to the agreement, which, however, I think it does.

Having thus dealt with the question apart from authority, I will now deal with the authorities. Farwell, J. calls attention in his judgment to three cases which, in his opinion, show that the decision of Kindersley, V.C. in *Barkworth v. Young* (4 Drew, 1)—which is a direct authority that a memorandum, though written after the marriage, stating an ante-nuptial agreement, is a sufficient memorandum within sect. 4 of the Statute of Frauds—cannot be supported. The three cases to which the learned judge refers are *Spurgeon v. Collier* (1 Eden, 55), *Warden v. Jones* (2 De G. & J. 76), and *Trowell v. Shenton* (38 L. T. Rep. 360; 8 Ch. Div. 318). Now, with regard to the case of *Spurgeon v. Collier* (*ubi sup.*). Lord Keeper Northington came to the conclusion that the proof of a parol promise before marriage failed, and the opinion expressed by the Lord Keeper that even if such promise had been proved to have existed it would not have supported a settlement made after marriage, was not necessary for the decision of the case. The case had nothing to do with the creditors, the plaintiff was not claiming through Collier, but against him, and the question was whether the rights of the plaintiff against Collier in respect of the Hillingdon estate were to be defeated by an alleged purchase for value by some defendants named Alston, to whom Collier purported to convey in consideration of marriage. There was no recital of an ante-nuptial agreement, and the court held that the attempted proof of an ante-nuptial agreement failed in fact, and consequently that the deed was voluntary. The recital would not even have been evidence against the plaintiff. Next comes the case of *Warden v. Jones* (*ubi sup.*). That case does not seem to me to be an authority for the general proposition that a post-nuptial settlement reciting that it was made in pursuance of an ante-nuptial agreement cannot be good. In the first place, in *Warden v. Jones* (*ubi sup.*) there was no recital of such an ante-nuptial agreement, and although Lord Cranworth may have expressed the opinion that, assuming the existence of an antecedent parol agreement, it was not sufficient to satisfy the statute so as to give consideration to the settlement made after the marriage in pursuance of such agreement, this is a very different thing from deciding that the settlement would have been void against creditors if it had contained such a recital. As to this Lord Cranworth only says: "I incline to think that even if this settlement had contained a statement that it was made in pursuance of a previous ante-nuptial parol agreement, I should still have considered it, as I now consider it, void as against creditors." It will be observed that in *Warden v. Jones* (*ubi sup.*) the circumstances of the husband at the date of the settlement of the wife's property were such as to afford cogent evidence that he in fact executed the settlement with the intent to defeat and delay creditors. Next, as to the case of *Trowell v. Shenton* (*ubi sup.*). This was a case in which it was held that an ante-nuptial agreement by an infant is not sufficient to take a post-nuptial settlement in which no reference is made to the ante-nuptial agreement out of the operation of 27 Eliz. c. 4, and that such post-nuptial settlement was therefore void against a subsequent purchaser for value. No doubt in that case Sir George Jessel, M.R. does express his opinion

that Lord Cranworth was right when he said in *Warden v. Jones* (*ubi sup.*), referring to a decision of Lord Thurlow—*Dundas v. Dutens* (1 Ves. Jun. 196; 2 Cox 235; 1 R. R. 112)—that a post-nuptial settlement wherein the parties recited an agreement before marriage is not within the statute. He said: "On that decision I will only remark that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing that there was such a previous parol agreement; it must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid." It will be observed that the observations of Sir George Jessel were not necessary to the decision of the case. The case was really decided on Lord Tenterden's Act and not on the Statute of Frauds, and the result was that there being no ratification in writing of the promise made during infancy the conveyance purporting to be made in pursuance of that promise was voluntary and void under 27 Eliz. against a subsequent purchaser. Against the authorities which I have been discussing there is the positive decision of Kindersley, V.C. in *Barkworth v. Young* (4 Drew, 1). The dictum of Turner, L.J. in *Surcome v. Pinniger* (3 De G. M. & G. 571): "But it has been held in many cases that if there be a written promise after marriage in pursuance of a parol agreement before marriage this takes the case out of the statute." Moreover, there is the opinion of Lord Cottenham in his judgment in *Hammersley v. De Beil*, when that case was before him as Lord Chancellor, which judgment is set out in the note to *Hammersley v. De Beil* in 12 Cl. & F. 45, at pp. 61, 62. Lord Cottenham says: "I am aware that in *Randall v. Morgan* (12 Ves. 67; 8 R. R. 289), Sir W. Grant suggests a doubt whether a written promise after marriage to perform a parol agreement made before could be enforced, but in *Hodgson v. Hutchenson* (5 Vin. Abr. 522, pl. 36), *Taylor v. Beech* (1 Ves. Sen. 297), and *Montacute v. Maxwell* (1 Strange, 236) it was held that such a subsequent written promise would be binding within the statute." It does not seem to me that anything which was said by Lord Cottenham in *Lassence v. Tierney* (1 Mac. & G. 551) as to the grounds of his decision in *Hammersley v. De Beil* (*ubi sup.*) can get rid of what he said as a dictum in which he deliberately differed from Sir W. Grant's doubt in *Randall v. Morgan* (12 Ves. 67, at p. 73). It is to be observed that in the House of Lords counsel abandoned the Statute of Frauds point. In my judgment the balance of authority as well as reason supports the view of Kindersley, V.C. in *Barkworth v. Young* (*ubi sup.*). In my judgment the settlement must in this case prevail against the official receiver representing the creditors of Mr. Isidore Bourke. First, because even though the settlement be treated as a voluntary post-nuptial settlement as against the official receiver claiming under the statute of 13 Eliz., yet the circumstances of Dr. Bourke at the date of the settlement and the source from which the settled property came and the lapse of time between the settlement and the bankruptcy all go to negative the inference that the settlement was executed with the intent to defeat or delay creditors. Secondly, because, assuming the settlement not to be fraudulent, the recital in the settlement is

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sufficient evidence, against anyone claiming through Dr. Bourke, of such a parol ante-nuptial agreement as would prevent the post-nuptial settlement from being voluntary.

STIELING, L.J.—The trustee in bankruptcy raises two objections to the payment of the fund to the trustees of the deed of the 8th Feb. 1873: First, that the deed is fraudulent under the statute 13 Eliz. c. 5; and, secondly, that it is voluntary, and that, resting as it does in covenant, it cannot be enforced in equity, and consequently does not bind the property. These two objections involve different considerations, and must be dealt with separately, but it will be convenient to make some preliminary observations on one point which arises with respect to both—viz., whether the recitals and statements of fact in the deed are admissible as evidence against the trustee in bankruptcy. These recitals and statements are in the nature of admissions made by the bankrupt long prior to the bankruptcy. Admissions of a party to an action or of one identified in interest with him are, as against such party, admissible in evidence: (see *Spargo v. Brown*, 9 B. & C. 935, at p. 938; *Woolway v. Rowe*, 1 Ad. & El. 114; 40 R. R. 264). Now, where the trustee in bankruptcy, on behalf of the creditors of the bankrupt, claims to treat the deed as void under the statute of Elizabeth, he is asserting a right which the bankrupt could never have set up, and is not identified in interest with the bankrupt, and consequently the recitals and statements in the deed are not admissible against him, though they are admissible against the trustees of the deed, whose interest is the same as that of the bankrupt. On the other hand, when the trustee resists specific performance of the covenants contained in the deed, on the ground that it is voluntary, he is setting up a defence which would have been available to the bankrupt himself, and is identified in interest with him; and the recitals and statements in the deed are admissible as against him, though the weight to be attached to them must depend on the circumstances of the case. The distinction just stated is recognised by the Master of the Rolls (Sir Thomas Plumer) in *Battersbee v. Farrington* (1 Swanst. 106; 18 R. R. 32) and appears to have been taken by Bramwell, B. in *Harris v. Bickett* (4 H. & N. 1, at p. 6.). As to the circumstances in which the deed was executed, there is little or no evidence other than appears on the face of the deed itself. It was evidently executed after the marriage; but it purports to have been executed in consideration of marriage and in pursuance of an ante-nuptial agreement. For the reasons just stated these statements are not admissible in evidence as against the trustee in bankruptcy setting up the statute of Elizabeth. It was expressly decided by Lord Northington in *Spurgeon v. Collier* (1 Eden. 55) and Lord Cranworth in *Warden v. Jones* (2 De G. & J. 76) that a statement in a deed that it was executed in consideration of marriage was of no avail as against plaintiffs who claimed adversely to the deed, and in the latter case Lord Cranworth said that, notwithstanding the dictum or decision of Lord Thurlow to the contrary in *Dundas v. Dutens* (1 Ves. Jun. 196; 2 Cox, 235; 1 R. R. 112), his opinion was that the recital made no difference as against creditors. I think that the weight of authority is in favour of this view, and that for the purpose of the

decision of the question whether or not the deed of the 8th Feb. 1873 is or is not void against creditors, it must be taken that the deed is not founded on valuable consideration. The deed must therefore be treated as a voluntary settlement of the wife's fortune made by the bankrupt soon after marriage. Twenty-five years elapsed between the execution of the deed and the bankruptcy of the settlor, and there is nothing to suggest that the settlor was indebted at the time he made the settlement or that any creditors he then had remain unpaid or that he then had in contemplation any hazardous or speculative transactions. With an exception to be presently mentioned, the deed is such as might in ordinary course be executed by a man of honour, who had without making any settlement married a lady of wealth for the purpose of settling his wife's fortune in such a way as to secure to her and his issue by her such a provision as is in this country commonly made on the occasion of marriage. And, indeed, the trusts are (with the same exception) such as might have been adopted in a settlement by the court when called on by the wife to enforce her equity to a settlement. The exception referred to is that under the settlement a life interest is reserved to the husband on the death of his wife, and is made determinable on bankruptcy. The case does not fall within the line of authorities (such as *Freeman v. Pope*, 23 L. T. Rep. 208; L. Rep. 5 Ch. App. 538), which establish that under this statute a voluntary deed may be set aside without proof of actual intention to defeat or delay creditors if the circumstances are such that the settlement necessarily would have that effect, and it lies on the trustee in bankruptcy to prove the existence of such intention: (*Ex parte Mercer*; *Re Wise*, 54 L. T. Rep. 720; 17 Q. B. Div. 290). The only evidence to that effect is the circumstance that the bankrupt's reversionary life interest is made determinable in the way just mentioned. It may be that such a limitation of the bankrupt's life interest is void as against his trustee: (see *Higinbotham v. Holme*, 19 Ves. 88; 12 R. R. 146), but does it invalidate the settlement altogether? Apart from authority I should think not. The only authority relied on is *Re Pearson*; *Ex parte Stephens* (35 L. T. Rep. 68; 3 Ch. Div. 807), a decision of Sir James Bacon when chief judge in bankruptcy; but with the utmost respect I cannot think that the conclusion of fact (and it is one of fact) at which he arrived was well founded, and certainly I am unable to arrive at a like conclusion in the present case. I pass on to consider the second objection, that the deed is voluntary and cannot be enforced in equity. The answer given to this objection on behalf of the trustees of the deed is in substance that the deed taken as a whole constitutes a note or memorandum of a parol ante-nuptial contract in consideration of marriage which satisfies the requirements of the Statute of Frauds, and enables the contract to be enforced both against the settlor who signed the deed and against his trustee in bankruptcy, and so binds the property in question. I think that this contention is well-founded. It is laid down by Lord Blackburn in *Alderson v. Maddison* (49 L. T. Rep. 303; 8 App. Cas. 467, at p. 488) that: "It is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render

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the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract." It is also established as regards many of the contracts within sects. 4 and 17 that the note or memorandum referred to in these sections need not be contemporaneous with the contract, but is sufficient if it comes into existence before the commencement of the action to enforce the contract: (see *Bill v. Bament*, 9 M. & W. 36; *Bailey v. Sweeting*, 9 C. B. N.S. 843; *Lucas v. Dixon*, 22 Q. B. Div. 357). These decisions are based on the language of the statute. The effect is (as stated by Williams, J. in *Bailey v. Sweeting* (*ubi sup.*), that, although there is a contract which is a good and valid contract, no action can be maintained upon it if made by word of mouth only unless something else has happened—e.g., unless there be a note or memorandum in writing signed by the party to be charged. As soon as such a memorandum comes into existence the contract becomes an actionable contract: (see 9 C. B. N.S. 859). In *Lucas v. Dixon* (*ubi sup.*) it is pointed out by Fry, L.J. that where the plaintiff wishes to avail himself of a memorandum which comes into existence after the commencement of the action, he can only do so by discontinuing the action and commencing another, so that a memorandum coming into existence after the commencement of an action may be available if the plaintiff is in a position to discontinue. The note or memorandum need not be given for valuable consideration, nor have any particular form; a letter by the party sought to be charged to a third party (*Bailey v. Sweeting*, *ubi sup.*; *Gibson v. Holland*, 13 L. T. Rep. 293; L. Rep. 1 C. P. 1); an affidavit (*Barkworth v. Young*, 4 Drew, 1), and even a will (*Re Hoyle*; *Hoyle v. Hoyle*, 67 L. T. Rep. 254, 674; (1893) 1 Ch. 84) have each been accepted by the court as sufficient. It has, however, been held by Farwell, J. that an agreement or memorandum or note of a contract made upon consideration of marriage must be reduced into writing and signed not merely before action brought, but before the marriage. The learned judge says that the contract in consideration of marriage differs from other contracts for sale within sect. 4 and sect. 17 of the Statute of Frauds, "because the marriage is performed once for all and is irrevocable," and that "in contracts for sale the consideration continues, for if the whole purchase money has not been paid, the balance unpaid remains a consideration at the date of the contract, and if the whole has been paid, the purchaser can recover it back if the contract is repudiated." I will assume this to be accurate as regards contracts of sale, but there are other contracts within sects. 4 and 17. Take, for example, the case of a guarantee, a promise to answer for the debt of another. The person to whom a verbal guarantee is given may on the faith of it have once and for all irrevocably advanced a sum of money to a pauper, from whom he is unable to recover anything back. Yet, as is shown by *Re Hoyle* (*ubi sup.*), he can enforce the contract of guarantee if at any time before action brought he is able to obtain a proper note or memorandum in writing signed by the guarantor. It seems to me (speaking with all respect) that the learned judge has overlooked the ground of the decisions that a note or memorandum which comes into existence before action brought is

sufficient. As I have said, it is found in the language of the statute, which in sect. 4 prohibits the bringing of an action unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, &c. If, on the true construction of that section, the commencement of the action gives the limit within which the note or memorandum on a contract of guarantee may be reduced into writing and signed I cannot see why another and narrower limit should be imposed by the courts with reference to contracts in consideration of marriage. Further, the case of *Barkworth v. Young* (4 Drew, 1) is an express decision that a contract in consideration of marriage may be enforced against a party who has signed a written memorandum of it after the marriage. There is no decision to the contrary, and there is much authority in the shape of dictum in support of it. In particular, I think that although it may be, as Farwell, J. says, that the ultimate decision in *Hammerley v. De Beil* (12 Cl. & F. 45) turned on part performance by acts other than the mere marriage, nevertheless the judgments of Lord Langdale (3 Beav. 469) and Lord Cottenham (12 Cl. & F. 61 n.) do show that those learned judges were of opinion that a verbal ante-nuptial contract in consideration of marriage could be enforced if a proper memorandum in writing were signed after marriage. Lord Selborne seems also to have been of the same opinion, for in *Codrington v. Lindsay* (28 L. T. Rep. 177; L. Rep. 8 Ch. App. 578) he says, speaking of a recital in a post-nuptial deed (at p. 588 of L. Rep. 8 Ch. App.): "This recital cannot, as against any person not a party to it, alter the consideration or the true character of the deed, or supply want of other evidence of a binding ante-nuptial contract: (*Warden v. Jones*, *ubi sup.*). But I apprehend it is good evidence as between the father and husband"—both parties to the deed in question—"at all events, of the terms of and the considerations for their agreement *inter se*." The cases relied on to the contrary are *Spurgeon v. Collier* (1 Eden, 55), *Warden v. Jones* (2 De G. & J. 76), and *Trowell v. Shenton* (38 L. T. Rep. 360; 8 Ch. Div. 318). Now, in *Spurgeon v. Collier* and *Warden v. Jones* the plaintiffs were persons claiming adversely to an instrument which purported to have been executed in consideration of marriage; they were not identified in interest with the party to the action who signed the instrument, but stood in the same position as does the trustee in bankruptcy in the present case when seeking to enforce rights derived under the statute of Elizabeth. These cases appear to me to be consistent with the proposition that an ante-nuptial verbal contract may be enforced against a party to it who has after marriage signed a written memorandum of it, and also against a person identified in interest with him, as I take his trustee in bankruptcy to be when he sets up, as here, the same defence as the bankrupt himself might have set up; they certainly do not establish the contrary proposition, nor, as I think, do the dicta in the judgments cover it. *Trowell v. Shenton* (*ubi sup.*) was decided with reference to another statute and a different class of cases, but is relied on mainly for the observation of Sir George Jessel, M.R. that *Warden v. Jones* (*ubi sup.*) being subsequent in

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date to *Barkworth v. Young* (*ubi sup.*) overrules it, but, as he expressly says, "so far as the two are inconsistent." As I have just said, I think there is no inconsistency between *Barkworth v. Young* and *Warden v. Jones*. It was, however, said on behalf of the trustee in bankruptcy that, even if this were so, the deed did not satisfy the requirements of the Statute of Frauds, because it only recites that previously to the marriage the husband agreed to make a settlement, and does not state with whom he agreed. It is no doubt necessary that the note or memorandum to satisfy the statute must show who the parties to the agreement are, but they need not be named or specifically described as such; it is sufficient if by reasonable intendment it can be inferred from the document who they are: (see *Newell v. Radford*, 17 L. T. Rep. 118; L. Rep. 3 C. P. 52). For this purpose the whole deed may be looked at. Now, I find the guardians of the wife are named as parties, and the covenants of the husband are entered into with their approbation as such. They were the persons with whom an ante-nuptial contract would in ordinary course be made. I see no reason why they should have been parties to her deed except that the contract was with them, and it is the reasonable intendment that it was actually made with them. I think, therefore, that this objection is not well founded. In my opinion, therefore, the appeal ought to be allowed.

COZENS-HARDY, L.J. — This appeal raises several questions of difficulty and importance. The facts, so far as material, may be shortly stated. In Aug. 1872 Miss Holland, who was then an infant, was married to Mr. Bourke. She was entitled under her father's will, on attaining twenty-one or on marriage, to a share in his estate in remainder expectant on the death of the testator's widow. The share was not given for her separate use. On the 8th Feb. 1873 a settlement was executed, the parties being Mr. Bourke and his wife, who was still an infant, of the first part, the guardians of the wife of the second part, and three trustees of the third part. [His Lordship read the material provisions of that settlement as above set forth, and continued:] The wife died in 1877. In 1897 the husband, in exercise of the power of appointment contained in the settlement, appointed two-thirds of the trust funds to two of his sons and surrendered to them his life interest. In 1898 the husband was adjudicated bankrupt. In 1899 the widow died, and the question then arose whether the trustees of the father's will ought to pay Mrs. Bourke's share in the residuary estate to the trustees of the post-nuptial settlement, or to the official receiver as the trustee in bankruptcy of the husband. There is no evidence that at the date of the settlement the husband was in difficulties or was contemplating entering upon speculative transactions. There is, in short, nothing to show that the settlement was executed with intent to defraud creditors. But Farwell, J., following the decision of Bacon, C.J. in *Re Pearson* (35 L. T. Rep. 68; 3 Ch. Div. 807), held that the limitation for the benefit of the settlor was in such a form as rendered the whole settlement fraudulent within the statute of 13 Eliz. It seems to me that in considering this point it is not material to decide whether the settlement was voluntary or for value, inasmuch as everybody claiming under

the settlement was affected by notice of the provision in the settlement which, and which alone, is said to avoid it *in toto*. But for the purpose of this branch of the case I treat it as a voluntary settlement, and disregard the recitals. The decision in *Re Pearson* (*ubi sup.*) is not supported by any prior authority, and, so far as I am aware, it has not been subsequently followed. I think it cannot be regarded as good law. It may well be that such a limitation of the settlor's life interest is void as against creditors, but I can see no ground for holding, on the mere construction of the settlement, that such a limitation of the settlor's life interest avoids the settlement *in toto*. The next point that arises for consideration is this. As the settlement rests in covenant the trustees cannot obtain specific performance unless it was for valuable consideration. The statute of Elizabeth not having any application, and there being no ground upon which creditors of the settlor could impeach the deed, I think it is clear that the official receiver is in no better position than the settlor himself would be, apart from his bankruptcy, or than his executors would be after his death. It has been argued that the settlement was necessarily voluntary, because under sect. 4 of the Statute of Frauds a mere parol agreement before marriage imposes no obligation upon the settlor, and, further, that any note or memorandum is of no validity unless it is signed before the marriage. This argument was adopted by Farwell, J. Now, it is well settled that in the case of other contracts within sect. 4, such as a contract of guarantee, it is sufficient if the note or memorandum in writing is made after the parol contract, and at any time before action brought: (see *Lucas v. Dixon*, 22 Q. B. Div. 357, at p. 363). It is strange that a different principle should prevail with reference to this one class of contracts made in consideration of marriage. There are dicta by Lord Hardwicke in *Taylor v. Beech* (1 Ves. Sen. 297), by Lord Langdale in *De Beil v. Thomson* (3 Beav. 469), and by Turner, L.J. in *Surcome v. Pinniger* (8 De G. M. & G. 571), and a decision by Kindersley, V.C. in *Barkworth v. Young* (4 Drew, 1), to the effect that a signed note or memorandum after marriage of a parol agreement before marriage takes the case out of the Statute of Frauds. In my judgment these dicta and that decision are in accordance with principle, and ought to be followed. If, therefore, there had been a note or memorandum signed by the husband after the marriage and before the settlement, I think an action for specific performance of the agreement could have been maintained against the settlor. The next question and, to my mind, the most difficult is this—whether it is sufficient that the post-nuptial settlement itself should be not merely a settlement in fact made in pursuance of an ante-nuptial parol contract, but also a memorandum of the ante-nuptial parol contract. The settlement contains a recital which, though not sufficiently definite and precise to create an estoppel, is, as against the settlor and anybody claiming under him, evidence of a parol agreement before marriage between the settlor and his intended wife that such a settlement should be executed as was in fact executed: (see *Codrington v. Lindsay*, 28 L. T. Rep. 177; L. Rep. 8 Ch. App. 578, at p. 588, per Lord Selborne). There is no evidence to the contrary.

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The settlement was, *ex hypothesi*, executed for valuable consideration. Before the Statute of Frauds a settlement made after marriage in pursuance of a parol contract before marriage would not have been a voluntary settlement. The Statute of Frauds does not make such a settlement voluntary. It is really only a rule of evidence. It enacts that you cannot prove the parol ante-nuptial contract unless there is a memorandum, a note in writing, signed by the party to be charged. But such a memorandum or note may be before the deed, or after the deed, or in the deed itself, provided only it is before action brought. Sect. 4 of the Statute of Frauds leaves untouched the question whether the contract is or is not in fraud of creditors. It seems to me that a settlement framed as this is may well be a memorandum in writing signed by the settlor sufficient to satisfy the Statute of Frauds. Moreover, as a general rule, evidence may be given to show that a deed in form voluntary was in truth for valuable consideration: (see *Pott v. Todhunter*, 2 Coll., 76; and *Gale v. Williamson*, 8 M. & W. 405). The Statute of Frauds excludes such evidence in the case of a post-nuptial settlement, unless there is a signed agreement or note or memorandum. A settlement in no way referring to the parol contract cannot be a note or memorandum thereof, nor can the marriage be regarded as a part performance sufficient to take the case out of the statute. This, as it seems to me, is all that was decided by Lord Cranworth in *Warden v. Jones* (2 De G. & J. 76), and Lord Cranworth's dictum at p. 86, upon which Farwell, J. relies, creates no difficulty when it is remembered that he was dealing with a case in which the plaintiff was asserting that the settlement was "void as against creditors," and was, therefore, in a better position than that of the settlor. The result is that in my opinion there is sufficient and uncontradicted evidence that the settlement was not voluntary. It follows that the trustees of the settlement are entitled to the wife's share, and not the official receiver. Whether the official receiver is or is not entitled to the husband's life interest under the settlement is a different question, which does not arise upon the present summons. The reversal of Farwell, J.'s order will in no way prejudice this.

Appeal allowed.

Solicitors: for the appellants, *Van Sandau and Co.*; for the respondents, *Tarry, Sherlock, and King*; *Henry Clifton Lambert*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 21 and Feb. 14.

(Before BYRNE, J.)

Re WESTON; BARTHOLOMEW v. MENZIES. (a)
Donatio mortis causa—Certificates of building society shares—Post Office Savings Bank deposit book—Document embodying terms of contract.

T. W., when lying ill in hospital in March 1901, gave H. M., to whom he was engaged to be married, the key of a drawer in his bedroom in

*which the certificates for eight investment shares in a building society, and a Post Office Savings Bank book, showing a deposit of about 130*l.*, were kept, and told her to keep them. H. M. subsequently offered them with the key to T. W., who said he wished her to keep them, and later also stated that he wished, in the event of his death, all his property, with one small sum excepted, to be hers.*

T. W. died on the 1st May 1901, and letters of administration were taken out to his estate by B.

This was an application by B. to have it decided whether under the circumstances H. M. was entitled to the shares and the money standing to the deceased's credit in the Post Office Savings Bank, which she now claimed.

Held, that the shares were not the proper subject-matter of a donatio mortis causa, but that, following the decision in Re Dillon; Duffin v. Duffin (62 L. T. Rep. 614; 44 Ch. Div. 76), the Savings Bank book was capable of being well given so as to create such a gift.

McGonnell v. Murray (3 Ir. Rep. Eq. 460) distinguished.

ADJOURNED SUMMONS.

Thomas Weston had been for many years a butler in domestic service, and had for seven years before his death been engaged to the defendant, Helen Menzies, who at one time had been his fellow-servant, and it had been arranged that they should be married early in 1901.

In Feb. 1901 Thomas Weston was taken ill, left his place in the country at Duffield, and came up to the National Hospital in Queen's-square, London.

On the 28th Feb. the defendant visited Weston in the hospital, when he spoke to her concerning his affairs, and told her that he was possessed of eight investment shares of 25*l.* each in the Hearts of Oak Permanent Building Society, and about 130*l.* in the Post Office Savings Bank, which was the whole of his property with the exception of his wearing apparel, and that, if anything should happen to him, he wished his uncle, the plaintiff, to have 100*l.*, and all the rest was for her, as he had saved it for her, and wished her to have it.

On the 7th March the defendant saw Weston again at the hospital, when he asked her to go to Duffield and get the building society shares certificates and the Post Office Savings Bank book, gave her the key of the drawer of the bedroom in which they were kept, and told her that she was to keep them.

The defendant shortly after went down to Duffield, obtained the certificates and book, which she took the next day to the hospital, and offered them with the key to Weston, when he again told her she was to keep them.

On the 14th March the defendant again visited Weston in the hospital in company with a friend in whose presence he again repeated his wishes that all his property, with the exception of 100*l.* to his uncle, should belong to the defendant in case of his death. On several subsequent occasions Weston repeated this to the defendant.

On the 1st May 1901 Weston died, and letters of administration to his estate were granted to his uncle, the plaintiff, by whom the present application was made to have it determined by the court whether under the circumstances there

(a) Reported by H. M. CHARTERS MACPHERSON, Esq.,
Barrister-at Law.

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had been any valid *donatio mortis causa* of the building society shares and the money standing to the deceased's credit at the Post Office Savings Bank.

The rules of the Hearts of Oak Permanent Building Society provided that any member holding an investment share might withdraw it on giving to the society one month's notice in writing of his intention so to do.

Among the regulations in the Post Office Savings Bank book were:

This book must be produced whenever any money is deposited or withdrawn.

Every deposit in a Post Office Savings Bank must be immediately entered by the postmaster or other person receiving it in the depositor's book, and the postmaster or other person receiving the deposit must affix his signature and the stamp of the office to each entry.

And it was also provided that upon a withdrawal the depositor's book must be presented by the depositor at the post-office together with the warrant for withdrawal.

J. A. Hay, for the plaintiff, stated the facts.

Lyttelton Chubb for the defendant.—There has been a complete and valid *donatio mortis causa*, both of the shares and the Savings Bank deposit. It was not necessary to execute a transfer of the shares, and delivery of the bank-book is sufficient to pass the right to the money on deposit in the bank:

Moore v. Darton, 4 De G. & Sm. 517;

Re Dillon; Duffin v. Duffin, 62 L. T. Rep. 614; 44 Ch. Div. 76.

J. H. Jackson for the next of kin.—These shares will not pass by mere delivery:

Moore v. Moore, 30 L. T. Rep. 752; L. Rep. 18 Eq. 474.

The gift of a Savings Bank deposit-book has been held to be insufficient in *McGonnell v. Murray* (3 Ir. Rep. Eq. 460), which was approved of in *Duckworth v. Lee* (1 I. R. 405).

Lyttelton Chubb in reply.—The book in *McGonnell v. Murray* (3 Ir. Rep. Eq. 460) was not a Post Office Savings Bank book.

Cur. adv. vult.

Feb. 14.—BYRNE, J. (after stating the facts and holding that in the circumstances of the case there had been a sufficient *traditio* to the defendant, continued:—) Two questions have been argued, one as to the certificates of the building society shares, and the other as to the Post Office Savings Bank book. With reference to the building society shares, I am of opinion that they are not the proper subject-matter of a *donatio mortis causa*. I am not able to distinguish the subject-matter of this gift from that of an ordinary certificate of railway stock, like that which was dealt with in *Moore v. Moore* (*ubi sup.*) and the mere fact that under the rules of the society there was power to withdraw these investment shares at any time and obtain the money for them is not sufficient to differentiate the present case from *Moore v. Moore* (*ubi sup.*). With reference to the remaining question, as to the gift of the Savings Bank book, ever since the decision of the Court of Appeal in the case of *Re Dillon; Duffin v. Duffin* (*ubi sup.*), it is well established that a banker's deposit receipt in a form showing the terms of the contract and being more than an acknowledgment for the receipt of money is good subject for a *donatio*

mortis causa. The question had not previously come before a Court of Appeal in England, although there had been, as stated by Cotton, L.J. in the last-mentioned case, a current of decisions in courts of first instance in England in favour of that view, and a decision of the Exchequer Division in Ireland (*Cassidy v. Belfast Banking Company*, 22 L. Rep. Ir. 68) to a similar effect. In the present case the question arises in reference to a Post Office Savings Bank deposit-book, and, in considering whether or not this is good subject of a *donatio mortis causa*, the test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shows what the contract between the parties is: (see *Moore v. Darton*, *ubi sup.*; and the judgment of Cotton, L.J. in *Re Dillon; Duffin v. Duffin*, *ubi sup.*). An examination of the Savings Bank book in the present case appears to me to show a fulfilment of that test; and, although every rule regulating the contract is not set out in the book itself, all the essential rules are. The book is not a mere receipt. It must, as stated on the face of it, be produced whenever any money is deposited or withdrawn, and it contains the terms of the contract as to payment of interest and withdrawal, as well as the other material terms of the contract between the depositor and the Savings Bank Department. Apart from authority pointing the other way, I should have considered it impossible after comparing the terms of the deposit receipts in the cases of *Re Dillon; Duffin v. Duffin* (*ubi sup.*) and *Moore v. Darton* (*ubi sup.*) with the Savings Bank book, to hold that the latter is not a good subject for *donatio mortis causa*. The case in Ireland of *McGonnell v. Murray* (*ubi sup.*)—which appears to be the only reported case dealing with a Savings Bank book—was relied upon as an authority to the contrary, and since the argument I have referred also to the case of *Duckworth v. Lee* (*ubi sup.*) in the Court of Appeal in Ireland. The latter case dealt with the gift of an I.O.U., and had no reference to a Savings Bank book, and, consequently, the actual decision in *McGonnell v. Murray* (*ubi sup.*) did not come in question; but the general reasoning in *McGonnell v. Murray* (*ubi sup.*), including an expression of disagreement with a dictum of Lord Romilly's in *Hewitt v. Kays* (L. Rep. 6 Eq. 198), appears to have been treated with approval by some of the judges, and the Lord Chancellor of Ireland expressly states that he sees nothing in the case of *Re Dillon; Duffin v. Duffin* (*ubi sup.*) to shake the authority of *McGonnell v. Murray* (*ubi sup.*). It is necessary, therefore, to consider carefully what the decision in *McGonnell v. Murray* (*ubi sup.*) actually was. It was not necessary to decide the point in the view the Master of the Rolls took of the facts; but it was, in fact, decided that the Savings Bank book in question in that case was not capable of being given *mortis causa* so as to confer a right upon the donee to the amount of the deposit. The point there arose, not as to the book of a depositor under the Post Office Savings Bank Act 1861 (24 & 25 Vict. c. 14), but as to the book of a depositor in a private savings bank governed by the provisions of the General Savings Bank Act of 1863 (26 & 27 Vict. c. 87), Acts which differ considerably in their terms. The only rules of the savings bank apparently relied on in *McGonnell*

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v. Murray (ubi sup.) are those set out at p. 463 of the report, and I do not find that it was part of the contract, as it was in the present case, that the book must be produced whenever any money is deposited or withdrawn, nor does it appear that there was any stipulation corresponding with that in the Post Office Savings Bank book to the effect that every deposit must be immediately entered by the postmaster or other person receiving it in the depositor's book, and that the postmaster or other person receiving the deposit must affix his signature and the stamp of his office to each entry. In *McGonnell v. Murray (ubi sup.)* the Master of the Rolls says that he does not find in the Savings Bank Acts (meaning, according to the reference in the report, the Act 26 & 27 Vict. c. 87) anything to distinguish a Savings Bank pass-book from an ordinary banker's pass-book; and he also takes the view that the book did not embody the terms of the contract between the depositor and the bank, and, further, that it was merely evidence of, or a voucher for, a debt. It appears to me that the book in *McGonnell v. Murray (ubi sup.)* was, in the view taken of it by the court, of a different nature from that with which I have to deal. I am quite unable to say that the Post Office Savings Bank book is not distinguishable from an ordinary banker's pass-book, and I think it is clearly more than evidence of, or a voucher for, the debt, and I do not see how I can consistently with the cases of *Moore v. Darton (ubi sup.)* and *Re Dillon; Duffin v. Duffin (ubi sup.)* do otherwise than hold the book to be capable of being well given so as to create a *donatio mortis causâ*.

Solicitors: *Paterson, Candler, and Sykes*, agents for *A. J. Ellis, Maidstone; W. W. Young, Son, and Ward*.

April 26, 28, and 29.
(Before EADY, J.)

Re McMURDO; PENFIELD v. McMURDO. (a)

Administration—Insolvent estate—Claim by secured creditor—Withdrawal of claim—Certificate—Application to prove debt—Rules in Bankruptcy—Practice in the Chancery Division—Judicature Act 1875 (38 & 39 Vict. c. 77), s. 10—Rules of Court 1883, Order LV., rr. 44, 56, 70, 71.

In the administration of insolvent estates in the Chancery Division of the High Court of Justice, the practice as to failure to prove a debt within the time fixed by advertisement or notice, and as to creditors being bound by the chief clerk's certificate, is the same as in the case of solvent estates, and a creditor is not entitled under a judgment for administration to come in and prove a debt after the time for varying the chief clerk's certificate has expired, so long as the estate remains undistributed, unless he can show special circumstances entitling him to be let in.

A creditor of an insolvent estate moved to be let in to prove his claim against the estate, which was being administered in the Chancery Division, notwithstanding that the time for making claims and for varying the chief clerk's certificate had expired, without showing any special circumstances in support of his application.

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Held, that the motion must be dismissed with costs.

EDWARD McMURDO, the testator in the action, was at the date of his death in the year 1889 indebted to the New Oriental Bank to the amount of 47,198*l.* 14*s.* 10*d.*, without reckoning interest, for which the bank held certain securities, including twelve debentures of the aggregate nominal value of 2000*l.* and 6000 shares of the aggregate nominal value of 60,000*l.* in the Delagoa Bay and East African Railway Company Limited.

The railway and assets of the Delagoa Bay and East African Railway Company Limited were seized by the Portuguese Government, and an arbitration tribunal was appointed on the 13th June 1891 which in the year 1900 awarded the sum of 941,511*l.* 13*s.* 10*d.* in respect of such seizure.

On the 25th July 1889 an order was made in the action for the administration of the testator's estate, which proved to be insolvent.

On the 29th March 1890 the bank, in answer to advertisements for creditors of the estate, sent in notice of their claim, and received notice to come in and prove it on the 29th May 1891.

On the 15th June 1891 and at other subsequent dates the bank, not having proved their claim, applied for and obtained extensions of the time for so doing.

On the 23rd June 1892 the bank went into voluntary liquidation, and Thomas A. Welton was appointed liquidator thereof.

On the 20th Oct. 1892 the solicitors for the liquidator wrote stating that the liquidator had decided not to prove for the bank's claim, but to rely on the securities held by him for the debt, and on the 2nd Dec. 1892 the claim was formally withdrawn, and was disallowed by the chief clerk's certificate dated the 29th Nov. 1893, of which certificate due notice was given to the liquidator.

In July 1900 the liquidator received 1448*l.* in respect of the twelve Delagoa Bay debentures; and there was evidence that no further sum would be paid in respect of the bank's securities for their debt.

On the 27th Jan. 1902 the master's final certificate was made in the action.

A summons was taken out by the liquidator on the 20th Jan. 1902 that, notwithstanding the time for applying to vary had expired, the chief clerk's certificate dated the 29th Nov. 1893 might be varied so far as the claim of the applicant was withdrawn or disallowed, and that, notwithstanding the time limited for making claims had expired, the applicant might be at liberty, under the judgment dated the 25th July 1889 in the action, to make and establish his claim as a creditor upon the testator's estate for the sum of 47,198*l.* 14*s.* 10*d.*, together with interest thereon.

The summons was heard in chambers on the 10th March 1902 and dismissed, and this was a motion by the liquidator to discharge the order dismissing the summons.

It was in evidence that other creditors of the estate who held similar securities in the Delagoa Bay and East African Railway had come in and proved their claims, some having from time to time obtained leave of the court on terms to realise such securities at times when they were far more valuable than at the date of the application, while others had valued their securities when

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far more valuable, and their claims had been allowed after deducting the amount of such realisations or the values put on the securities, and that the applicant would obtain an advantage over those creditors who had so acted, if allowed to come in and prove. Also that there were other creditors in a position similar to the applicant who would be let in to prove their claims if the application succeeded.

Muir Mackenzie and *R. J. Parker* for the motion.—Under the rules obtaining in Bankruptcy, a creditor is entitled to come in and prove his claim at any time as long as any assets remain undistributed, even after the certificate is made and the time to vary it has expired, but cannot disturb dividends actually paid; and by virtue of sect. 10 of the Judicature Act 1875 the rules of Bankruptcy now apply to the administration in the Chancery Division of insolvent estates. [EADY, J.—Do you say that under the rules in Bankruptcy a creditor has such right without taking out a summons to vary the certificate; and even after the further consideration?] Yes. The case of *Re Hopkins*; *Williams v. Hopkins* (44 L. T. Rep. 543; on appeal, 45 *ibid.* 117; 18 Ch. Div. 370) supports that view, because, although under the old Bankruptcy Rules of 1870 the creditor was bound by the certificate after the time to vary it had expired, he is not so bound under the present rules in Bankruptcy. And *Ex parte Boddam*; *Re Taylor* (2 L. T. Rep. 120; on appeal, *ibid.* 343; 2 D. J. F. & J. 625. [EADY, J.—Assuming that you could have come in and proved under the rules in Bankruptcy, your difficulty is that the Chancery practice is different.] Sect. 10 of the Judicature Act 1875 provides that the rules in Bankruptcy shall apply in the administration in the Chancery Division of insolvent estates; and, according to the old Chancery practice, a creditor of an estate had a right to come in under a judgment for administration so long as any part of the estate remained undistributed:

Brown v. Lake, 1 De G. & S. 144;

Ex parte Good; *Re Lee*, 41 L. T. Rep. 660; on appeal, 42 *ibid.* 450; 14 Ch. Div. 82;

Re Kit Hill Tunnel; *Ex parte Williams*, 44 L. T. Rep. 336; 16 Ch. Div. 590.

The certificate of debts at the time cannot affect the applicant's right, if the question is governed by the rules in Bankruptcy. The applicant has a right to come in and prove now unless there are special circumstances:

Gillespie v. Alexander, 3 Russ. 130; 27 R. R. 35;

Re Metcalfe; *Hicks v. May*, 41 L. T. Rep. 572; 13 Ch. Div. 238.

There has been no distribution of the estate, and no order on further consideration.

Jenkins, K.C. and *Whinney* for the defendant in the action and other persons beneficially interested in the estate.—The practice in the Chancery Division with respect to a creditor neglecting to come in and prove his debt within the time fixed for so doing is prescribed by rules 44 and 56, and, as to a creditor being bound by the certificate, by rules 70 and 71 of Order LV. Here the applicant's claim was sent in, but not proved, and afterwards deliberately withdrawn. It would be giving him an unfair advantage over other creditors holding similar securities who came in and proved, to allow him to come in now that he relied upon his

securities until they became of little or no value, and be unfair to all interested in the estate. Here the applicant cannot make out a case for the assistance of the court such as was made out in *David v. Froud* (1 My. & K. 200; 36 R. R. 308). The case of *Re Whitaker*; *Whitaker v. Palmer* (83 L. T. Rep. 342; on appeal, *ibid.* 449; (1901) 1 Ch. 9) shows that the cases in which the Bankruptcy rules supersede the Chancery rules in the administration of insolvent estates are limited to particular subjects by the provisions of sect. 10 of the Judicature Act 1875.

Upjohn, K.C. and *Eastwick* for a creditor.

Muir Mackenzie replied.

EADY, J.—This is a motion to discharge an order made in chambers on the 10th March 1902 dismissing a summons by the applicant, taken out on the 14th Jan. 1902, to vary the chief clerk's certificate dated the 29th Nov. 1893, so far as the claim of the applicant was withdrawn and disallowed, and that, notwithstanding the time limited for making claims had expired, the applicant might be at liberty, under the judgment dated the 25th July 1889 in this action, to make and establish his claim as a creditor upon the estate of the testator for the sum of £7,198l. 14s. 10d. with interest thereon. There were creditors of the estate for very large amounts, some being contingent on the Delagoa Bay arbitration. [His Lordship stated the facts, and continued:] The applicant's case is stated to be the result of sect. 10 of the Judicature Act 1875. [His Lordship read that section, and proceeded:] It is contended that that section incorporates Bankruptcy practice into the administration of insolvent estates in the Chancery Division of the High Court, and supersedes the Chancery practice in such cases; that a creditor has an absolute right to come in and prove at any time, as in Bankruptcy, so long as any assets remain undistributed and he does not disturb the dividends actually paid; that the fact that a certificate has been made is immaterial as being a matter of form, even if it has to be varied, and that the creditor has such an absolute right. That contention is not borne out by authority. Chancery practice is not superseded by Bankruptcy practice in the administration in Chancery of insolvent estates. Rules 44, 56, 57, 70, and 71 of Order LV. apply to the case of insolvent estates. The decision in *Re Hopkins*; *Williams v. Hopkins* (*ubi sup.*) supports this view. In his judgment Fry, J. said that taking the chief clerk's certificate and not excepting to it or attempting to vary it amounted to election from which creditors ought not to be relieved except upon the ground that they acted by mistake or under pressure, and Jessel, M.R. and Bagge, L.J. took the same view. This decision established the rule that all creditors were bound by the chief clerk's certificate even in the case of an insolvent estate. The question now arises whether a creditor is entitled to be admitted to prove his claim even if the certificate is against him. It has been argued that he is entitled to come in and prove his claim unless precluded by special circumstances. The rule is that he cannot do so unless he makes out a special case within rule 71. In *David v. Froud* (*ubi sup.*) a creditor was let in who made out that he had not been guilty of wilful default in not coming in before.

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In *Gillespie v. Alexander* (*ubi sup.*) the creditor was let in partially only as against beneficiaries after decree on further directions had been made. In the case of *Brown v. Lake* (*ubi sup.*) there were special circumstances which do not exist here. In *Re Metcalfe*; *Hicks v. May* (*ubi sup.*) there were special circumstances under which the applicant by mistake had omitted to make his claim. In *Howell v. Kightley* (8 De G. M. & G. 325) the general rule is stated that after eight days the chief clerk's certificate is in the condition of a master's report confirmed absolutely, and therefore cannot be discharged or varied except on special grounds. I think that in this case the applicant must show some special circumstances to entitle him to come in and prove his claim. The facts here, however, show no special circumstances in his favour, but, on the contrary, special circumstances against him. The administration of the estate has been going on since the year 1889. There has been no undue delay, but it has been necessarily protracted by the Delagoa Bay Arbitration. The result has been to delay the distribution of the assets. The applications by the creditors have been considered, and 184 debts were allowed and eighty-four disallowed. The funds in hand amount to 38,000*l.* subject to heavy costs, and claims amounting to 250,000*l.* have been admitted after great expense has been incurred in respect of them. If the applicant's claim were admitted it would have to go back to the master to settle the details, which would cause delay; and other claims would come in. The applicant would obtain an advantage over other creditors. He has not had to value his securities, and if they had turned out well he would have benefited by not coming in. This is no case of mistake or surprise. The applicant deliberately selected the course he adopted, and consented to have his claim disallowed. The motion must be refused with costs.

Solicitors: *Hollams, Sons, Coward, and Hawksley*; *Hurford and Taylor*; *Harston and Bennett*.

ERRATUM.—*Easton v. Isted*.—*Ante*, p. 443, col. 1, line 13, for "window" read "windows."

KING'S BENCH DIVISION.

Wednesday, Dec. 11, 1901.

(Before WRIGHT, J.)

GENERAL ACCIDENT ASSURANCE CORPORATION
v. NOEL. (a)

Principal and agent—Agreement by agent not to interfere in the business after ceasing to be employed—Liquidated damages—Injunction—Election.

By an agreement made between the plaintiffs and the defendant, the latter was appointed the agent of the plaintiffs, and he agreed that if he ceased to act as such he would not give information about the plaintiffs' connections and would not, directly or indirectly, interfere with the plaintiffs' business, or represent others doing similar business for a year from his ceasing to receive remuneration from the plaintiffs. It was further agreed that if the defendant committed any breach of the agreement he should forfeit and pay 100*l.* to the plaintiffs as liquidated damages.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at Law.

*The employment having terminated, the defendant committed breaches of the agreement, and the plaintiffs sued for 100*l.* liquidated damages and for an injunction.*

Held, that the plaintiffs could not pursue both remedies, but must elect between the damages and the injunction.

ACTION tried before Wright, J. without a jury, and brought for an injunction to restrain the defendant from giving information about the plaintiffs' connections, and from interfering directly or indirectly with the business of the plaintiffs, and from representing any other corporation doing similar business to the plaintiffs within fifty miles from Oxford within one year of his ceasing to receive remuneration of any kind from the plaintiffs.

In addition to this, the plaintiffs asked for 100*l.* as ascertained and liquidated damages.

By an agreement made between the plaintiffs and the defendant, the defendant was appointed inspector of agents in London or where the plaintiffs should determine. By that agreement it was provided:

This appointment is given with the distinct understanding that, should the within-named representative cease to act at any time under this or any other agreement for this corporation, he binds himself and agrees in no way to give information about the corporation's connections, or to interfere either directly or indirectly with the business of this corporation, or to represent any other corporation doing a similar business to this corporation either directly or indirectly within a radius of fifty miles from his headquarters within one year at least from the date of his ceasing to receive remuneration of any kind from this corporation, and in case of the breach of this agreement in that behalf the said representative shall forfeit and pay to the corporation a sum of 100*l.* by way of ascertained and liquidated damages, and not by way of penalty.

On the 7th March 1901 the plaintiffs terminated the agreement, and it was alleged by the plaintiffs, and admitted by the defendant, that he had since that date committed breaches of the clause set out above, but he justified those breaches on the ground that he had been wrongfully dismissed.

By his defence the defendant further pleaded that the plaintiffs could not have both the injunction and the liquidated damages.

Danckwerts, K.C. and *Kisch* for the plaintiffs.—We are entitled to the 100*l.* as well as to an injunction. No doubt formerly where damages were recovered at law, equity would not grant an injunction, but the person was bound to elect where the covenant was not to do a certain thing, and there was a penalty if that thing was done. But the act is not authorised if the penalty is paid. That does not allow a person to go on breaking his covenant. In *French v. Macale* (2 Dr. & War. 274) Sugden, L.C. said: "The general rule of equity is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. So if a man covenants to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract." The payment of the 100*l.* here cannot allow the defendant to break his

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contract. In *Robb v. Green* (73 L. T. Rep. 15; (1895) 2 Q. B. 1, 315) both damages and an injunction were granted.

S. A. T. Rowlatt for the defendant.—The plaintiffs here cannot have both an injunction and the damages. In *Sainter v. Ferguson* (1 Mac. & G. 286) a plaintiff having brought an action and recovered liquidated damages for breach of an agreement, the court refused to grant an injunction. Again, in *Carnes v. Nesbitt* (4 L. T. Rep. 538; 7 H. & N. 158, 778) the court refused any injunction where the parties had agreed as to liquidated damages. He referred to

Howard v. Woodward, 11 L. T. Rep. 414; 34 L. J. 47, Ch.

In *Young v. Chalkley* (16 L. T. Rep. 286) the defendant undertook to abstain from carrying on business within two miles of the plaintiff, and there was a proviso that there should be a penalty of 20*l.* for a breach. There the court held that whether the 20*l.* was a penalty or liquidated damages, they would not grant an injunction.

Danckwerts, K.C. in reply.—If the plaintiffs have to elect, they will take an injunction.

WRIGHT, J.—Both parties here are agreed that this is a case in which an injunction can be granted, but the question is whether under the agreement the plaintiffs are entitled to a double remedy—that is to say, both damages for the past breaches and an injunction to restrain future breaches. The cases are not altogether satisfactory. The judges in *Cole v. Sims* (23 L. J., 258, Ch.) do not seem to take the view that the payment of liquidated damages excludes the jurisdiction to grant an injunction, but they seem to think that a person may be entitled to both. They do not, however, seem to have had their attention called to *Sainter v. Ferguson* (1 Mac. & G. 286). However, I have come to the conclusion that the current of authority from the case of *Sainter v. Ferguson* (*sup.*) down to *Howard v. Woodward* (*sup.*) and *Young v. Chalkley* (16 L. T. Rep. 286) shows that when the damages are intended to cover the whole ground, if the plaintiff takes those damages he cannot get an injunction. These cases show that a plaintiff cannot have both remedies, but has an option to elect which he will have. If the plaintiffs elected to take the damages they could not have an injunction, for the damages would be all they were entitled to, but as they have elected to take the injunction, they cannot have judgment for the damages as well.

Judgment accordingly.

Solicitors: *Beyfus and Beyfus*; *Trower, Still, Freeling, and Parkin.*

Feb. 5, 6, and 10.

(Before KENNEDY, J.)

KIDSTON AND CO. v. MONCEAU IRONWORKS COMPANY. (a)

Sale of goods—Stipulation—Condition precedent
—“Specification to be given at the beginning of May”—*Delay—Repudiation.*

The defendants agreed to sell and deliver to the plaintiffs 1000 tons of iron.

By the sale note it was provided: “Delivered

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

... cost and freight Japan, direct port, specification to be given in the beginning of May. Time of shipping May and June from Antwerp.”

It was known by both parties that the specification had to be sent from Japan, and, in fact, the specification was given in various parts between the 12th and 15th May.

All the iron could be manufactured by the defendants in eight days, and opportunities of shipment in May and June were frequent from Antwerp to Japan.

Held, that “specification to be given in the beginning of May” was not a condition precedent, a breach of which entitled the defendants to repudiate the contract, but that, even if it was, the giving of the specification between May 12 and 15 was sufficient compliance.

Whether or not a term of a contract is a condition precedent must be collected from the provisions of the instrument creating the contract and the circumstances legally admissible in evidence with reference to which it is to be construed.

THIS was an action tried before Kennedy, J. without a jury.

It was brought by the plaintiffs against the defendants to recover damages for breach of contract for sale and delivery by the defendants to the plaintiffs of 1000 tons of No. 2 bar iron at 6*l.* 7*s.* 6*d.* net per ton.

On the 21st March 1901 the defendants agreed to sell and deliver to the plaintiffs 1000 tons of iron of the description No. 2 bar iron, at the price of 6*l.* 7*s.* 6*d.* net per ton on the terms contained in a sale note of that date signed by the defendants by their duly authorised agent.

Such sale note contained the following term:

Delivered . . . cost and freight Japan, direct port, specification to be given in the beginning of May. Time of shipping May and June from Antwerp.

The plaintiffs duly gave specifications in accordance with the terms of the sale note for 1000 tons of iron in various parts between the 12th and 15th May for shipment to Japan, which specifications the defendants duly received.

The defendants refused to perform their agreement with the plaintiffs or to deliver the iron or any part thereof. The iron ordered by the plaintiffs was required by them for shipment to a consignee in Japan, and it was known to both the parties that the specifications had to be sent from Japan, and the iron contracted for could have been manufactured by the defendants in eight days. The opportunities of shipment from Antwerp to Japan were frequent during May and June.

On the 14th to the 18th May 1901, when the defendants refused to deliver the 1000 tons, the price of the iron described in the sale note for shipment to Japan on the terms of such note as to shipment was 7*l.* 2*s.* 1*d.* per ton. The plaintiffs claimed the difference between the price per ton at which the defendants agreed to sell the iron to the plaintiffs and the price at the date of the defendants' refusal to deliver—namely, 15*s.* per ton, equal to 750*l.* The defendants admitted repudiating and refusing to carry out the contract, and they also admitted non-delivery.

The price of iron between the 14th and 18th May was 6*l.* 19*s.* per ton.

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KIDSTON AND CO. v. MONCEAU IRONWORKS COMPANY.

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Scrutton, K.C. and Muir Mackenzie for the plaintiffs.

Hamilton, K.C. and Bateson for the defendants.

Feb. 10.—KENNEDY, J. read the following written judgment:—The principal and almost only question in this case is whether the defendants were or were not justified in refusing to deliver the 1000 tons of iron contracted for, because the plaintiffs did not give the defendants the specifications for its manufacture until a date which, as the defendants allege, was outside the period allowed by contract for such delivery. The controversy between the parties is not as to the terms of the contract, which was in writing, but as to the meaning and the legal effect of one of those terms. By the terms of the contract, which was made on the 21st March 1901, the plaintiffs, the buyers of the iron, were to deliver the specification "in the beginning of" the following "May"—it was, in fact, delivered in several parts between the 12th May and the 15th. The defendants at once declared the contract at an end. Were they justified in this action? Two questions arise: First, was the delivery by the plaintiffs of the specification at this time a delivery in accordance with their obligation as to the time of delivery of the specification under the contract? Secondly, if it was not such a delivery is the term "specification to be given in the beginning of May" a condition the non-fulfilment of which entitled the defendants to declare the contract at an end? I will take the second point first. The rule of construction is settled. The court must ascertain the intention of the parties to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed. That is the law as laid down by Parke, B., at p. 716, in *Graves v. Legg* (2 H. & N. 210; 9 Ex. 709), cited by Blackburn, J., at p. 246, when delivering the judgment of the Court of Queen's Bench in *Bettini v. Gye* (34 L. T. Rep. 246; 1 Q. B. Div. 183). I have come to the conclusion that the provision in question in this contract is not a condition precedent. The expression "in the beginning of May" is in itself not precise but indefinite. It has no fixed boundaries. Whereas if the intention of the parties was to stipulate for a hard and fast time limit, compliance with which might be rigidly enforced, one would expect precision. The parties knew that the specification had to come from Japan, and therefore the date of its arrival was obviously subject to contingencies. The time prescribed to the defendants by the contract for the shipment of the iron, the possibility of compliance with which might no doubt, in the nature of things, be largely influenced by the date of the delivery of the specification, is elastic, for it spreads over May and June. The opportunities of shipment in those months from Antwerp to Japan, as I am satisfied on the evidence, were known to be frequent, and the defendants' works are so extensive that as far as regards the mere production of the whole quantity contracted for, as I understand the evidence, it could be rolled, according to the proved facilities of output, in less than eight days. No doubt as it was a c.f. contract, the defendants must engage some little time ahead and also make some arrangements in their works so as to fit in the production of this iron

with the fulfilment of other orders. But in truth, as the evidence stands, it appears to me that the delivery on the 15th May did not prevent nor practically inconvenience any of these things being leisurely done. Of course, if the delivery of the specification on the 12th May and the 15th was not only later than the contract authorised, but so late that, from a business point of view, it would deprive the defendants of the whole benefit of the contract, or entirely frustrate the object of the contract by rendering it impracticable, in a business sense, for the defendants after such delivery to ship the iron in May or June, the lateness of the delivery would constitute a sufficient justification for the defendants' refusal to be bound to a performance of their part of the contract. This is the effect of the judgment referred to on behalf of the plaintiffs of Willes, J. in *McAndrew v. Chapple* (8 L. T. Rep. 813; L. Rep. 1 C. P. 643). But I am satisfied upon the evidence that such was not the case here. I think the true result of that evidence is that it was not impracticable, and that, if I may use the phrase, it did not put upon them, from a business point of view, an unreasonable burden to manufacture the goods, ordered as they were by the 15th May, and ship them in May or June after the delivery of that specification. They do not so assert, I may point out, in their letter of repudiation. They seem simply to take their stand upon the construction of the clause in question as containing upon the face of it that which must be construed rigidly as a condition precedent to their obligations under the contract. I cannot so hold. It appears to me that whatever may be the date which is to be taken as the termination to the period described as the beginning of May, the promise in question is one which, unless indeed, as I have said, there is a breach of it so extensive as to frustrate the intention that the goods should be shipped before the end of June, could give rise properly if transgressed only to a right to compensation in damages. Assume, for argument sake, that the beginning of May is taken to mean within the first eight days of May, and that the delivery of the specification had taken place on the 10th May, it appears to me that it would be quite unreasonable to suppose that the parties, as business men, meant to stipulate that any such delay, practically of no moment whatever, should destroy the plaintiffs' right under the contract. The view which I have expressed makes it unnecessary for the decision of this case to answer the first question—namely, whether delivery completed on the 15th May was a delivery "in the beginning of May" or not. But if it were necessary to decide this point, I have come to a conclusion, though not without hesitation, that this question also ought to be answered in favour of the plaintiffs. I am inclined to think that this loose expression "in the beginning of May" would cover a delivery of specification made as this was in the first half of May. I come to this conclusion chiefly upon the consideration of the nature of the contract and of the circumstances which affect and surround the contract to which I have already adverted in dealing with the second question. But I would add that directly the term is treated as the defendants themselves evidently treated it, and as I think it must be treated, as meaning something wider than a literal interpretation

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would make it, something wider than the 1st May, which is the literal interpretation of the beginning of May, then the most reasonable construction is to take the phrase to include any date which cannot be described as being either "at the end of May" or "in the latter part of May."

Judgment for the plaintiffs.

Solicitors: *Stephenson, Harwood, and Co.; Stibbard, Gibson, and Co.*

Feb. 11 and 20.

(Before KENNEDY, J.)

McDOWALL v. GREAT WESTERN RAILWAY COMPANY. (a)

Negligence—Railway—Trucks on incline—Act of trespasser—Damage—Liability.

A railway company left certain trucks in a position on an incline, which if not interfered with were safe as regards a highway. They were aware that there might be interference by trespassers, and the jury found that the danger of interference might have been guarded against by the exercise of reasonable care and skill on the part of the company, which they did not exercise, and the jury found they were negligent. An accident having arisen to the plaintiff, who was passing along by highway, owing to the trucks running down the incline:

Held, that the railway company were liable.

FURTHER CONSIDERATION.

This was an action brought by the plaintiff, a young lady of nineteen years of age, by her next friend, her father, to recover damages for serious injury inflicted upon her in July 1900 by a brake van belonging to the defendants at Pembroke, and under the management of the defendants' servants.

The material facts were as follows:

The defendants have as part of the railway system at Pembroke a branch called Hobbs Point branch. It is an offshoot of the main line, and is chiefly used as a siding. The Hobbs Point branch line crosses on the level a highway with a gate on either side across the line of railway.

For some distance from the highway to the eastward there is a steepish gradient in the railway line of about one in fifty-five, descending to the point where the line crosses the highway.

In the course of the gradient is what is termed a "catch-point," which would arrest and divert any railway trucks or carriages which from any cause happened to run down the incline towards the highway and prevent them from "running wild."

On the day before the accident a servant of the company had taken an engine with five trucks and a brake van along Hobbs Point branch line from the railway station, intending to leave them there as on a siding until they were required.

He drew them beyond and to the westward of the catch-point to a position on the incline between the catch-point and the highway and there left them, after putting on the brake in the van and properly "spragging"—that is, securing by means of pieces of wood—the wheels of the trucks. The van was attached to the trucks by a screw coupling, which was not screwed up tight, but

sufficiently tight to hold the van in connection with the trucks if not interfered with.

The position would not be a safe one in regard to the highway if these precautions had not been taken, but it would have been safe if things had remained as they were when the trucks and the van were left in this condition.

The reason why the trucks and van were not left to the eastward of the catch-point was that it was wished by the company's servants to have extra space of free line for shunting purposes.

The next day some boys amused themselves by playing with the vehicles and their fastenings. They were seen doing this. They carelessly unfastened the screw coupling of the van and partly released the brake. In consequence of this, the van, loosed from the trucks, ran down the incline, smashed the gate which separated the line from the highway, as well as the gate higher up, and knocked down and seriously injured the plaintiff, who was passing along the highway.

At the trial the jury returned the following answers to questions left to them by the learned judge:

1. Was the van in regard to persons using the highway where the plaintiff was in a safe position as and where it was left by the defendants' servants on the 20th July unless interfered with afterwards?—Yes. 2. Would the accident to the plaintiff have happened if the van had not been interfered with?—No. 3. Was the interference the act of trespassers, and, if so was the interference with the wilful intent of causing the van to descend the incline or merely negligent?—Yes, it was the act of trespassers with negligence. 4. Was the danger of such interference causing injury to persons using the highway known to the defendants at the time when the van was left and kept where it was, and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?—Yes; it was known and could have been guarded against by exercise of reasonable care on the part of the defendants. 5. Was the accident and injury to the plaintiff materially and effectively caused by want of reasonable care and skill on the part of the defendants' servants in placing and keeping the van as and where it was placed by them either (1) in regard to its position apart from interference by trespassers; or (2) in regard to its danger if so interfered with; (3) in any other way by want of reasonable care?—Yes, the company were negligent in not placing the van and trucks to the east of the catch-points.

The jury assessed the damages at 175*l*.

Arthur Lewis and Samson for the plaintiff.—The rule laid down in *The Bernina* (56 L. T. Rep. 450; 12 P. Div. 58) is the one which governs this case. There Lord Esher, M.R. said: "If no fault can be attributed to the plaintiff and there is negligence by the defendants and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer." The same was said by Lindley, L.J. In *Clark v. Chambers* (38 L. T. Rep. 454; 3 Q. B. Div. 327) the defendant was held liable where the immediate cause of the accident was the act of a third party, when the defendant had brought the dangerous instrument upon the road and the third party had moved it on the pathway, where it injured the plaintiff. No doubt there was a cause of action against the trespassers for

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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negligence, but there was also negligence on the part of the defendants in not preventing trespassers interfering. In *Lynch v. Nurdin* (1 Q. B. 29) the defendant negligently left his horse and cart unattended in the street. The plaintiff, a child of seven, got upon the cart in play and another child led the horse on, and the plaintiff was thrown down and injured. There it was held that the defendant was liable though the plaintiff was a trespasser and contributed to the accident by his own act, and it was properly left to the jury whether the defendant was negligent and the negligence caused the injury. *Sharpe v. Powell* (26 L. T. Rep. 436; L. Rep. 7 C. P. 253) is not against the plaintiff, and, when examined, is in our favour. The effective cause of the damage was the negligence of the defendants, and *Engelhart v. Farrant and Lipton* (75 L. T. Rep. 617; (1897) 1 Q. B. 240) and *Harrold v. Watney* (78 L. T. Rep. 788; (1898) 2 Q. B. 320) apply. The defendants are therefore liable.

B. Francis-Williams, K.C. and Benson for the defendants.—All the cases cited show that the defendants in those instances were guilty of some unlawful act. What the defendants in this case did was perfectly lawful, and they cannot be held liable for the negligence of trespassers. That is the whole basis of the decisions, and is the distinction between the cases where the defendant has been held liable and where he has not been held liable. They referred to

Hott v. Wilkes, 22 R. R. 400; 3 B. & Ald. 304;
Jordin v. Crump, 8 M. & W. 782;
Ilidge v. Goodwin, 38 R. R. 798; 5 C. & P. 190;
Hughes v. Macfie, 9 L. T. Rep. 513; 2 H. & C. 744;
Bird v. Holbrook, 4 Bing. 628;
Hill v. New River Company, 18 L. T. Rep. 555; 9 B. & S. 308;
Burrows v. March Gas and Coke Company, 26 L. T. Rep. 318; L. Rep. 7 Ex. 96;
Collins v. Middle Level Commissioners, 20 L. T. Rep. 442; L. Rep. 4 C. P. 279;
Harrison v. Great Northern Railway Company, 10 L. T. Rep. 621; 3 H. & C. 231.

The whole of these cases are dealt with and discussed in *Clark v. Chambers* (sup.). [KENNEDY, J. referred to *Smith v. London and South-Western Railway Company* (23 L. T. Rep. 678; L. Rep. 6 C. P. 14).] They also referred to *Vaughan v. Menlove* (43 R. R. 711; 3 Bing. N. C. 468). It was not negligence on the part of the defendants to assume that persons would not trespass. Here, on the findings of the jury, there is nothing to make the defendants liable.

Samson in reply.

Feb. 20.—KENNEDY, J. after stating the facts set out above, continued:—I did not give judgment at the time upon these findings, but reserved the case, which is in some respects peculiar, for further consideration; and the questions of law arising upon the case have been fully and carefully argued before me. The defendants' contention is, in short, that as the placing of the vans as and where they were placed, was, as they were left, safe and without danger to others, there was no negligence in any act of the defendants; and that they cannot be held legally responsible for an occurrence which was immediately and directly due to the subsequent act of trespassers. The plaintiff, on the other hand, relying especially on

the fourth finding of the jury, contends that the principles laid down by the Queen's Bench Division in their considered judgment in *Clark v. Chambers* (38 L. T. Rep. 454; 3 Q. B. Div. 327), and in the earlier cases of *Lynch v. Nurdin* (1 Q. B. 29), and in other cases which were fully reviewed in that judgment, and also in the later decision of the Court of Appeal in *Engelhart v. Farrant and Lipton* (75 L. T. Rep. 617; (1897) 1 Q. B. 240), are applicable here. They contend that the jury were warranted in the circumstances in finding as they did, in answer to the fourth and fifth questions, that the defendants were guilty of negligence in the circumstances in leaving and keeping the vans in the place in which they left and kept them, and that such negligence was the material and effectual cause of the injury to the plaintiff. I have, upon the whole, come to the conclusion that the plaintiff's contention is right. The finding of the jury in answer to the fourth question—namely, that the defendants at the time of the placing and keeping the van and trucks where they did, knew of the danger to those on the highway of such interference as caused the plaintiff's hurt appears to me to be conclusive. The position in which, with this knowledge, they placed and kept the van was one of danger, because if the interference happened, there was nothing there to stop the van running down the incline, crashing against the intervening gates as it did, and into the highway. There was a catch-point which has been placed to prevent, and which would in fact on this occasion have prevented, a disaster. With the knowledge of the danger the defendants, for the convenience of their traffic arrangements, preferred not to use an obvious and effective safeguard. There was, I think, quite sufficient evidence to justify the finding of the jury of the defendants' knowledge of the existence of the danger which the defendants' servants then needlessly imposed upon persons using the highway. For years, according to the defendants' witnesses, they had been troubled by boys playing with and on trucks and carriages left stationary at this part of the line. This portion of the branch was bounded on the one side by a wire fence which separated it from some open ground of the defendants, and on the other side there was a field, which was separated from the high road by a garden. To the knowledge of the defendants' servants on whom the management of the traffic devolved, boys used to get into the trucks and even unlock the doors of the vans for purposes either of theft or amusement. If the defendants knew of this systematic, or, at any rate, very frequent, interference, it does not appear to me to be otherwise than reasonable for the jury to say that they must be taken to have known of the risks involved to trucks and carriages kept in position on the down grade only by temporary means which were apparently easily moveable, moved as they were by some two boys in this case, and uncontrolled by the catch-point, and the risks that would follow to those who were lawfully using the highway below. If, as the jury have found, the risk of interference by trespassers with trucks and carriages in this locality was a risk known to the defendants, and if the consequent danger of their movement down the incline to the highway was also a known risk, and if, further, this danger might have been guarded against by the

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exercise on the part of the defendants of reasonable care, which the jury have also found, I can find no legal reasons upon which the defendants can claim immunity from the consequences to themselves merely because the boys were trespassers. I may point out that in *Engelhart v. Farrant* (sup.) the act which there immediately caused the hurt to the plaintiff was an unauthorised and improper act on the part of the person who did it, and in *Lynch v. Nordin* (sup.), in a passage in his judgment quoted in the case of *Clark v. Chambers* (sup.), by Cockburn, C.J., at p. 332, "Lord Denman said: 'If I am guilty of negligence in leaving anything dangerous, where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if the injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.'" Here the van when left was not, in itself, in a position or condition to cause danger to others; but it was known that if left it might become dangerous for reasons which were known to the defendants which they might have guarded against by the use of a catch-point, and which they must be taken therefore to have placed in a position which they might know would have become dangerous, and I think the principle of the judgment applies. I therefore give judgment for the plaintiff for the amount found by the jury by their verdict.

Judgment accordingly.

Solicitors: A. B. and H. Steele, for W. J. Jones, Haverfordwest; R. E. Nelson.

Monday, Feb. 24.

(Before KENNEDY, J.)

MODESTO PINEIRO AND CO. v. DUPRE AND CO. (a)

Shipping—Charter-party—Demurrage—Ship to go "to a loading place as ordered"—Commencement of time—Lien—Keeping goods on ship—Demurrage.

By a charter-party it was provided that a ship should proceed to Santander, excluding San Salvador old tip "to a loading place as ordered" and there take on board a cargo.

Held, that the ship could not be taken as an arrived ship for the purpose of the commencement of the lay days until she had arrived at the loading place as ordered, and that arrival at Santander was not sufficient.

A shipowner who has a lien on the cargo for freight or demurrage, when he has the opportunity of unloading the cargo, cannot keep the cargo on the ship and then claim for the detention of the ship.

COMMERCIAL CAUSE.

This was an action brought by the plaintiffs against the defendants to recover 400*l.* for demurrage on the s.s. *San Salvador*.

By a charter-party made between the parties, dated 3rd Nov. 1901, it was provided that the plaintiffs' steamship *San Salvador* should proceed to Santander, excluding San Salvador old tip, to a loading place as ordered, and there take on board,

by day or by night if required, a cargo of iron ore, and, being so loaded, should proceed to Maryport (Senhouse Dock), and there deliver the cargo, as customary, alongside lighters or at any wharf or usual landing place as directed by the consignees.

It was also provided that:

The merchants shall be allowed, weather permitting, one working day for loading every 400 tons of cargo, and a proportionate period for any odd quantity, and shall be allowed a similar period for discharging every 400 tons and a proportionate period for any odd quantity. The periods in each case, whether for loading or discharging, not to commence until after a true written notice has been given during usual Customs hours that the vessel is wholly unballasted and in every respect ready to load, or, as the case may be, to discharge, and that she has been duly entered inwards at the Custom-house and is in free pratique. The following shall not be computed as part of the aforesaid running days: Sundays, Custom-house holidays, or any time of *force majeure*, war, epidemic, civil commotion, political disturbances, riots, lock-outs, strikes, or stoppage of workmen, or other hands connected with the working, delivery, shipment, or discharge of the cargo, whether partial or general, or accidents to the mines, works, or machinery, floods or frosts, stoppages on railway or canal, or time when by any cause, of what nature or kind soever beyond their personal control, the charterers or their agents may be prevented or delayed in supplying, loading, or discharging, or the conveyance of the cargo from the mines to the vessel may be prevented or delayed. Demurrage (if any) shall be ascertained by adding together the running days calculated as before stated, and all hours actually occupied over the aggregate running days allowed for both operations of loading and discharging shall be deemed to be demurrage, and shall be paid for at the rate of 16*s.* 8*d.* per hour. The merchants are to be at liberty to average the time for loading and discharging during the entire currency of this charter in order to avoid demurrage and to load the steamer on Sundays and holidays, any time used to count. Time between 1 p.m. on Saturdays and 7 a.m. on Mondays not to count at ports of loading or discharge unless used. Ship to work at night if requested to do so, charterers paying extra expenses. . . . It is agreed that all liability of the charterers shall cease as soon as the cargo is shipped, notwithstanding it may have been sold at a price to cover cost, freight, and insurance, in consideration of the vessel having a lien upon same for all unpaid freight, dead freight, and demurrage, which she is hereby bound to exercise. . . . The periods, whether for loading or discharging, not to commence until after a true written notice has been given during usual Customs hours that the vessel is wholly unballasted and in every other respect ready to load or, as the case may be, to discharge, and that she has been duly entered inwards at the Custom-house and is in free pratique.

The *San Salvador* arrived at Santander on the 18th Nov. 1900. Due notice was given under the charter-party, and the loading time commenced to run at 1 p.m. on the 19th Nov. 1900. The loading was completed on the 10th Dec. 1900 at 6.30 p.m. The vessel loaded 1947 tons. She arrived at Maryport on the 16th Dec. Due notice was given under the charter-party. She could have got into Senhouse Dock on the 18th, but not to a berth in the dock. On the 19th Dec. she was put into a discharging berth in the dock basin on the same terms as if she had docked, and discharge commenced on the same day. The discharge was completed on the 4th Jan. 1901.

The defence raised was that by the charter-party the plaintiffs agreed that their vessel should

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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proceed to a loading place as ordered by the defendants at Santander, exclusive of San Salvador old tip, and there load a cargo of 2000 tons of iron ore at the rate of 400 tons per day, weather permitting. The vessel did not arrive at the loading place ordered by the defendants, and was not ready to load until Friday, the 7th Dec. 1900. She commenced to load at 9 p.m. on the 7th Dec., and was fully laden on Monday, the 10th Dec. at 6.30 p.m., having been engaged (excluding time between 1 p.m. on Saturday, the 8th Dec., and 7 a.m. Monday, the 10th Dec., as per charter-party) 27½ hours or thereabouts in loading the cargo.

Hamilton, K.C. and Balloch for the plaintiffs.

Carver, K.O. and Noad for the defendants.

KENNEDY, J.—This is an action for demurrage, and there are two parts; I will take the latter part first. The question arises as to what took place on the arrival of this steamship in bringing a cargo from Santander to Maryport, and as to the time which was consumed at Maryport, the port of discharge. The plaintiffs say that there was a delay there in taking the discharge; and the defendants repudiate any liability on that head. Now I am of opinion that, assuming that there was a delay at Santander—a demurrage, that is, for which the plaintiffs had a good claim at the port of loading—what they did at the port of discharge cannot be treated as in any respect wrong. Assuming that they had a claim for demurrage, there is this right, which is not disputed, given them by the terms of the charter-party: while all liability of the charterers shall cease as soon as the cargo is shipped, the vessel has a lien for all unpaid freight, dead freight, and demurrage, which she is hereby bound to exercise. The plaintiffs, in effect, when they got to Maryport, said: "We have a good claim." No question arises as to the freight; that was never disputed by those who had to pay the freight, but the question as to demurrage was known to be in dispute. I think Mr. Hamilton is right in saying that, as they had their right to exercise their lien, they had done nothing (assuming them to have a good claim for demurrage) which would prevent them from exercising their lien in the way in which they did. The other side, representing the cargo, offered a guarantee which no doubt would have been sufficient, but the shipowner was not bound to take a guarantee, or even to accept a lodgment of money, to abide the result, in either joint names, or in a single name; and the controversy which culminated in the actual stoppage of the discharge was, in substance, as I follow the correspondence so far as it has been cited to me, this: "We claim to exercise our right of lien. You, say the shipowners, ask us to accept a guarantee. If we take that guarantee it must be with an admission that there is a good claim against you for demurrage at Santander. That may, or may not, have been, apart from any question of law, a perfectly fair way of settling a debatable dispute for time being, to procure the discharge and delivery of the cargo, but in law the shipowner was not bound to do it; he had the right to exercise his lien, and I do not think on the whole that there is anything which shows that, if there had been a tender of the actual money, whether under protest or not, claimed to be due for demurrage, the shipowner

would have refused it; or would have told the charterers in effect: It is no use your making me an offer which will discharge my lien. Then it still remains no doubt clearly the law that, if there is a right of the shipowner, as was the right of the plaintiffs here, to exercise a lien upon the cargo, whether for freight or demurrage, as there are facilities now given him by Act of Parliament for preserving his rights while discharging the ship, he cannot lay upon the receivers of the goods—the persons liable for the freight or demurrage, as the case may be—a larger burden in the shape of charges for the detention of his ship than the circumstances treated reasonably warrant. I think it is the law now, and I should so hold, that if a shipowner, having a right of lien, when he had the opportunities of unloading the cargo and keeping a stop upon it until the lien was discharged, made his ship into a warehouse, and then had a claim for detention, he would not be acting in a way which would be justified by law. But I think, on the whole, that that is not the case here. There are statements no doubt which, taken from the letters read by themselves, seem to signify that it would have been possible to put this cargo on shore somewhere at Maryport; but on the whole I think the balance of the evidence is that there were no trucks, and no other place reasonably fit for the storage of this cargo where the shipowner could have placed it to preserve his lien while discharging the cargo. So, on those points I should find in favour of the plaintiffs in the action. The whole result of the action, as I think the learned counsel who have given me so much assistance in the case agree, turns on what took place at Santander. Now, this is a charter-party under which the ship has to proceed with all convenient speed to Santander, excluding San Salvador old tip, to a loading place as ordered. Those are the initial words of the charter-party; and while, of course, the construction of these charter-parties, which now run into a very elaborate form, I do not say is generally easy, or easy in this particular case, I have formed the opinion that on the main point the defendants are entitled to succeed. The main point which arises in this case is this: What is the place at which the ship must arrive in order to be treated as an arrived ship for the purpose of the commencement of the lay days? Is it to be Santander, or the river, as Mr. Hamilton suggests, which leads from Santander to the loading place for cargoes of this description; or is it, as Mr. Carver contends, the place which is ordered as the loading place inside the port of Santander? It seems to me the true interpretation of this is, that the ship is not to be taken for the purpose of demurrage as an arrived ship, not to be taken as a ship which is in a position to say, "My lay days are now commencing"—until she has arrived at the loading place which was ordered in the port of Santander. In effect, under the circumstances of this case, there is only one place to which she could be ordered and was ordered—viz., the new tip. There is the old tip, which is excluded by the terms of the charter-party. She was ordered to the new tip, and that is the loading place as ordered, and it seems to me the demurrage days did not arise until she got to that loading place, providing nothing was done to prevent her getting there earlier. Why is that so? I think

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it must follow from the fact that this is not a clause under which the vessel is to proceed simply to Santander only. If it had been, it might have been held that it was sufficient if the vessel proceeded to the port named, and to that usual place, be it a dock or that class of place at which the cargo to be loaded has, by the practice of the port, usually to be loaded. Here they describe the place where she is to go, and at which she would be arrived for the purpose of being at the charterers' disposal, as being not merely the port of Santander, but the port of Santander and the loading place at that port, and it seems to me that this place as ordered, the Santander new tip, is the place she must go to before she can say to the charterers, "I am here at your disposal." I think that makes the loading place as ordered, being a place in Santander, equivalent to the berth which was dealt with by the term, "Any safe berth as ordered on arrival in the dock at Garston," in the case of *Tharsis Sulphur and Copper Company Limited v. Morel Brothers and Co.* (65 L. T. Rep. 659; (1891) 2 Q. B. 647). Here the vessel has to proceed and get—whether you call it a dock or loading place does not seem to me to matter—into the port of Santander, and she has to go to that particular place in it which was known as the new tip, and which is ordered by the charterers. It is said for the plaintiffs that those words are so qualified by the subsequent long clause beginning, "The merchants shall be allowed, weather permitting, one working day," and so on, that even if otherwise the view which I take to be the right one on the construction of the earlier words is correct, that view ought to be changed by the effect of that long subsequent clause; and, of course, I quite agree that the whole of a charter-party must be read together. But I think on that the comment of Mr. Carver is a good one. Certain things are there specified as being conditions precedent to be performed—or to happen—to the right of the shipowner to say: "My lay days are beginning"; and, it is said, that the periods for loading or discharging are not to commence until after the certain notices have been given which are there mentioned. I think that it is logically a very strong thing in support of the defendants' argument that this is a negative clause. You may read it as if the parties had said in first place: The point from which the right of the shipowner to claim to be loaded, or to have demurrage if he is not loaded in a specified time, is not to begin until the ship goes to the loading place ordered—the new tip; and, further, not only is that to be a condition precedent to the right to enforce any claim for demurrage, but that condition shall not be treated as the commencement of the period for loading until after certain notices besides have been given. In other words, there are certain additional things which the shipowner must do besides bringing his ship to the place in question. There are other words referred to by the learned counsel for the plaintiffs as supporting his view which I do not think, on consideration, affect the matter. There is a clause about the captain having to telegraph as to the probable date at which the steamer will be at Santander ready to load—that is, ready to take the cargo; and then there is the further clause about the cancelling date. Of course, if she was not in the port within the date mentioned, there would be the right to

cancel. It may be—I do not know that it is necessary to decide it—that "arrived" may not have meant "arrived at the loading place;" but it is expressly provided here that if she has not arrived at Santander within twenty-seven days, meaning, I think, ready to load so far as arrival in Santander is a necessary preliminary to her taking the cargo in at the particular point at Santander which the loading place ordered may be, there is a right to cancel. I think on these grounds the plaintiffs' case fails. In fact, she did not arrive at that place until a considerable time after her arrival at Santander. She could not get there because there were a number of vessels before her, but this is the first simple fact—she did not get there until the time at which she did arrive, and was loaded then in due time. It is not disputed that she was. Then it has been suggested by the defendants that even if I was wrong in deciding for them on the first point, there are certain clauses here which would act as a relief. It is said that there has been bad weather, which would be a sufficient ground for their not loading her earlier, and for not having her at the tip earlier to load. In my opinion that, I confess, I should be unable to decide in favour of the defendants. It seems to me that the argument which has been used, with regard to the construction of the long clause, does not make such weather as described in itself a sufficient protection, unless that weather was weather which affected the loading of this particular ship. It is not easy to distinguish the cases, but that is the view, if it was necessary—which it is not—I should be inclined to take; and I further think that the mere fact of there being a number of vessels in front of this vessel, by itself, would not be a sufficient protection. It seems to me that the fact of there being what has been called a glut of vessels was not a matter which fairly comes under the clause which protects the charterers or their agents, in case of "accidents to the mines, works, or machinery, floods or frosts, stoppages on railway or canal, or time when by any cause of what nature or kind soever beyond their personal control," they may be prevented or delayed in supplying, loading, or discharging, or the conveyance of the cargo from the mines to the vessel may be prevented or delayed. It is not necessary for me to deal with those points, because I think that the other point is sufficient; and therefore on the construction of the charter-party, as the days did not run, as it seems to me, against the charterer until the arrival of the ship, and the other conditions being fulfilled, they being ready to load, the case of the plaintiffs fails, and there must be judgment for the defendants.

Judgment accordingly.

Solicitors: *Botterell and Roche; W. A. Crump and Son.*

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COX (app.) v. BLEINES (resp.).

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Tuesday, Feb. 25.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

COX (app.) v. BLEINES. (resp.) (a)

*Bread—Sale of—Otherwise than by weight—London Bread Act 1822 (3 Geo. 4, c. cvi.), s. 4.**Where a person asked to be supplied with a half-quartern loaf, and the baker's assistant placed the loaf with two rolls in the scale pan, a 2lb. weight being in the other scale, but the beam of the scales did not move owing to the fact that the bread so sold was less than 2lb.:**Held, that this was not a sale by weight within the meaning of sect. 4 of the London Bread Act 1822.*

CASE STATED.

On the 12th July 1901 an information was laid by the appellant for that on the 11th July 1901 the respondent, at No. 64, Hackney-road, did unlawfully sell or cause to be sold bread in other manner than by weight, contrary to 3 Geo. 4, c. cvi.

By sect. 4 of that Act (hereinafter referred to as the London Bread Act 1822) it was provided as follows:

And be it further enacted that from and after the commencement of this Act all bread sold within the limits aforesaid shall be sold by the several bakers or sellers of bread respectively within the said limits by weight, and in case any baker or seller of bread within the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted shall order or direct: Provided always that nothing in this Act contained shall extend, or be construed to extend, to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same.

At the hearing of the information the following facts were proved:—

On the date charged in the information the respondent was carrying on at the shop and premises, No. 64, Hackney-road, the business of a baker and seller of bread.

By the direction of the appellant, who is the inspector of weights and measures for the district, one Charles James Murrell, on the date aforesaid, went into the shop and asked Alice Culham, who was then in the respondent's employment and was serving his customers there, for a half-quartern loaf.

She thereupon supplied him with a loaf and two rolls, for which he paid the sum of 2d.

Before handing such loaf and rolls to Charles James Murrell, Alice Culham placed them in the pan of the shop scales, the loaf first and the two rolls afterwards on the top of it.

The loaf and rolls did not carry the scale down, though they would have done so if they had weighed more than the 2lb. weight which was already in the other scale.

The beam of the weighing machine did not move at all, and the weight of the loaf and rolls was not nor had been ascertained at the time of such sale to Murrell, except that it was clearly

apparent that the total quantity of bread on the scale weighed less than 2lb.

The loaf and rolls were then taken away from the shop by Murrell and weighed by the appellant, who found their aggregate weight to be 5oz. short of 2lb.

The appellant contended that the bread had been sold in other manner than by weight, especially as the actual weight of the bread had not been in any other way ascertained either at the time of or before the sale.

The magistrate was of opinion that the bread was not sold otherwise than by weight. It was sold neither by denomination nor by measure, as two additional rolls were sold with the half-quartern loaf. The appellant did not suggest what mode of sale there could possibly be in this case other than by weight. It seemed to him that directly the bread was placed on the scales it was recognised by both parties to the contract that the sale was to be by weight, and it made no difference even if the bread was afterwards imperfectly or fraudulently weighed.

He was, however, further of opinion that not only was the bread in question thus sold by weight, but that it was actually weighed, and it was weighed in the balance and found wanting. It was not necessary that the beam should be disturbed in order that the process of weighing should be complete. If more than 2lb. of bread is first placed upon the scale and a 2lb. weight is afterwards put upon the other scale, the beam would not be disturbed, yet it could not be said then that the bread had not been weighed. It is sufficient, in a transaction of this sort, to ascertain whether the bread is above or below a certain weight without determining the exact number of ounces or grains. If the respondent's servant in weighing this bread had committed a fraud, she could have been prosecuted under the Weights and Measures Act 1878, s. 26; but he was clearly of opinion that the offence charged had not been committed, so he dismissed the summons.

The question of law for the opinion of the court was whether the sale above described was a sale in other manner than by weight within the meaning of sect. 4 of the London Bread Act 1822.

Duly for the appellant.—He referred to the London Bread Act 1822 (3 Geo. 4, c. cvi., ss. 4, 6). [Lord ALVERSTONE, C.J.—Is not the offence here selling by false weight, and not, not selling by weight?] I submit not. In *Jones v. Huxtable* (16 L. T. Rep. 381; L. Rep. 2 Q. B. 460) the loaf was not weighed at the time of the sale, nor did the purchaser require that it should be weighed. The practice followed by the baker in that case was to weigh the dough before it was put in the oven, allowing for shrinkage, but not to weigh after baking unless at the request of the purchaser. That was held to be a sale otherwise than by weight. Again, in *Williams v. Deggan* (16 L. T. Rep. 492) Cockburn, C.J. said: "I think this case is not distinguishable from *Jones v. Huxtable*, which I consider was rightly decided. To sell bread by weight it must be weighed, and here there is no evidence that it was ever weighed." In *Milton v. Troke* (20 L. T. Rep. 563) Cockburn, C.J. again said: "The statute says that the baker is to sell by weight. Now, by general understanding, a quartern loaf is taken to mean a

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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4lb. loaf. In this case a party goes into the appellant's shop and asks for a quart loaf, meaning a quartern loaf, and a loaf is handed to him which is found to be short in weight. Now, is not that *prima facie* evidence that the bread has not been weighed? I am of opinion that it is." Under this statute the weight, and the correct weight, must be ascertained before the sale takes place or when it takes place. In *London County Council v. Read* (81 L. T. Rep. 452; (1900) 1 Q. B. 288) the respondent was asked for a twopenny loaf, for which he received 2d. This was not weighed in the presence of the customer and nothing was said to him as to its weight, and there was no evidence that it had ever been weighed. This was held to be a sale otherwise than by weight within sect. 4 of 3 Geo. 4, c. cvi. The facts in the present case show that there was no sale by weight. The price was not regulated by the weight of the bread at all. The magistrate should have convicted.

The respondent did not appear.

LORD ALVERSTONE, C.J.—It certainly is unfortunate in this case, as in the case before my brothers Ridley and Channell, that the other side of the case has not been argued. Now, it seems to me that Mr. Daldy is right, and that there was no evidence that there was a sale by weight within the construction that has been put upon the statute in question by the various cases. I think also that the view which I expressed in the course of the argument was a wrong view. I think the statute is open to the construction and intends to distinguish between selling or carrying on the trade of selling by weight and carrying on the trade of selling by any other means. I think the decisions amount to this: that the particular quantity of bread sold for any particular price must be weighed—that is to say, either weighed beforehand by the baker, or, if necessary, weighed in the presence of the customer on demand. In this case all that appears to have been done was that the bread, which could not have weighed 2lb., was put into the scale and had no effect upon the scale, and did not move the beam, and therefore the weight was never ascertained at all. I think, under these circumstances, that there was no evidence upon which the magistrate could properly come to the conclusion that this quantity of bread was weighed at all, or that its weight was ascertained, or that it was sold by its weight; it being a case in which the person was asking for a 2lb. loaf and something else was delivered, when what ought to have been delivered was bread which had been weighed, or the weight of which had been ascertained, so that it was sold by weight. I was at first impressed, as I said before, with the idea that the magistrate's view that the real offence here was selling as or representing the weight of the loaf to be 2lb., when it was not 2lb., was an answer, and showed that this sale might be a sale by weight. I think I was wrong in taking that view, and that this statute, interpreted by the subsequent decisions, means that the weight of the parcel of bread sold is to be ascertained. That being so, in this case, I am of opinion that there is no evidence that the weight of the parcel of bread sold was ascertained at all. The case must therefore go back to the magistrate.

DARLING, J.—I am of the same opinion, and, if I add a word to the judgment of my Lord, it is only because I think it necessary to guard against this: that I do not think our decision means that, in order that there should be a sale by weight, it is absolutely necessary that there should be an ascertainment of the true weight; because, if we held that, then someone who might be prosecuted for not having sold by weight might escape the penalty for the offence by saying, "Oh! yes, I weighed it; but I weighed it with false scales or false weights." It seems to me that it is necessary, in order to decide this point, to decide what "to weigh" means. I think that "to weigh" means to affect to ascertain weight by means of balancing—using what may be properly called a balance—although the instrument be fraudulently used. Still one might weigh a thing and sell it, and yet not sell it by its weight. There would be a weighing, and then a selling otherwise than by weight.

CHANNELL, J.—I agree that the appeal must be allowed. It seems to me, looking at the old statute of George IV. and looking at those words in the enactment of sale by weight, perfectly possible to put two different meanings upon them. It might be held that selling by weight meant merely selling by weight as distinguished from selling by measures, or selling by a supposed measure, or by the particular loaf, or anything of that sort; that is to say, that it went to the mode in which the person was carrying on his business. I am allowed to sell this or that loaf, and to say the price of that is 2d. and of that 3d., and you can look at them and take whichever you like, according to the price. It might be held that it was merely intended to prevent that, and, if the man professed to sell his bread according to weight, and not according to some other mode of pricing it, he was complying with the statute, and so it did not really involve the consideration of whether the weight which was purported to be sold was a true or a false weight. Of course, if he purported to sell as a 4lb. loaf a loaf which did not weigh 4lb., he might be proceeded against on a penalty under some other section of the Act. I was under the impression it might have been possible to take that view, unless the cases showed anything to the contrary, but, now that they have been quoted to us by Mr. Daldy, I think it is quite clear that they do show to the contrary. The first case he referred to, the case of *Jones v. Huatable* (16 L. T. Rep. 381; L. Rep. 2 Q. B. 460), clearly involves the contrary. It shows that what is meant by this statute as interpreted is that each particular loaf must be sold according to the weight of that particular loaf. It was held that it was a contravention of that enactment to do what was done in this case, even if it was a fraud, or an accident, or carelessness, on the part of the person, because he did not sell this loaf according to the true weight of it, but sold it as being a 2lb. loaf when it in fact weighed something less—I forget what. I think that what the magistrate held by his judgment shows that he took the first of those two views which I have endeavoured to express as being the meaning of this Act of Parliament. I think that the cases show that the view he took was the wrong view, and that, if there were no authority on the point, the magistrate's decision would require very careful consideration, but, having

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regard to the authorities which have been cited to us, I have no doubt that his decision is wrong.

Appeal allowed. Case remitted.

Solicitor: W. A. Blaxland.

Tuesday, Feb. 25.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

DAVIES (app.) v. BURNETT (resp.) (a)

Licensing—Bonâ fide club—Intoxicating liquors—Delivery to wife of member for his consumption off the premises—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 3.

A member of a bonâ fide club not licensed for the sale of intoxicating liquor sent his wife to buy intoxicating liquor at the club for his consumption off the premises, having given her for that purpose a written order addressed to the steward of such club. The appellant served the wife with such liquor, and she handed over to the appellant on behalf of the club the price of the liquor.

Held, that no offence had been committed by the appellant, under sect. 3 of the Licensing Act 1872, of selling intoxicating liquor without a licence.

CASE stated on an information preferred by the respondent against the appellant, under sect. 3 of 35 & 36 Vict. c. 94, charging the appellant with, on the 9th Aug. 1901, unlawfully selling by retail intoxicating liquor—to wit, stout—which he was not then licensed to sell by retail.

On the hearing of the information the following facts were proved or admitted:—

The appellant was a waiter employed at the North Wolverhampton Working Men's Club, a *bonâ fide* club, duly registered under the Friendly Society Acts 1875, whose registered office and place of business were at No. 72, North-road, in the borough of Wolverhampton.

About 8.35 p.m. on Friday, the 9th Aug. 1901, Elizabeth Hickman, the wife of George Hickman, went to the club, asked appellant for a bottle of stout for her husband, and handed to him the following ticket:

TO THE STEWARD
NORTH WOLVERHAMPTON WORKING
MEN'S CLUB.

Aug. 9th, 1901.

Please supply bearer with 1 stout
for

Member's }
Signature) G. HICKMAN.

Member's No. 355.

The appellant thereupon, for and on behalf of the club, sold or transferred to Elizabeth Hickman from the stock of intoxicating liquors, the property of the club, a bottle containing stout, in

exchange for which she paid or handed over to him, on behalf of the club, the sum of 2d.

The ticket had been filled in by and was signed by George Hickman, husband of Elizabeth Hickman, who was then at his home, and Elizabeth Hickman on receiving the stout from the appellant returned home with it and handed it to her husband, who drank it.

George Hickman was a duly elected member of the club, but Elizabeth Hickman was not a member.

It was contended on behalf of the appellant, that, inasmuch as the woman Elizabeth Hickman was acting as agent for her husband George Hickman, a *bonâ fide* member of the club, there was in consequence no sale to a non-member, but merely a transfer of the special property in the goods of the club to one of the members, and that therefore no licence was required by the appellant for the sale of intoxicating liquor.

It was contended on behalf of the respondent that the principal objects of the club were "to afford to its members a means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation"; and that if a member not being on the premises could send any person, not being a member, to such a club to purchase intoxicating liquor, the objects of such club would be entirely defeated and the licensing laws evaded.

The justices found upon the above-stated facts that there had been a sale to a non-member, and convicted the appellant.

The question of law arising was whether, upon the facts stated, the appellant committed an offence against sect. 3 of the Licensing Act 1872 and was rightly convicted.

Hobson for the appellant.—Under the circumstances set out in the case, there was no sale of intoxicating liquors by the appellant contrary to sect. 3 of the Licensing Act 1872. It was decided in *Graff v. Evans* (46 L. T. Rep. 347; 8 Q. B. Div. 373) that a member of a *bonâ fide* club was entitled to buy intoxicating liquors at his club and to take them home for consumption. It can make no difference that the sale to the member takes place by means of an agent, and here the wife was undoubtedly the *bonâ fide* agent for her husband. In *Woodley v. Simmonds* (60 J. P. 150) a conviction was upheld where liquor was fetched from the club for the husband by the wife, but, on looking at the report of that case, it is clear that the evidence for the defence was not believed, and *bona fides* was not found. The question of agency where *bona fides* exists was not discussed, and in the present case that being found to exist makes it quite different from that one.

Arthur Powell for the respondent.—There is no power on the part of a member to send an agent to fetch his intoxicating liquors, even assuming that the club is a *bonâ fide* one; the member must act personally, and cannot act by deputy. He referred to

Graff v. Evans (sup.);

Woodley v. Simmonds (sup.).

Lord ALVERSTONE, C.J.—With great reluctance we have come to the conclusion that this appeal must be successful, but I think that this practice of delivering liquors to be consumed by a member of the club off the premises is one that

Name of Article and Quantity must be stated.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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ought to be discouraged and discountenanced. The privileges and advantages which are given by these clubs should be kept for enjoyment on the club premises. But here all we have to decide is a question of law, and in all these cases, when considering whether or not the club is a *bonâ fide* one, it is very important to find out whether there is a practice of delivering liquors for consumption off the premises to non-members as well as to members. It is, however, found here that the club was a *bonâ fide* one; that the wife went for her husband, who was a member and who handed her the ticket which he had signed; and that in fact the husband had the bottle of stout. It is agreed that the wife was the agent for her husband. Under those circumstances it is impossible for us to say that a member of a club which is *bonâ fide* may not by his lawful agent carry out a transaction which was held to be lawful in *Graff v. Evans* (46 L. T. Rep. 347; 8 Q. B. Div. 373). This was a transfer of property authorised by law—namely, a transfer by means of an agent. The case of *Woodley v. Simmonds* (60 J. P. 150) is not against this view. In that case the sale was not a *bonâ fide* one. I think this appeal must be allowed.

DARLING, J.—I agree, though I come to that conclusion with reluctance. This case assumes that the wife was the agent of her husband, and, that being so, there was no offence committed.

CHANNELL, J.—I agree that on the findings in this case the appellant must succeed. If, however, I had a case before me of a club allowing liquor to be taken and consumed off the premises, that would go very far to induce me to hold that such a club was not a *bonâ fide* one.

Appeal allowed.

Solicitors: *Harrison and Davies*, for Hooper and Ryland, Birmingham; *Indermaur and Brown*, for A. Turton, Wolverhampton.

Thursday, March 13.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GREENWOOD (app.) v. BACKHOUSE (resp.). (a)
Animal—Horse—Working in an unfit state—Guilty knowledge—Prevention of Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92), s. 2.

The appellant, who was charged with causing two horses to be worked in an unfit state, carried on business in London, and the two horses in question were under the charge of one L. at a farm at C., where the appellant resided. He was practically always away, and did not see the horses above once a fortnight, they being under the entire management of L. There was some evidence that the appellant knew that the horses had been out of condition at some time, but no evidence was given as to the date when that was, or how long it was before the alleged improper working. There was no evidence that the appellant had interfered with L., had given any order for the horses to be worked, or knew of their condition on the day in question. On the 2nd May 1901 the horses were being worked in an unfit state. The justices convicted the appellant.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Held (allowing the appeal), that there was a failure on the part of the prosecution to give any evidence of guilty knowledge with regard to the offence in question.

CASE stated on an information preferred by the respondent against the appellant charging him with unlawfully causing to be cruelly ill-treated, abused, and tortured certain animals—to wit, two horses—by causing them to be worked in an unfit state.

Upon the hearing of the information the following facts were admitted or proved:—

The appellant was a slate merchant carrying on business in London and employing horses in his business. He resided at Hill Top, Chaldon, where he had a pleasure farm of 100 acres.

At the beginning of May 1901 John Lunn and a man named Bradford were in the employment of the appellant at Hill Top Farm, Lunn in the capacity of foreman.

On the 2nd May 1901 two horses were being worked in an unfit state on the appellant's farm by Bradford. They were suffering from old sores on the shoulders.

The following evidence was also given: Two witnesses called by the respondent swore that on the day in question on one horse there was a mass of old sores extending from the withers to the point of the shoulders, and that on the shoulders of the other horse was an old sore the size of a five-shilling piece.

The respondent swore that on the 3rd May 1901 he went to Hill Top Farm. The stable door was locked, but he looked through a ventilator and the two horses were pointed out to him by the first two witnesses. He could see a large sore on the right shoulder of one of them which was standing about 7ft. away—apparently an old sore.

On the same day he saw the appellant and said to him: "I've called to see you respecting two horses the police stopped yesterday which were suffering from sore shoulders and were unfit for work." The appellant replied: "Write to me, and I will reply to you." The respondent declined to do so, and added: "I understand that you have given orders for these animals to be locked up." The appellant replied: "Precisely so. If you are not going to summon me, you shall see the horses; but if you are, you shall not. I'll get a veterinary surgeon to see them."

The respondent offered to see the horses with the appellant, or to see them when the veterinary surgeon came. The appellant again wanted an undertaking that the respondent would not summon him as a condition of his being allowed to see the horses.

Later on the same day the appellant came up to the respondent and said: "It seems to me as if you wanted to get people fined or put in prison." The respondent said that he was waiting to see Lunn.

Later on still the appellant appeared with Lunn, and said to the respondent: "Now, here is Lunn, and I've told him that he is not to say one word to you or to answer any questions."

The respondent said: "I shall ask him one question," and then he said to Lunn: "Have you ever spoken to your master about the horses' shoulders?" The appellant said: "Come on; don't you answer him; don't say a word," and turned him away.

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The respondent followed, and said to the appellant that Bradford had told him that he (Bradford) had been dressing the shoulders with hot water and salt for some few days, and that he (Bradford) had seen the appellant go into the stables while the horses were suffering from the sores. To this the appellant made no reply.

For the defence the appellant gave evidence, and swore that he took no personal management of the farm, but left that to Lunn. The last time he saw the horses at work before the 2nd May was about a week previously, when he saw them at work in the distance, but could not tell whether anything was the matter with them or not. He did not know the state they were in. He was in business in London and left home very early in the morning, and, as a rule, did not get back before seven o'clock in the evening. In cross-examination the appellant said that he did not go to see that his horses were well fed or kept clean. He visited the stables perhaps once a week or a fortnight to see the horses. He went in order to go round and see all there was there. He did not know that water and salt had been obtained from the house, and he had not been spoken to about the wounds. There was a previous case of the same kind against him in which the respondent gave untrue evidence; that was why he (the appellant) said to him: "If you have any questions, in order that there may be no misunderstanding, you put them in writing, and you shall have the answers in writing." That previous case was dismissed. He had never, to his knowledge, been in the stable when the horses had suffered from boils or sores.

Lunn was also called, and swore that the appellant did not see the animals often; that he (Lunn) had the whole management of the horses, and that the appellant was in London all day; and that he did not think that the appellant knew anything of the condition of the animals. He did not remember seeing the appellant in the stables during the week previous to the 2nd May. He (Lunn) had said to Police-constable Boon that the appellant would hold him (Lunn) responsible, but he did not see how he could be responsible for this sort of thing on his pay.

On the part of the appellant it was contended that there was no evidence upon which the appellant could be convicted of the offence charged against him.

The justices were of opinion that there was such evidence, and they accordingly convicted the appellant.

The question of law arising on the above statement for the opinion of this court was whether there was any evidence upon which the conviction could be supported.

Woodcock for the appellant.—Here there is an entire absence of guilty knowledge which is necessary for a conviction under sect. 2 of 12 & 13 Vict. c. 92. That guilty knowledge must be proved by the prosecution. It is not enough to prove that the appellant knew the state of the horses; it must be proved that he knew they were being worked in that state. There is no evidence that he knew that the horses were being worked in that state, or were going to be worked. He referred to

Cecil Dwyer (*Colam* with him) for the respondent.—There is some evidence upon which the justices could draw the conclusions which they have. In *Elliott v. Osborne* (*sup.*) and *Small v. Warr* (*sup.*) the only evidence was that the persons there were in the relationship of master and servant respectively; that, of course, would not be sufficient for a conviction, but the facts here go a good deal further than that. The conviction was right.

Lord ALVERSTONE, C.J.—Of course, if there is evidence on which the magistrates can act, whatever we may think of their finding, we ought not to interfere. But in this case, when the whole of the evidence is looked at, we do not think there is evidence of guilty knowledge on the part of the defendant. It has been recognised for a great many years that under this Act there must be some guilty knowledge. The defendant was, on the evidence, in London all the day. It is further said that, on the evidence, he was practically always away, but he did visit the stables once a fortnight. It is also sworn by Lunn, who was called, that he had the whole management of the horses, that the appellant was in London all day, and that he (Lunn) did not think the appellant knew anything of the condition of the animals. The only evidence which may be said to be against that, and I think it cannot be said to be wholly inadmissible, is some evidence that the inspector, making a statement to the appellant, made a statement in reference to what Bradford had said to him, which would go to show that the appellant was told by the inspector that he did know that the animals had been out of condition at some time, because it was stated to him, and he made no reply. He said that he had seen Bradford with water and salt for some few days, and that the appellant had gone into the stable while the horses were suffering from sores. At first I thought that that was enough; on consideration I think not. It is perfectly true that it is said that the appellant made no reply, but nothing is said as to the date when that occurred, and how long it was before the alleged improper working, and there is no evidence that the appellant had interfered with Lunn, had given any order for the horses to be worked, or knew of the condition of the horses on this day. I think the conversation and the apparent reluctance to give answers to the inspector was sufficiently explained, or so sufficiently explained that the magistrates ought not to act upon that confirmative evidence. Whatever view may be taken of the particular defence set up, or the particular explanation given by the defendant, I think there was on the part of the prosecution failure to give sufficient evidence, or any evidence on which the magistrates ought to have acted, of guilty knowledge on the part of the appellant. Therefore the appeal should be allowed and the conviction quashed.

DARLING, J.—I am of the same opinion. It seems to me that what was before the magistrates amounted to a suspicious amount of ignorance, and the magistrates interpreted suspicious ignorance to be guilty knowledge. I do not think that they are the same thing.

CHANNELL, J.—I agree. I assume that the magistrates are entitled to disbelieve the appellant's evidence if they liked. There was some-

Elliott v. Osborne, 65 L. T. Rep. 378; 17 Cox C. C. 346;

Small v. Warr, 47 J. P. 20.

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thing to the contrary, and we cannot judge whether they were right or wrong in disbelieving him, but, assuming that they did disbelieve him, that does not supply the defect which seems to me to exist in the affirmative evidence for the prosecution.

Appeal allowed.

Solicitors: *Dixon, Weld, and Dizons; S. G. Polhill.*

March 14 and 26.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. JUSTICES OF WARWICK; *Ex parte* MAYOR OF COVENTRY. (a)

Justices—Costs of appeal from licensing justices to quarter sessions—Borough or county funds—Alehouse Act 1828 (9 Geo. 4, c. 61), s. 29—City of Coventry Act 1842 (5 & 6 Vict. c. 110)—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43)—Local Government Act 1888 (51 & 52 Vict. c. 41).

C. is a county borough, having a separate commission of the peace, but no separate court of quarter sessions. The justices of the county of W. hold quarter sessions at C. by adjournment from W.

An appeal was brought to the quarter sessions against the refusal of the justices of C. to grant the renewal of a licence, and that appeal was allowed.

Held, that the costs of the justices of C. by virtue of sect. 29 of the Alehouse Act 1828 were not payable by the treasurer of the borough of C., but by the treasurer of the county of W.

CAUSE shown against a rule nisi for a writ of *certiorari* directed to the justices of the county of Warwick, to bring up and quash an order made by such justices at the general quarter sessions held by adjournment at the city of Coventry, whereby it was ordered that a certain appeal against the refusal of certain justices for the city of Coventry to grant the renewal of a certain licence should be allowed and the renewal licence granted; and whereby it was further ordered that the treasurer of the city of Coventry should pay the costs of that appeal.

The grounds upon which the rule was desired were that the justices had only jurisdiction to make such order for the payment of costs by the treasurer of the county of Warwick, and not by the treasurer of the city of Coventry.

Coventry is a city in the county of Warwick, and a municipal borough regulated by the Municipal Corporations Act 1882, and a county borough within the Local Government Act 1888, having a separate commission of the peace, but no separate court of quarter sessions. The justices of the county of Warwick hold a quarterly session at Coventry, by adjournment from Warwick, for the city of Coventry. The expenses of the city police force are defrayed out of the borough fund, and there is a treasurer of the city appointed under the Municipal Corporations Act 1882.

Upon the order of the Local Government Act Commissioners, dated the 28th Jan. 1892, as to financial adjustments, the city pays half-yearly to the county council of Warwick a fixed sum towards

the expenses of the county incurred in part on behalf of the city, including the expenses of county buildings (including the county hall, Coventry), assizes, quarter sessions, criminal prosecutions, coroner, and salaries and remuneration of county officers, including clerk of the peace and county treasurer.

Under an arrangement made between the city and the county council, embodied in the same order, the fines received in respect of summary convictions by the city justices for offences committed within the city are paid to the borough fund, and an agreed sum in satisfaction thereof is paid half-yearly by the city to the county council.

The quarter sessions at Coventry are held under the City of Coventry Act 1842 (5 & 6 Vict. c. 110), which enacts that after the 9th Nov. 1842 there shall be no sheriff and no recorder in the city of Coventry, and that no separate court of quarter sessions of the peace shall be holden in the city, but that after that date the justices of the county of Warwick shall hold a quarterly session of the peace at Coventry, by adjournment from Warwick, for the city and such other part of the county as the Warwickshire justices shall order (now the Coventry petty sessional division) after the business of the session at Warwick shall have been concluded, and it is enacted that the justices of the county of Warwick shall not have jurisdiction within the city except for the purposes of holding the quarter sessions and of levying county rates.

The city paid the county rates from the 9th Nov. 1842 till April 1889, when under the provisions of the Local Government Act 1888 the city became a county borough, and therefore during that time contributed to the fund out of which costs (if any) ordered to be paid by the justices who were respondent on the appeal were defrayed.

At the adjourned general annual licensing meeting of the justices of the city held on the 25th Sept. 1901 one Walter Edwin Mealand applied for a renewal of the full publican's licence held by him at the New Inn in the city, and the justices there assembled refused to renew the same.

Walter Edwin Mealand and Messrs. Phillips and Marriott Limited, the owners of the New Inn, appealed from the refusal to the Court of Quarter Sessions for the county of Warwick, and the appeal was heard at the quarter sessions held by adjournment at the county hall, Coventry, on the 17th Oct. 1901, when the city justices appeared as respondents.

The Court of Quarter Sessions allowed the appeal, and granted the renewal of the licence.

On the deputy-chairman of quarter sessions announcing the decision of the court allowing the appeal, application was made by counsel for the respondent justices for an order on the county treasurer for their costs, but the court refused such application, and made an order on the city treasurer for such costs.

Roskill showed cause against the rule.—It is said that these costs should be paid by the treasurer of the county of Warwick, but I submit that the order was properly made against the treasurer of the city of Coventry. He referred to

The Alehouse Act 1828, s. 29.

The case relied on against me is *Reg. v. Justices*

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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of the *West Riding of York*, (1900) 1 Q. B. 291), but that is distinguishable, and it does not affect this question which arises under the Licensing Acts. The reasoning in that case cannot apply to the application for a licence as here. All the penalties inflicted would go to the treasurer of the city of Coventry. All the authorities dealing with penalties do not apply to cases of licensing. In *Rees v. Amos* (2 B. & Ald. 533; 21 R. R. 386) it was held that where justices of a borough, contributing to the county rate, have committed prisoners to the county house of correction for offences cognisable within the county, the justices at their borough sessions have a right to order such prisoners to be brought before them for trial there; but, *quære*, where a county magistrate having concurrent jurisdiction has committed a prisoner for an offence within the borough, whether the borough sessions have not the same power of ordering such prisoner to be brought before them for trial. He referred to

Winn v. Mossman, 20 L. T. Rep. 672; L. Rep. 4 Ex. 292.

The only jurisdiction that the county justices had within the city were with regard to the matters specifically provided for by sect. 154 of the Municipal Corporations Act 1882. The city justices here were not acting for the county on an application for a renewal of a licence, but only for the city, because of sect. 1 of the City of Coventry Act 1842 (5 & 6 Vict. c. 110) and sect. 38 of the Licensing Act 1872. This last section provides that in the first instance the city justices have exclusive jurisdiction. The fees here go to the city, and not to the county. He referred to

Reg. v. Dale, 6 Cox C. C. 93; *Dona* C. C. 37;
Mayor of Reigate v. Hart, 18 L. T. Rep. 237;
L. Rep. 3 Q. B. 244.

The other side cannot rely on sect. 31 of the Summary Jurisdiction Act 1848 and say that "place" means a place with a separate court of quarter sessions within that section, which deals with the costs of respondent justices. Since *Boulter v. Justices of Kent* (77 L. T. Rep. 288; (1897) A. C. 556), justices hearing licensing applications are not a court of summary jurisdiction. The costs here should be paid by the city of Coventry, and not by the county.

F. Low in support of the rule.—*Winn v. Mossman* (sup.) was a decision under sect. 26 of the Alehouse Act 1828 (9 Geo. 4, c. 61), and sect. 31 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) is the section substituted for it. Under both Acts, and in the decisions of *Winn v. Mossman* (sup.) and *Reg. v. Justices of the West Riding of York*, (1900) 1 Q. B. 291, "place" means county. Where the penalties go in substance, that is the fund to bear these expenses and costs. The county before this financial arrangement would have received the penalties and fines, and so it would have been liable.

Cur. adv. vult.

March 26.—CHANNELL, J. read the following written judgment of the court:—In this case a rule nisi was granted to bring up on *certiorari*, in order to quash it, an order of the justices of Warwickshire for payment by the treasurer of the county borough of Coventry of the costs of certain justices of Coventry as unsuccessful

respondents to an appeal to the quarter sessions against their refusal to renew the licence of a public-house. The order was made under 9 Geo. 4, c. 61, s. 29, and it was admitted that the quarter sessions were bound to make an order for the payment of the justices' costs, but it was contended that it should have been made on the treasurer of the county of Warwick, and not on the treasurer of the city of Coventry. The city of Coventry has had no court of quarter sessions since 1842, when the court was abolished by 5 & 6 Vict. c. 110, and it was made a county borough by the Local Government Act 1888. The authorities quoted on the argument of the rule satisfied us that between 1842 and 1888 the costs of the justices of Coventry in such a case as this would have been payable by the county of Warwick, and not by the city of Coventry, but we reserved our judgment in order to consider the effect of the city having become a county borough, and of the financial adjustment which was made under the Act of 1888. By the Act of 9 Geo. 4, c. 61, s. 29, the costs of justices are, in the event of a reversal of their decision, to be paid by the treasurer of "the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment," and by the 37th section "county or place" were defined as including, amongst other things, "town corporate." There have been a series of cases showing that "place" means a "place having a separate court of quarter sessions." Prior to the Municipal Corporations Act 1835, the question whether county justices had jurisdiction within a borough depended on whether there was a non-intromittant clause in the borough charter. In *Rees v. Amos* (2 B. & Ald. 533) it was held that in a borough not having such a clause, and where, therefore, the county justices had concurrent jurisdiction, the borough justices acted within the borough as justices for the county of which the borough formed a part. By the Municipal Corporations Act the grant of a court of quarter sessions had a similar effect to a non-intromittant clause. In a quarter sessions borough the county justices had no jurisdiction, and in particular could not rate the parishes in the borough to the county rate. The quarter sessions borough paid from its borough fund to the county fund a money payment in respect of services rendered to it by the county at the expense of the county fund, but, not being directly rated to the county rate, it did not share in the burden of general county expenditure, and was for financial purposes separated from the county. On the other hand, a non-quarter sessions borough was subject to the jurisdiction of county justices, and its parishes were rated to county rates just as parishes in the county outside the borough were. Such a borough was therefore for financial purposes a part of the county. Accordingly, in an Act of Parliament in which such expressions as "county or place for which justices acted" or "county or place where an offence was committed" were used for the purpose of declaring to what fund fines or penalties should be paid or from what fund costs should be paid, it has been uniformly held that "place" meant a place which had a separate court of quarter sessions, and was therefore separated from the court for financial purposes. The justices of a non-quarter sessions borough were held

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to act for the county of which their borough was part, according to the principle of *Rez v. Amos* (2 B. & Ald. 533; 21 R. R. 386), and the justices of a quarter sessions borough were held to act for their borough as a "place" separated from the county for financial purposes by being withdrawn from the jurisdiction of the county justices. Thus the quarter sessions borough paid the costs of its own justices when they were unsuccessful respondents to a licensing appeal, but, not being rated to the county rate, did not pay any share of the costs of justices of other parts of the county when such other justices were in the same position. On the other hand, the non-quarter sessions borough did not directly pay the costs of its own justices under such circumstances, but did pay through the county rate, to which it was rated, a share of such expenses, both of its own justices and any other justices of places within the county other than quarter sessions boroughs. The authorities for these propositions are *Reg. v. Dale* (6 Cox C. C. 93), *Mayor of Reigate v. Hart* (18 L. T. Rep. 237; L. Rep. 3 Q. B. 244), and *Winn v. Mossman* (20 L. T. Rep. 672; L. Rep. 4 Ex. 292). The last of these cases is a very strong case, for the court held, in order to arrive at this result, that the express words of 24 & 25 Vict. c. 75, s. 4, that "county or place" in the Licensing Act should include "every borough having a separate commission of the peace although it may not have a separate court of quarter sessions," were controlled by the preamble of the Act, and were limited by it to enabling the justices in such boroughs to act in licensing matters. The law so far being clear, the only question we should have to consider, apart from the Act of 1888, would have been whether the Act 5 & 6 Vict. c. 110 had placed Coventry in any different position from any other non-quarter sessions borough. We think it clear that it did not, for, although the jurisdiction of county justices was excluded for some purposes, the city was expressly made subject to the county jurisdiction as regards county rate, and this, we think, clearly brought it within the decided cases as to other non-quarter sessions boroughs. The Act of 1888, however, divided boroughs in a different way, and the having or not having a separate court of quarter sessions became no longer the test whether the borough was subject or not to county rate, and was or was not separate from or included in the county for financial purposes. County boroughs were created; a new class, or possibly an extension of the formerly very limited class of cities and boroughs which were counties of themselves. The new county boroughs, whether quarter sessions boroughs or not, are not subject to be rated to the county rate. They pay, as quarter sessions boroughs formerly did, many contributions from their borough fund to the county fund for certain matters of common expenditure, but they are for general financial purposes separate from the county. The next class of boroughs of population over 10,000, but under 50,000, are made subject to the county rate, whether quarter sessions boroughs or not, and they are now for general financial purposes part of the county, though exempt as to some particular matters. There is a third class of the still smaller boroughs with which we are not now concerned, but we may refer to the recent case of *Thetford Corporation v. Norfolk County Council* (77 L. T. Rep. 498; 79 L. T. Rep. 315; (1898) 1 Q. B. 141; (1898)

2 Q. B. 468) as showing their position. Speaking generally, the effect of these alterations is that for many purposes "county borough" now stands in the position of a "quarter sessions borough before 1888," and a non-county borough in the position of a non-quarter sessions borough. What we have to consider is how far the position of the city of Coventry as regards the particular matter before us is affected either by the provisions of the 32nd and some other sections of the Act of 1888, or by the award of the commissioners forming the financial adjustment between the borough and the county. By sect. 32, sub-sect. 1, certain liabilities are to cease, and compensation is to be given in the adjustment for their cessation. The adjustment between Coventry and the county of Warwick deals with fines and penalties, but not expressly, at any rate, with these costs of justices. By sub-sect. 3 it further appears that the adjustment is, so far as possible, to prevent either body suffering loss by the altered arrangements, and in proviso b it is said that where the borough was not at the passing of the Act a quarter sessions borough (which is the case with Coventry) the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and if a grant of quarter sessions should be thereafter made should redeem such liability. The cost of quarter sessions is defined in sect. 100 in wide terms and as including costs of prosecutions and the costs of defendants' witnesses, "and all other costs incidental to the quarter sessions." We think the costs with which we have to deal here must be considered costs of quarter sessions within this definition. They are the costs of one of the parties before the Court of Quarter Sessions, and as much costs of quarter sessions as costs of prosecutions or defendants' witnesses. They are costs as to which the Court of Quarter Sessions has to make an order. It appears, therefore, that Coventry has to contribute by a money payment towards costs, similar to those in question in the present case, incurred by justices of other places within the county, and, that being so, it would be only fair to hold, unless we were forced to do otherwise, that Coventry has not to pay the entire costs of its own justices when unsuccessful as respondents, but only a share of those costs by its contribution to quarter sessions expenses. These provisions of the Act of 1888 have somewhat altered the machinery for payment of quarter sessions costs, for Coventry is no longer directly subject to county rate, but, if the view we take as to these costs being costs of quarter sessions is correct, it cannot be said that, so far as regards this particular matter before us, Coventry is financially separate from the county of Warwick any more than it was before the Act. We think, therefore, that we ought to hold, as we should have held but for the Act of 1888, that Coventry, not having a court of quarter sessions and being liable to contribute to quarter sessions expenses, is not a "place" within the meaning of the 29th section of 9 Geo. 4, c. 61—that is to say, not a place separate from the county—and that, as before the Act of 1888, the justices must be considered to have acted for the county of Warwick. The county justices have at all events got jurisdiction within Coventry for the business reserved to them by the Act of 1842, except as to the county rate, which alone was taken away by the Act of 1888.

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The doctrine of *Res v. Amos* (sup.) may therefore still be applied to some extent. The explanation of the matters with which we have to deal in the present case being left in as much doubt as they are, is, I think, that the Legislature intended when the Act of 1888 was passed that all such details should be dealt with by the "financial adjustment." There were too many matters of detail involved in the changes made by the Act to make it possible for the Legislature to deal with them all, and accordingly they were intentionally left for adjustment between the parties, or, if necessary, by the commissioners or an arbitrator. We think, therefore, although the point is not quite clear, if the costs in question are costs of quarter sessions, that an adjustment between Coventry and the county of Warwick expressly providing in some way for costs of justices under the section in question of the Act of 1828 (9 Geo. 4, c. 61, s. 29) would have been good and binding. The matter is not, however, dealt with in the adjustment, unless, indeed, the provision as to the fines and penalties being paid to Coventry carries with it the corresponding liability to these costs, which have always been considered to be payable out of the same fund as that to which the fines have to be paid. As to this, however, it may be said, on the one hand, that the fines and penalties belong under the Act to the county, and that the borough has purchased the right to them for a money payment, and, on the other hand, it may be contended that the Act of 1888 has transferred the right to these fines from the county to the borough, and that the money payment is the compensation payable under the Act for the right to the fines having been so taken away. The test, therefore, as to the fund which receives the penalties does not help us much in the present case. The only case decided since 1888 on a similar point to that before us is *Reg. v. Justices of the West Riding of York*, (1900) 1 Q. B. 291, in which the decision was given in accordance with the old authorities, and without any reference, either in the arguments of counsel or in the judgments, to the Act of 1888. As, however, the matter in question there was the actual costs of prosecutions at quarter sessions, it would be still more clear in the present case that the Act of 1888 had not really affected the matter, and the decision is in accordance with our present view. That view is that, although the Act of 1888 has made very extensive alterations in the relation of boroughs to counties, it has not clearly provided that the liability of these particular costs should be transferred from the county of Warwick, which should have borne it prior to 1888, to the city of Coventry, and, further, that, as the city has to contribute to similar costs from other parts of the county, it is only just to assume that the liability was intended to remain with the county of Warwick. The order of quarter sessions was therefore wrong, and the rule should be made absolute.

Rule absolute.

Solicitors: *Field, Roscoe, and Co.*, for *E. Field*, Leamington; *Crowders and Vizard*.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 22 and 24.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

OWEN v. GIBBONS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Limitation to "right heirs" of testator—Co-heiresses—Joint tenancy or coparcenary—Inheritance Act 1833 (3 & 4 Will. 4, c. 106), s. 3.

By virtue of sect. 3 of the Inheritance Act 1833, where property is devised to the testator's "right heirs," his heir-at-law takes the property as devisee and not by descent. If the testator leaves co-heiresses they will take under the devise as joint tenants and not as coparceners, as coparcenary is an incident of an estate taken by descent, and not of an estate taken by purchase.

Re Baker (79 L. T. Rep. 343) approved.

Decision of Farwell, J. (84 L. T. Rep. 381) affirmed.

JOHN GIBBONS by his will, dated the 6th Sept. 1845, devised certain freehold property to trustees upon various trusts therein mentioned, and, on failure of such trusts, in trust for "my own right heirs for ever."

The testator died on the 12th Dec. 1847, leaving two daughters, Mary Parry and Anne Gibbons, his co-heiresses. Anne Gibbons survived Mary Parry and died in 1882 intestate, leaving Richard Owen her heir-at-law.

All the prior limitations being exhausted in 1900, a question arose as to the effect of the limitation to the testator's "own right heirs for ever," having regard to the 3rd section of the Inheritance Act 1833.

Richard Owen, the plaintiff, contended that on the testator's death his two daughters became entitled under the trust for the testator's "own right heirs" to the property in fee simple as joint tenants, subject to the prior limitations; and that as heir-at-law of the survivor of the two daughters of the testator he was entitled to the whole of the property in fee simple.

The defendants, who claimed through the heir-at-law of Mary Parry, contended that on the death of the testator his two daughters became entitled, subject to the prior limitations, to the property in fee simple as tenants in common, and therefore were each entitled to an undivided moiety of it in fee simple.

Proceedings were commenced by Richard Owen claiming a declaration that he was entitled to the whole of the property as from the death of the last tenant for life under the will.

The action was heard by Farwell, J., who held that the daughters took under the devise, and, it being impossible to create estates in coparcenary by purchase, they took as joint tenants, and he therefore gave judgment for the plaintiff.

The defendants appealed.

Butcher, K.C. and *Austen-Cartmell* for the appellants.—But for the Inheritance Act 1833 it is not disputed that the testator's daughters would have taken by descent as coparceners, and not as

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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joint tenants. That Act does not apply to this case; but if it does, and under it they took as devisees and not by descent, they took as tenants in common and not as joint tenants. Under the old law a testator by a limitation to his right heirs could not make them take as purchasers, the rule being that they took by their better title as heirs:

Counden v. Clerke, Hob., 5th edit., 29;

Robinson v. Knight, 2 Eden, 155.

The Act has made no alteration in such a case:

Hayes' Conveyancing, 5th edit., vol. 1, p. 318;

Watkins' Law of Descent, 4th edit. (1837), by

Joshua Williams, pp. 218, 225 (note 1).

The opposite view is, however, taken in Davidson's *Conveyancing*, 3rd edit., vol. 4, p. 390, and in Jarman on Wills, 5th edit., vol. 2, p. 905. There is a difference in the words used in the two parts of sect. 3. In the first part the word "heir" is used, and in the second part the word "heirs." The first part was only intended to affect cases in which difficulty had arisen in consequence of a devise to the testator's heir as *persona designata*, or to a person by name when he was in fact the testator's heir. The law did not permit a man to take as a gift that which was his by his title as heir, and questions often arose whether under the will he took an estate differing from that which he would have taken as heir:

Scott v. Scott, 1 Eden, 458, 462;

Mounsey v. Blamire, 4 Russ. 384; 28 R. R. 133;

Anon., Cro. Eliz. 431;

Clerk v. Smith, 1 Salk. 241;

Gilpin's case, Cro. Car. 161;

Chaplin v. Leroux, 5 M. & S. 14;

Doe v. Tynins, 1 B. & Ald. 530;

Swaine v. Burton, 15 Ves. 365.

If the devisee took under the devise exactly the same estate or interest as he would have taken without the devise, he took by descent and not as a devisee: (Co. Litt., 19th edit., vol. 1, 12b, note 2). But if he took a different estate or interest, he took as devisee and not by descent. No difficulty arose under the old law in cases of a devise to the testator's heirs or right heirs, because such a devise was considered equivalent to a declaration of intestacy. Therefore sect. 3 was not intended to affect these limitations. But if the Act applies to the present case it does not alter the character of the estate which the persons would otherwise have taken; and if the daughters took by devise, they took as tenants in common as before the Act and not as joint tenants. In *Cooper v. France* (19 L. J. 313, Ch.) Shadwell, V.C. said the meaning of this Act "was to leave the law of inheritance, in cases absolutely plain, just as it found them, and only to lay down rules where there was any doubt existing." [STIRLING, L.J. referred to Shelford's Real Property Statutes, p. 358, and to *Strickland v. Strickland* (10 Sim. 374; 51 R. R. 270) and *Biederman v. Seymour* (3 Beav. 368; 52 R. R. 155) there referred to.] In *Strickland v. Strickland* this point was not considered. There are some observations of Kay, J. in *Berens v. Fellowes* (56 L. T. Rep. 391), which was a case on this Act, which are in favour of the appellants. The decision of Stirling, J. in *Re Baker* (79 L. T. Rep. 343) is contrary to the appellants' contention. But it does not appear to have been argued there that sect. 3 did not apply. It was assumed it did apply.

Upjohn, K.C. and C. L. Coote, for the plaintiff, were not called on.

WILLIAMS, L.J.—In my opinion the judgment of Farwell, J. ought to be affirmed. We have to construe the words of the Act of Parliament, and we must be governed by those words. I do not suppose that anyone would contend, if the words of sect. 3 are taken by themselves, that the present case would not be governed by that section, or that the words in the singular, "to the heir or to the person who shall be the heir of such testator," did not cover a case of a devise to the heirs, or to the persons who should be the heirs (in the plural), of the testator. Mr. Butcher did not, I think, contest that proposition. But he said the words in sect. 3 ought to be limited when you come to construe them, partly because of the words that are used in other parts of the Act of Parliament which seem to draw a distinction between the words "heir or the person who shall be the heir" and the expression "the person or the heirs of the person." It is also argued that we ought to go back to the history of the law before the passing of this Act, and find out what the real difficulty was that arose from the decided cases, and then so narrow the construction of the words of this section as that they shall meet only the cases in which there was a difficulty, and not extend to cases in which there was no difficulty. It was said that in cases where the words used were general words like "my own right heirs" there was never any difficulty whatsoever, because such a devise was considered as equivalent to a case of intestacy, and that the question only arose in cases where words were used under which a *persona designata* took, and the question was whether any estate was by the devise given to him differing in quantity or quality from that which he would have taken as heir by descent; and it was said that the reason, or one of the reasons, of that rule was that the law did not allow a man to take as a gift that which was his own without a gift. Those, I think, are the two principal grounds upon which counsel for the appellants have invited us to put this narrower construction upon the words of sect. 3. But they also contended that, even though you construe the words of sect. 3 in, I cannot help saying, their more natural as well as wider sense, yet they should not be construed as having any effect beyond that which it is said was the object of the Act, which, it is said, was to create a new root of descent, and that if effect is given to sect. 3 for that purpose so as to make the heir, whether coparceners or anyone else, take by devise, that is all that need be done, and that no alteration should be made in the quality of the estate taken by the heir, so that co-heiresses should no longer take as coparceners, but as joint tenants. I think I have stated shortly the whole of the arguments which were put forward by counsel for the appellants. With regard to the first contention—that is, the contention which is based upon the difference of words used in the two parts of sect. 3—I do not think that that difference is sufficient to make us adopt the construction contended for. I am not sure that it is not a little misleading to say that the two expressions mean the same thing. They do in a sense cover exactly the same ground, but obviously you may describe a thing which is really identical in different words

according to the point of view from which you are looking at it; and it seems to me, taking sect. 3 alone, it is obvious that the Legislature, in the two parts of the section, was looking at the matter to be remedied from a different point of view, and I think that is quite sufficient to account for the difference in the language used. Then it is said that the statute should be so construed as to meet only the cases of difficulty which had arisen before the statute was passed. But although it may be true that the cases which had arisen before the statute were only connected with wills in which there was, or purported to be, a devise to a particular person, whether described as the testator's heir or really being his heir, yet that was a mere accident. The reason of the rule in either case, whether there was a gift to the heir by name or whether there was a gift to "my own right heirs," was just the same—namely, that the law did not allow a man to take, or to be made to take, by gift, that which was his own without any gift. It may be quite true that that rule was very easy of application in some cases and very difficult of application in others, still the rule was the same. According to my reading of this Act, the intention of sect. 3 was to abrogate that rule—to abrogate it, it is true, for the purpose of ascertaining, in a new way, the root of descent, but still to abrogate it. Then I come to the last point, which is that we should not construe sect. 3 as doing anything else than altering the mode of arriving at the root of descent—altering, that is, the mode itself. I think Mr. Butcher had to admit, in the course of this argument, that that proposition went too far; but still he did contend that some limitation ought to be placed upon it. He suggested that, notwithstanding sect. 3, these co-heiresses, although they took as devisees, yet for some purposes were to be considered coparceners, and that they took as tenants in common and not as joint tenants. I see nothing in the words of sect. 3 to lead me to that conclusion. We have the distinct decision of Stirling, L.J. in *Re Baker (ubi sup.)* to the contrary. The utmost that can be said of the decision of Kay, J. in *Berens v. Fellowes (ubi sup.)* is that it left the matter in doubt. That being so, I have only really to consider the words of sect. 3, and I had arrived at the conclusion before I considered sect. 2 that there was nothing to justify us in so limiting the terms of sect. 3. But, when I look at sect. 2, my former conclusion is very much strengthened. Under sect. 2 everyone who cannot be proved to take by inheritance is to be considered as taking as a purchaser. Under sect. 3 these two ladies cannot be said to take by inheritance because they are to take as devisees, and therefore it seems to me that they were purchasers. It is right I should call attention to the observations of Shadwell, V.C. in *Cooper v. France (ubi sup.)*. I do not understand the observations of the Vice-Chancellor which have been referred to to be more than *obiter dicta*; but, whatever he meant, it seems to me that he left the point in the present case open, and on this point I agree with the decision of Farwell, J., and hold that these ladies took as devisees—that is, as joint tenants—and that they did not take as coparceners.

STIRLING, L.J.—I agree. The question is whether, on a gift in a will in trust for the testator's own right heirs, his co-heiresses take as

joint tenants or as tenants in common. The will took effect in 1847, after the passing of the Inheritance Act 1833, and the effect of the will must be governed by that Act. [His Lordship then read sect. 3, and continued:] Where before that Act came into operation a will contained a devise, either to the heir of the testator, or to the right heirs of the testator, or to a person named who turned out at the death of the testator to be his right heir, it was held that the devise did not take effect, because, as it was said, in each case the devisee took by his better title—namely, by descent. The Act provides otherwise in cases of testators dying after the 31st Dec. 1833. We have here a devise in trust for the testator's own right heirs. Who are meant by the testator's right heirs? It seems to me that the answer to that question must be, the person or persons who at the death of the testator answer the description of his heir, or heirs, at common law. It is hardly necessary to cite any authority for that proposition, but, if authority is required, it may be found in the case of *Garland v. Beverley* (38 L. T. Rep. 911; 9 Ch. Div. 213). That being so, we have to inquire whether such a devise is a devise to the heir of the testator within the meaning of sect. 3. I cannot see why it should not be. If there had been a devise by the testator to "my heir" it would certainly be within the letter of the enactment. It cannot make any difference, it seems to me, that another letter is added and that the gift is to "my heirs" instead of to "my heir." I think, therefore, that Farwell, J. was well founded in coming to the conclusion that sect. 3 applied. Then there remains the question, What is the effect of that section? The section says that the heir is to be considered to have acquired the land as devisee, and not by descent. He is, therefore, to take as devisee. These co-heiresses, therefore, take as *persons designated*, and as devisees under the will. That being so, it seems to me they must have taken as joint tenants, and not as tenants in common. If there had been a devise to them by name before the Inheritance Act, they would have taken as joint tenants. That is expressly decided in the *Anonymous* (Cro. Eliz. 431). Further, it has been decided by Shadwell, V.C. in the case of *Strickland v. Strickland (ubi sup.)*, on a question of marshalling, that under this section persons who take as devisees, take as devisees to all intents and purposes. Moreover, coparcenery is an incident of an estate taken by descent, not an incident of an estate taken by purchase. For these reasons, I think that on this point also Farwell, J. came to the right conclusion. I do not rely on my own decision in *Re Baker (ubi sup.)*, but in that case the former of the two points was not brought to my attention.

COZENS-HARDY, L.J.—We are asked to give an unnatural interpretation to the words used by the Legislature in sect. 3 on the ground that this particular case might well have been exempted from the generality of the section. I cannot follow this argument. A devise to "my heir" or "upon trust for my heir" is clearly hit by the section. It can make no difference if instead of "my heir" the words used had been "my right heir." Nor can it make any difference if the words are "my right heirs." Each of these three phrases indicates the same person—viz., the

common law heir. "Heir" is the strictly proper designation of coparceners who together are the heir. I think this will must be construed on the same principles as it would be if the trust had been for "the right heirs of X. Y.," a stranger, to whom no estate was given. In that case the right heirs always took as *personæ designatæ*—i.e., took as devisees: (see Jarman on Wills, 5th edit., vol. 2, p. 906). When once this conclusion is reached, I think it is plain that the coparceners, who together are the "right heirs," must take as joint tenants. I see no answer to the reasoning of my brother Stirling in *Re Baker (ubi sup.)*.

Solicitors: *Patersons, Snow, Blozam, and Kinder for Longueville and Co., Oswestry; Woodcock, Ryland, and Parker, for H. C. and A. S. Reynolds, Liverpool.*

March 24 and April 8.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

NEALE v. GORDON-LENNOX. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Counsel—Counsel retained in action—Authority to compromise—Agreement to refer to arbitration—Express limitation of authority—Counsel exceeding his authority—Application by client to set aside—Order to refer.

Counsel retained in an action has an apparent general authority to agree to an order referring the matters in dispute in the action to arbitration, and the client is bound by such an agreement although contrary to his express limitation of his counsel's authority, if that limitation of authority was not made known to the other party; and the court will not set aside the order to refer on the application of the client.

THIS was an appeal by the defendant from an order of Lord Alverstone, C.J. setting aside an order made by consent for a reference of the matters in dispute in the action to arbitration.

The plaintiff brought this action against the defendant to recover damages for an alleged slander.

On the 12th Feb. the action came on for trial before Lord Alverstone, C.J. with a jury. The Lord Chief Justice suggested that the action, instead of being tried in open court, should be referred to arbitration. Sir Edward Clarke, K.C. the leading counsel for the plaintiff, and the leading counsel for the defendant, could not agree upon terms of reference, and thereupon the Lord Chief Justice invited the counsel to see him in his private room, and they did so.

Sir Edward Clarke suggested, alternatively, that all matters in dispute between the parties should be referred to arbitration, or that all matters in dispute should be referred to an arbitrator to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in the action; and that in either case the defendant should state by her counsel in court that she never imputed or meant to impute anything against the moral character of the plaintiff.

Counsel for the defendant refused to consent to make the statement as to the imputations upon

the plaintiff, and would consent only to refer to arbitration the matters in dispute in the action, and ultimately it was agreed that the action should be referred without any statement being made by the defendant's counsel, and the record was withdrawn upon those terms.

Before the action was called on for trial Sir Edward Clarke had written out a document as follows:

Defendant stating by her counsel that she never imputed or meant to impute anything against the moral character of the plaintiff, and is satisfied that there is no ground for any such imputation, case referred to — to say what should be done between the parties in satisfaction of all matters in difference between them. Case referred to — to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action. I consent to either alternative Sir E. Clarke adopts.

Sir E. Clarke's junior saw the plaintiff, and she signed the above document. Sir E. Clarke subsequently stated in court on the hearing of this application and of the appeal that his authority as counsel was limited by that document, and that he had no authority to consent to the action being referred except upon the terms contained in that document that a statement should be made by defendant's counsel; that he had not made any mistake in consenting to the reference; that he had not forgotten that his authority as counsel was limited by the terms of the document; and that, in the circumstances, he ought not to have consented to the reference.

The fact that Sir E. Clarke's authority as counsel was limited was in no way communicated to the defendant's counsel when it was agreed to refer the action to arbitration.

Immediately after it was announced in court that the action was referred, and the plaintiff became aware that no statement was to be made by defendant's counsel, she communicated with her solicitor and instructed him to see Sir E. Clarke upon the matter.

The plaintiff saw Sir E. Clarke on the 14th Feb., and it was arranged that he should apply as soon as possible to the Lord Chief Justice to set aside the order of reference.

The plaintiff, in an affidavit made by her on the 17th Feb., swore that she agreed to the action being referred on the express condition and understanding that the defendant admitted in court by her counsel that no imputation was made upon the plaintiff's character.

On the 15th Feb. the plaintiff gave notice of a motion to rescind the agreement to refer; and on the 19th Feb. the application was made to the Lord Chief Justice to set aside the order of reference and to restore the action to the list for trial.

The application was adjourned in order that affidavits might be made as to the facts.

The order of reference was not in fact drawn up until the 17th Feb.

The application came on to be heard on the 1st March.

Sir Edward Clarke, K.C. (B. J. Drake with him) for the plaintiff.—In consenting to the order of reference against the instructions of the plaintiff, counsel exceeded his authority, and the plaintiff ought not to be bound. No doubt the general proposition is that counsel has authority to deal

(a) Reported by J. H. WILLIAMS and W. W. ORR, Esqrs., Barristers-at-Law.

with the issues in the case, and unless that authority is withdrawn by a communication to the other side, the other side are entitled to consider that counsel has full authority to accept any arrangement made by him within the limits of the case. That general proposition does not apply to this case, as to which there is no authority exactly in point. Although counsel has authority to agree as to matters within the scope of the action, he has no such authority as to matters outside the scope of the action: (*Kempshall v. Holland*, 14 R. 336). Where, in the absence of the defendant and without his express authority, his counsel consented to a verdict against him, the client was held to be bound in *Matthews v. Munster* (57 L. T. Rep. 922; 20 Q. B. Div. 141). [Lord ALVERSTONE, C.J. referred to *Prestwick v. Poley*, 12 L. T. Rep. 390; 18 C. B. N. S. 806.] If the litigant has left himself in counsel's hands, he is bound so long as counsel acts within his apparent authority, but not if the compromise be of a matter collateral to the action: (*Strauss v. Francis*, 14 L. T. Rep. 326; L. Rep. 1 Q. B. 379), and in *Swinfen v. Swinfen* (28 L. T. Rep. O. S. 233; 1 C. B. N. S. 364) Crowder, J. says: "My firm conviction always was, and still is, that counsel is not justified in referring a cause against the client's consent, and that it is not within the scope of his authority." Where counsel has acted against his instructions—as in this case—and then asks the court, the parties being in just the same position and nothing having been done, to interfere to set the compromise aside, the court will do so, and the court will not bind counsel to a mistake through misapprehension: see per Malins, V.C. in *Holt v. Jesse* (3 Ch. Div. 177). The present is an *a fortiori* case. If the client ought not to be bound when the case is one of misapprehension of counsel, much more so ought the client not to be bound when counsel has gone beyond his instructions. So if counsel, acting on general instructions to compromise a suit, by misapprehension consents to concede something which he ought not to have done, neither counsel nor client is bound by the compromise:

Hickman v. Berens, 73 L. T. Rep. 323; (1895) 2 Ch. 638;

Lewis v. Lewis, 63 L. T. Rep. 84; 45 Ch. Div. 281.

The law is practically this: that although counsel has general authority to deal with the conduct of a case, and although that includes an authority to compromise the case on such terms as he thinks right, yet, where through misapprehension of counsel he has entered into an agreement which the client disapproves of and which the client says is prejudicial to his interests, the court will not insist on the compromise arrived at. In the present case there are even stronger grounds, as no harm has been done and there is no suggestion that any injury could happen by setting the order aside. The order made is not a final order, but is an interlocutory order and stands in a different position from a final order. Though the record is withdrawn the action still subsists, and may be restored.

Rufus Isaacs, K.C. (Norman Craig with him) for the defendant.—The principle is that where by the authority of counsel, although that authority is limited by the directions of his client,

but that limitation has not been communicated to counsel on the other side, an arrangement has been arrived at and counsel's apparent authority has been acted upon, the court will not set aside the arrangement. On ordinary principles of law the court will not interfere to set aside a compromise made by a person clothed with such apparent authority, and where counsel's authority is limited, either that fact must be communicated to the other side, or counsel's authority must be withdrawn, and notice of such withdrawal given to the other side. The true reason on which the whole of these cases, in which compromises have been set aside are based, is mistake, that the parties have never been *id idem*. *Swinfen v. Swinfen* (*ubi sup.*), which has been relied on, has not been followed, but has been doubted in the two cases of *Strauss v. Francis* (*ubi sup.*) and *Prestwick v. Poley* (*ubi sup.*); and *Strauss v. Francis* (*ubi sup.*) not only deals with that case, but it also deals with this very question, and the judgment of Blackburn, J. is very strongly in favour of my contention, and is an authority expressly in point. If the compromise be within counsel's apparent authority it is binding on the client, although he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time. The authority must be not only limited, but the limitation, or even the express dissent of the client in court, must be communicated to the other side: (*Wright v. Soreby*, 2 Cr. & M. 671; 3 L. J. N. S. 207, Ex.). That was a case which is precisely similar to the present, and which bears out what Bowen, L.J. says in *Matthews v. Munster* (*ubi sup.*), namely, that counsel has the alternative of returning his brief. *Matthews v. Munster* (*ubi sup.*) clearly shows that whatever the instructions of the client to the counsel may be, the counsel has full authority to compromise the case so far as the cause or the conduct of the cause is concerned. *Kempshall v. Holland* (*ubi sup.*) merely comes to this, that matters collateral to the action are not within the apparent authority to compromise: (see also the judgment of Lord Campbell in *Fray v. Voules*, 33 L. T. Rep. O. S. 133; 1 E. & E. 839). *Holt v. Jesse* (*ubi sup.*) is merely of importance on the question of ratification. Malins, V.C. there says that the client was present in court, and was therefore not at liberty to withdraw the consent there given. That is precisely what happened in this case. This order was made by consent; it had been drawn up and the plaintiff stood aside, and she cannot now interfere:

Ainsworth v. Wilding, 74 L. T. Rep. 193; (1896) 1 Ch. 673;

Wilding v. Sanderson, 77 L. T. Rep. 57; (1897) 2 Ch. 534;

Chambers v. Mason, 5 C. B. N. S. 59;

Swinfen v. Swinfen, 24 Beav. 559.

There is no suggestion in the affidavits that the plaintiff did not understand what was being done. The record was withdrawn, and there is no action pending. Upon all these grounds the defendant is entitled to hold the order which has been made and drawn up.

Sir E. Clarke, K.C. in reply. *Cur. adv. vult.*

March 4.—Lord ALVERSTONE, C.J. read the following judgment:—This is an application to rescind the order of reference of the action to

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Mr. Dickens to which the parties consented through their counsel on the 12th Feb., and which consent was subsequently embodied in an order of the 17th Feb. The only facts I need state are those which appear in the affidavits which have now been produced and the documents which have been handed to me by Sir Edward Clarke. From these it appears that prior to the consent given by counsel the plaintiff had signed a document which had been drawn up by Sir Edward Clarke [reads it]. If the matter had rested there it would, in my opinion, have been impossible to hold that any restraint was actually put upon Sir Edward Clarke's discretion in dealing with the case; but the plaintiff swears in her affidavit, made upon the 17th Feb., that after consultation with her counsel, whom I understand to have been Sir E. Clarke's junior, she consented to the reference on the understanding that the defendant admitted in court by her counsel that the plaintiff's character was exonerated and that no imputation was to rest upon it. I must take it that this statement in the affidavit was true. It further appears from the affidavits that immediately after it was announced in court that the action was referred the plaintiff communicated with her solicitor and instructed him to see Sir E. Clarke with reference to the case being referred without such statement having been made, and that on the 14th the plaintiff had a consultation with Sir E. Clarke which led to the application being made to me upon Monday, the 17th. Under these circumstances I come to the conclusion, as a matter of fact, that the plaintiff had only consented to the action being referred upon the condition that the statement was made, and did, before the order was drawn up, communicate with her counsel and solicitor with a view to the arrangement being set aside and the case restored to the list. The case was argued before me on Saturday last by Sir E. Clarke for the plaintiff and Mr. Rufus Isaacs for the defendant, and a great many authorities bearing upon the question were cited and discussed before me. I do not propose to go through all these cases, as my so doing would serve no useful purpose; but I will state what, in my opinion, are the propositions of law to be derived from them, and then consider their bearing upon the present case. I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement; and further that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement unless the fact that the counsel's apparent authority had been limited was communicated to the other side. These propositions are, I think, established by the cases of *Wright v. Soresby* (2 Cr. & M. 671), *Prestwick v. Poley* (12 L. T. Rep. 390; 18 C. B. N. S. 806), *Strauss v. Francis* (14 L. T. Rep. 326; L. Rep. 1 Q. B. 379, at p. 381), and *Mattheus v. Munster* (57 L. T. Rep. 922; 20 Q. B. Div. 141), and were stated to be clear law by Lord Coleridge, C.J. in *Harvey v. Croydon Union Rural Sanitary Authority* (50 L. T. Rep. at p. 292; 26 Ch. Div. at p. 256). It is equally well established that the authority of counsel does not extend to matters collateral to the action: (see *Furnival v. Bogle*, 4 Russ. 142), the various

reports in *Swinfen v. Swinfen* (28 L. T. Rep. O. S. 233; 1 C. B. N. S. 364; and 2 De G. & J. 381), *Mattheus v. Munster* (*ubi sup.*), and *Kempshall v. Holland* (14 R. 336). Whether agreeing to a reference of an action is part of the conduct of a case and not collateral has not, as far as I know, been decided by authority. Crowder, J. clearly thought it was not within the authority of counsel—see his judgment in *Swinfen v. Swinfen* (1 C. B. N. S. at p. 403)—but I doubt whether this opinion is consistent with the view expressed by Pollock, C.B. in *Swinfen v. Lord Chelmsford* (2 L. T. Rep. 406, at p. 417; 5 H. & N. 890, at p. 922), or with the judgments in *Strauss v. Francis* (*ubi sup.*) where withdrawing a juror—or *Bumsey v. King* (33 L. T. Rep. 728) where entering a *stet processus*—was held to be within the authority of counsel. Sir Edward Clarke said he could not argue that agreeing to a reference was collateral to the action; and for myself I should hold that, having regard to the existing rules and the power of judges thereunder to refer actions or send them to referees for trial, it was within the authority of counsel to consent to a reference. It is further clearly established that, if the counsel consenting to a compromise is mistaken as to the facts, the client may have the right to set aside the arrangement on the ground of mistake: (see *Holt v. Jesse*, 3 Ch. Div. 177; *Hickman v. Berens*, 73 L. T. Rep. 323; (1895) 2 Ch. 638; and *Wilding v. Sanderson*, 77 L. T. Rep. 57; (1897) 2 Ch. 534). There is, however, as far as I know, no case which has decided that the compromise will be set aside merely on the ground that the counsel has exceeded his authority; and, as I have already indicated, such a view would, in my opinion, be inconsistent with the first proposition which I have formulated and the cases therein referred to. If, therefore, the arrangement came to by Sir E. Clarke had been a final settlement of the action, I am of opinion that it would be binding upon the plaintiff, even assuming that she had limited Sir E. Clarke's authority at the time when he entered into the arrangement. None, however, of the authorities to which I have referred, in which the compromise or arrangement has been held binding upon the client, were cases of interlocutory orders; and in my judgment, in considering the principles which have been and ought to be applied, there is a broad distinction between interlocutory and final orders. This distinction has often been pointed out: (see the judgment of Sir George Jessel, M.R. in *Mullins v. Howell*, 11 Ch. Div. 763, and also the judgment of Romer, J. in *Ainsworth v. Wilding*, 74 L. T. Rep. at p. 195; (1896) 1 Ch., at p. 677). There is, in my opinion, a fundamental difference between interlocutory and final orders as well as between interlocutory and final judgments. Interlocutory orders and judgments are only intended to affect the rights of the parties in the litigation. They are always subject to review when fresh facts are brought to the consideration of the court. Judgments passed and entered stand in a very different position. In the case of an interlocutory order it is generally possible to restore parties to their original position by payment of costs or otherwise; final orders are intended to, and do, as a rule determine the rights of the parties. Perhaps I should add in deference to an argument of Mr. Isaacs that I am clearly of opinion that an order to refer an

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action is an interlocutory and not a final order; (see the authorities collected at p. 842, vol. 1, and p. 507, vol. 2, of the Annual Practice. I cannot help feeling regret that the plaintiff has thought fit to make the present application. The arrangement which was made proceeded from a suggestion made in the first instance by me, and was I believe greatly to her advantage. Sir Edward Clarke, in my opinion, had ample reason to think that he was not exceeding his authority at the time his consent was given, and has, with the chivalry which he has always shown in every act of his professional and public life, taken too large a responsibility for the mistake, if mistake there has been. But holding, as I do, that this was an interlocutory order, that it was in fact made without the plaintiff's authority, and that she took steps to set aside the arrangement before the order was drawn up, I am of opinion that I must reverse the order and restore the case to the jury list. The plaintiff must pay the costs of and occasioned by the postponement of the case, including these applications, in any event.

Application granted. Leave to appeal.

The defendant appealed.

Rufus Isaacs, K.C. and Norman Craig for the appellant.—The Lord Chief Justice was wrong in making an order that the order that this action should be referred, which was made by agreement between counsel, should be set aside and the case restored to the list for trial. The ground upon which the order was set aside was that counsel for the plaintiff agreed to that compromise contrary to his instructions, and that, as the order was only an interlocutory order, the compromise could be set aside. *Prima facie* counsel retained in an action has full authority to agree to a compromise upon any terms not collateral to the action, and he is held out to the opposite party as having that full authority. If that authority has in fact been in any way limited by the client, the opposite party is not in any way affected by that limitation unless it is communicated to him or to his counsel:

Wright v. Soresby, 2 Cr. & M. 671; 39 R. R. 876;
Strauss v. Francis, 14 L. T. Rep. 326; L. Rep. 1 Q. B. 379;
Matthews v. Munster, 57 L. T. Rep. 922; 20 Q. B. Div. 141;
Kempshall v. Holland, 14 R. 336;
Swinfen v. Swinfen, 28 L. T. Rep. O. S. 233; 1 C. B. N. S. 364.

The result of the authorities is, that if the matter is within the apparent general authority of counsel and is not collateral to the action, and any limitation which may have been imposed upon the general authority of counsel is not communicated to the other side, the compromise is binding though made contrary to the instructions of the client. If there has been any mistake or misunderstanding, then the court can reopen the matter whether the compromise has resulted in a final or in an interlocutory order. In the present case there was no such mistake or misunderstanding on the part of plaintiff's counsel. If counsel by mistake merely exceeds the express limits of his authority, that is not such a mistake as to take the case out of the general rule; mere inadvertence on the part of counsel in not observing the limits which have

been placed upon his authority by his client does take the case out of the general rule:

Holt v. Jesse, 3 Ch. Div. 177;
Hickman v. Berens, 73 L. T. Rep. 323; (1895) 2 Ch. 638;
Lewis v. Lewis, 63 L. T. Rep. 84; 45 Ch. Div. 281;
Ainsworth v. Wilding, 74 L. T. Rep. 193; (1896) 1 Ch. 673.

It is within the general authority of counsel to agree to refer an action; that is not a matter collateral to the action:

Filmer v. Delber, 3 Taunt. 486; 12 R. R. 688;
Fariell v. Eastern Counties Railway Company, 2 Exch. 344;
Smith v. Troup, 7 C. B. 757.

Upon the question whether a compromise entered into by counsel is binding upon his client, it makes no difference whether the order made by consent is a final order or an interlocutory order. The only difference is one of procedure. If a proper case is made out for setting aside the compromise, if the order is interlocutory it can as a rule be set aside upon motion, but, if it is final, an action to set it aside must as a rule be brought:

Ainsworth v. Wilding, 74 L. T. Rep. 193; (1896) 1 Ch. 673;
Mullins v. Howell, 11 Ch. Div. 763.

That distinction, therefore, has no application to the question in the present case. This was not an interlocutory order at all, for it finally disposed of the action, the record being withdrawn.

Sir E. Clarke, K.C. and B. J. Drake for the respondent.—The decision of the Lord Chief Justice was right. The facts upon which his decision was based are stated in his judgment. This was an interlocutory order for the reference of the action to arbitration, and the application to set it aside was made before the order was drawn up. If this order was agreed to under a mistake or misapprehension, then it could be set aside as not being binding upon the client:

Lewis v. Lewis, 63 L. T. Rep. 84; 45 Ch. Div. 281.

We cannot, however, say that there was in the present case a mistake of that kind. In fact, counsel for the plaintiff ought not, in the circumstances, to have gone into the private room of the Lord Chief Justice at all, considering what his instructions were as to not agreeing to a reference without a statement being made in court as to the imputations upon the plaintiff. It is admitted that the court has jurisdiction to set aside an order made by consent under a compromise, if it is an interlocutory order and has been agreed to under a mistake as to its effect or scope, or as to the acquiescence of the client in the order. Yet it is contended that, if counsel wrongly and contrary to his instructions agrees to an interlocutory order, the court has no such jurisdiction. That would be an extraordinary position, and the contention cannot be right. The case of *Wright v. Soresby* (2 Cr. & M. 671; 39 R. R. 876) is really an authority in favour of the respondent. The court there refused to interfere under the special circumstances of that case, because the defendant must be taken to have acquiesced in the order, and the other party would be prejudiced if the order were set aside. The court did not say that it had no power to interfere. In this case the plaintiff did not acquiesce in the order which was agreed to,

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and the defendant will not be prejudiced if the order is set aside and the action at once restored for trial. A client can limit the authority of his counsel. In *Strauss v. Francis* (14 L. T. Rep. 326; L. Rep. 1 Q. B. 379) Shee, J. said: "I fully concur in what I understand my learned brothers to hold, that, although a counsel has this general authority, it is yet not an authority which cannot be limited." In this case the authority of counsel was limited by the plaintiff. When a client expressly authorises his counsel to compromise on certain terms, that is an exclusion of any general authority to agree to any other terms, and limits counsel's authority to the terms expressly authorised. The authorities show that an arrangement come to can be set aside before the order is drawn up, which is the completion of the agreement between the parties:

Holt v. Jesse, 3 Ch. Div. 177;

Hickman v. Berens, 73 L. T. Rep. 323; (1895) 2 Ch. 638;

Ainsworth v. Wilding, 74 L. T. Rep. 193; (1896) 1 Ch. 673;

Wilding v. Sanderson, 77 L. T. Rep. 57; (1897) 2 Ch. 534.

At any rate, the court has a larger power to set aside an agreement to refer an action. Special considerations apply to such an agreement. It has been held that an agreement, indorsed on the briefs of counsel, to refer an action is a submission to arbitration within sect. 1 of the Arbitration Act 1889: (*Aitken v. Batchelor*, 68 L. T. Rep. 530). Under that section a submission can be revoked by leave of the court or a judge, and in the present case the Lord Chief Justice, who was cognisant of all the circumstances of the case, has thought it right to permit this submission to be revoked upon the sufficient ground that it was agreed to by counsel who had no right to agree to it.

Craig in reply.—The court will only set aside a submission to arbitration upon the same grounds and principles as it will set aside other agreements.

COLLINS, M.R.—This is an appeal from the decision of the Lord Chief Justice, by which he relieved the plaintiff from an agreement made by her counsel to refer the action to an arbitrator, and restored the case to the list for trial. This appeal is now brought by the defendant, who insists upon the compromise by which it was agreed that the case should be referred. The question is whether the appellant is entitled to insist upon the terms of the compromise made at the trial, and to have the action referred to an arbitrator. Counsel for the plaintiff admits that, in making this compromise, he acted contrary to the instructions of his client. He has taken upon himself the full responsibility. There was no kind of mistake upon his part, and he admits that in fact there was a limitation placed by his client upon his authority, and that notwithstanding that limitation he made this compromise, which was outside of and contrary to his authority. The question before us is, whether the defendant is nevertheless entitled to insist upon the compromise being carried out. Nearly all the authorities were discussed before the Lord Chief Justice, and he has formulated the principles which are to be derived from those authorities. I have read his judgment, and up to a certain

point can see nothing in it which I could wish to qualify or impugn. He has stated with admirable clearness the result of those authorities. He says: "I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement; and further that, notwithstanding a limit may have been placed on the authority of counsel, the party for whom he appears is bound by such settlement unless the fact that the counsel's apparent authority has been limited was communicated to the other side"; and the authorities to which he refers fully support that proposition. Therefore counsel for the plaintiff had *prima facie* full authority to agree to refer the action, and to agree to a reference either with or without a statement being made as to the imputations upon the plaintiff's character. For the proposition that the right to agree to a reference of the action is within the ambit of counsel's authority, either with or without a withdrawal of imputations, there is ample authority. There are clear authorities to that effect. As incident to the position of solicitor in an action, there is a right to agree to refer the action. That was decided in *Smith v. Troup* (7 C. B. 757), where it was held that the attorney on the record has authority to consent to a reference on behalf of his client. In that case, during the argument (p. 762), counsel said: "The point was raised in *Faviell v. Eastern Counties Railway Company* (2 Exch. 344)," and Cresswell, J. said: "And decided against you. Platt, B. there says: 'I think that an attorney, who has been duly authorised to appear for a litigant, has incidentally authority to conduct the cause, and to refer it. If he does wrong, he may be responsible to his client; but his client is bound.'" It was there held, although the defendant made an affidavit that he never consented, or authorised his attorney to consent, to a reference, and that he never attended before the arbitrator, but protested against the proceedings before the award was made, the defendant was bound by the award made by the arbitrator. And I think that the same rule must apply to the authority of counsel. Further, it has been decided that the right to compromise an action for malicious prosecution upon the withdrawal of all imputations and payment of an agreed sum for damages, was within the authority of counsel, and was binding on the defendant: *Matthews v. Munster* (57 L. T. Rep. 922; 20 Q. B. Div. 141). The headnote to that case is as follows: "On the trial of an action for malicious prosecution the defendant's counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for 350*l.* with costs, upon the understanding that all imputations against the plaintiff were withdrawn. Held, that this settlement was a matter which was within the apparent general authority of counsel, and was binding on the defendant." Therefore there are two points as to which a controversy might otherwise have been raised as to whether they were within the apparent general authority of counsel, which is limited, as was said by the Lord Chief Justice, to "matters which relate to the conduct of the action," which are settled by authority; that consenting to a reference, and the withdrawal of imputations, are within the general authority of

counsel. That being so, what is the effect of a limit being placed upon the authority of counsel when that limit is not communicated to the other party? That very point is dealt with in *Strauss v. Francis* (14 L. T. Rep. 326; L. Rep. 1 Q. B. 379), where Blackburn, J. said: "All we decide is, that when a counsel, acting within his apparent authority, consents to withdraw a juror, the other side, acting fairly, may safely rely on the compromise being binding; and that, in order to invalidate the arrangement, not only must it be shown that the counsel's authority was limited, but that the limitation was known to the other side at the time." I need not refer to the other cases which affirm that rule. In the present case the limitation of the authority of the plaintiff's counsel was not communicated to the other side, and the compromise was agreed to that the action should be referred without the defendant's counsel knowing that the authority of the plaintiff's counsel was in any way limited. It now appears that the general authority of the plaintiff's counsel was limited, as Sir E. Clarke states, by the terms of the express authority to consent to a reference upon terms which involved the withdrawal of all imputations. If there was, in those circumstances, in fact any limitation of Sir E. Clarke's authority, it was secret and was not known to the other side. In these circumstances it seems to me that the cases have established beyond all question that the compromise agreed upon cannot be undone. It is conceded that there was no mistake or inadvertence on the part of counsel in agreeing to this compromise. Therefore it seems to me that, whatever right there may be to rely upon a mistake, even when the mistake is on one side only, in order to set aside a compromise, there can be no such right in the present case because there was no mistake of any kind. It appears strange, therefore, that the Lord Chief Justice should have decided this case in the way in which he did decide it, because all the cases which he cited lead to the position which is thus stated in his judgment: "If, therefore, the arrangement come to by Sir Edward Clarke had been a final settlement of the action, I am of opinion that it would be binding upon the plaintiff, even assuming that she had limited Sir E. Clarke's authority at the time when he entered into the arrangement." He came, however, to the conclusion that this was not a final settlement, but only an interlocutory order, and that a different set of principles was therefore applicable, and that the settlement could be undone upon different grounds from those which are applicable in the case of a final order. There is not, however, any authority whatever that different principles are applicable for the purpose of setting aside an interlocutory order than for setting aside a final order. The only difference is that an interlocutory order may be set aside by another interlocutory order of the court, whereas a final order can generally only be set aside by bringing an action for the purpose; but the principles governing the right to have either kind of order set aside are the same. In this case there was no mistake of any kind, and therefore there was no jurisdiction to undo the compromise whether the order was a final or an interlocutory order, and it seems to me that the distinction drawn by the Lord Chief Justice was not based upon any sound foundation. In my opinion, therefore, the decision of the Lord

Chief Justice was wrong, because it was not based upon the principles which he correctly stated to be applicable in the case of a final order or judgment. This appeal must, therefore, be allowed.

ROMER, L.J.—I am of the same opinion. It could not be, and has not been, disputed that the power to make such a compromise as was made in this case was within the general authority of counsel. But it is said that in this case the authority of counsel was expressly limited by the client, and that the limited authority did not allow him to make the compromise in question. I am not satisfied that in fact counsel's authority was limited, but, assuming that his authority was limited and that the limitation prevented him from making the compromise which was made, yet it is clear that it was not known to the other side that his authority was limited in any way. It is clear that, in those circumstances, the compromise is binding upon the client unless it can be departed from upon some general principles. There are some general grounds upon which the client can get such a compromise set aside, for instance, a mistake or misunderstanding on the part of counsel. But it is clear that the compromise cannot be set aside except upon some definite and substantial ground. I have been unable to see the precise ground upon which it is said that this compromise ought to be set aside. There was no mistake or misapprehension on the part of counsel, and counsel had not forgotten the limitation which had been placed upon his authority. The case really comes to this, that counsel made a compromise which at the time he thought beneficial for his client, and that he subsequently found out that his client objected to that compromise, and then regretted that he had made it. That does not enable the client to come to the court and ask it to set aside the compromise which was come to, if the other side insist that it shall be carried out. There is really no other ground which I can see in this case. I cannot see that the fact that the order agreed to was an interlocutory order and not a final order makes any difference. There is no difference, for the purpose of a compromise of an action, between an interlocutory and a final order except in this respect, that, if there is a proper ground for setting aside the compromise and the order, it is easier to do so in the case of an interlocutory order than in the case of a final order. When a compromise has resulted in a final order, the compromise thereby effected cannot as a rule be set aside except by another action brought for the purpose; but, if the compromise has resulted in an interlocutory order, it can as a rule be set aside upon motion without bringing another action. But even in the case of an interlocutory order, if there is any conflict of fact, the court might say that an application to set it aside must be made by action and not by motion. If there would be no ground for setting aside a compromise if it had resulted in a final order, there is no ground for setting it aside although it has resulted in an interlocutory order only. It seems to me, therefore, that the only ground upon which the Lord Chief Justice based his judgment cannot be supported. This compromise was made by an interlocutory order at the trial of the action, and was so far acted upon that it can be set aside only upon one of the definite and substantial grounds which are well

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known to the courts. I agree, therefore, that the decision of the Lord Chief Justice was wrong, and that this appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. The Lord Chief Justice gave the ground of his decision as follows: "But holding, as I do, that this was an interlocutory order, that it was in fact made without the plaintiff's authority, and that she took steps to set aside the arrangements before the order was drawn up, I am of opinion that I must reverse the order and restore the case to the jury list." I am unable to concur in the conclusion that the fact that the compromise was made without the plaintiff's authority is decisive of the matter. I agree that, with reference to the compromise of an action, the court has jurisdiction to set it aside where there has been a mistake, but there is no authority to show that the court will interfere except where there has been a mistake or in analogous cases. In the present case it is conceded that there was not any mistake, and it is admitted that the limitation of the authority of plaintiff's counsel was not forgotten by him. He had no personal communication with his client, but his client signed the document which has been read. I am not satisfied, looking at that document, that there was really any limitation of the authority of counsel. There is nothing to show that counsel was bound not to exercise his unfettered judgment as to that which he might think best for his client. Assuming, however, that counsel's authority was limited, is there any ground upon which this compromise can be set aside? It is clear that counsel retained in an action has a general authority to compromise. The law upon that point has been fully and accurately stated by the Lord Chief Justice. The limitation of the authority of plaintiff's counsel, if there was any, was not known to the other side. Looking at the cases which have been referred to, it seems to me that there is no distinction in principle between cases in which a final order has been agreed to and cases in which an interlocutory order has been agreed to. Either will be set aside if there has been a mistake, though as a general rule the application to set aside a final order must be by action and not summarily by motion. What possible ground is there for asking the court to treat as invalid the agreement which was come to in this case? There is no principle of law upon which the contention can be founded. There is no analogy between that which happened in this case and such a mistake as gives ground for setting aside a compromise. I am unable to agree with the decision of the Lord Chief Justice that this order should be set aside because it is an interlocutory order and was consented to by counsel without the authority of his client.

Appeal allowed.

Solicitors for the appellant, *Lewis and Lewis*.
Solicitor for the respondent, *W. H. Jamieson*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, March 3.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MONK v. ARNOLD. (a)

Landlord and tenant—Means of escape from fire—Division of cost between owner and occupier—Covenants in lease—Factory and Workshop Act 1891 (54 & 55 Vict. c. 75), s. 7 (2).

As lessor of a factory the plaintiff had been required by the London County Council, under sect. 7 (2) of the Factory and Workshop Act 1891, to provide means of escape from fire, which he did at a cost of 368l. 17s. 6d.

The lease contained the following covenant by the lessee, the tenant: That he would "from time to time and at all times during the said term pay and discharge all rates, taxes, charges, assessments, and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, which now are or may be at any time assessed, charged, or imposed upon the demised premises or the landlord or the occupier in respect thereof (the landlord's property tax only excepted)."

Held, that whatever might be the true construction of the covenant, the County Court judge had jurisdiction, under sect. 7 (2), to apportion the expense of providing means of escape between the lessor and lessee in such proportion as appeared to him "just and equitable under all the circumstances of the case."

Semble, that if by the terms of the lease these expenses under sect. 7 (2) were expressly in terms provided for, it would not be "just and equitable" to make any order not in accordance with such express contract.

THESE were cross appeals from the decision of His Honour Judge Edge sitting at the Clerkenwell County Court.

All the material facts were set out by the learned County Court judge in his judgment, which was as follows:

HIS HONOUR.—The plaintiff is the statutory owner, within the Factory and Workshop Act 1891, of a factory in Holloway-road, Islington, and the defendant is the occupier under a lease, dated the 18th Nov. 1897, for a term of fourteen years from the 27th Dec. 1896 determinable at his option at the end of seven years at a rent of 200l. per annum. As owner of the factory the plaintiff has been required by the London County Council, under sect. 7, sub-sect. 2, of the above-named Act, to provide means of escape from fire, which he has done at a cost of 368l. 17s. 6d., and this action is brought to recover that sum from the defendant under a covenant in the lease on his part "from time to time and at all times during the said term to pay and discharge all rates taxes charges, assessments, and outgoings whatsoever whether Parliamentary, parochial, local, or of any other description, which now are or may at any time be assessed, charged, imposed upon the demised premises, or the landlord or the occupier in respect thereof (the landlord's property tax only excepted)." It is clear, however, that no part of the covenant refers to money expended by the landlord in carrying out works of this nature, unless the use of the word "outgoings" brings such an expenditure within it. I confess that I have the

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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greatest difficulty in saying that a "liability," to use the words of the late Lord Chief Justice in *Arding v. Economic Printing and Publishing Company* (79 L. T. Rep. 420, 622), "of so exceptional a nature" is an "outgoing," within the meaning of such a covenant. If I may say so, I respectfully agree with the Lord Chief Justice that such a covenant taken as a whole is intended to deal with recurrent payments, and not with the capital sums expended in structural alterations or additions. I am quite sure such a liability was never intended by either party to the lease to be borne by the defendant. I am aware of the dictum of Smith, L.J. in the above case on appeal, but as he expressly does not decide the point, but merely says "the authorities were strong to show" the expenditure would have been an "outgoing" within the meaning of the first covenant, I feel myself at liberty to adopt the view of the Lord Chief Justice, fortified as it is by the opinion of Mathew, J. in *Hill v. Edwards* (C. & E. 481; 1 Times L. Rep. 253) (where the word "outgoings" was used in the covenant) and the recent case of *Foulger v. Arding* (84 L. T. Rep. 467) (where the covenant extended to impositions, &c., charged on the landlord in respect of the premises), and to hold that the defendant is not liable for this exceptional expenditure under the terms of his lease. I have come to this conclusion on the construction of the covenant alone, as evidencing the intention of the parties, but it was further submitted on the part of the defendant that such a liability as that now sought to be enforced was proposed to be imposed on the defendant and was objected to by him, and the draft of the defendant's lease, signed by the respective solicitors to the parties, was tendered in evidence to prove the fact. I doubted at the trial if such evidence was admissible, but allowed it to be put in for the purposes of argument. With some hesitation I have come to the conclusion that the evidence is admissible, either on the ground of the latent ambiguity of the word "outgoings," or as showing the position and intention of the parties at the time the lease was executed. As is said in Smith's *Principles of Equity*, 2nd edit., pp. 207-8, "Equity has resorted to extrinsic evidence to modify the meaning of general words where there has been reason to suppose they were not intended to bear their full and natural meaning": (*London and South-Western Railway v. Blackmore*, 23 L. T. Rep. 504; L. Rep. 4 H. L. 610-623; *Turner v. Turner*, 42 L. T. Rep. 495; 14 Ch. Div. 829; and see *Leggett v. Barrett*, 43 L. T. Rep. 641; 15 Ch. Div. 306). On reference to the draft lease, therefore, I find that the proposed covenant on the part of the defendant (*inter alia*) "to execute all such works as are or may under or in pursuance of an Act or Acts of Parliament already passed or hereafter to be passed be directed or required by any local or public authority to be executed at any time during the said term upon or in respect of the said demised premises," which would undoubtedly have included the work done by the plaintiff, was struck out by the defendant's solicitors, and such striking out was assented to by the plaintiff's solicitors; and I find as a fact that such a liability was intended by both parties to be excluded from the defendant's covenants. Upon both grounds, therefore, I hold the defendant not liable for the whole of the expenses sued for by the plaintiff. A question has been raised, however, as to whether the defendant is liable for the cost of casing in the lift, which is inside the building, and the defendant has paid into court a sum of money sufficient to cover such costs, but at the same time denying his liability to pay it. I do not see any ground for separating this expense from the other expenses incurred. It was an expense incurred in providing means of escape from fire by hindering its sudden spread through the lift, and thus giving the occupants time to get away, and I think forms part and parcel of the general expenses of carrying out that object. I am not aware of any other ground for charging the defendant. My attention was also called

to the fourth of the defendant's covenants, where he agrees to repair, &c., the demised premises—"original structural defects in the building of the premises excepted"; and it was contended that the want of means of escape from fire was an original structural defect. But I cannot accept that view, as there is no suggestion of a defect in the building *quod* building, which only becomes subject to the provisions of the Act when more than forty persons are employed in it. An original structural defect cannot depend upon the number of persons employed in the building. If it did, then, if forty persons only were employed, there would be no defect; but if forty-one were, there would be, and the building would be structurally defective or otherwise as the numbers rose above or fell to forty or under. Under the whole circumstances of the case, therefore, I conclude, though with considerable misgiving, that there is no legal liability on the defendant to pay these expenses or any part of them to the plaintiff. But it seems to me that these are just the circumstances contemplated by the last clause of sect. 7, sub-sect. 2, of the Act, where the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirements of the Act—i.e., where there is no legal liability upon him to do so, but where it is "just and equitable under all the circumstances of the case" that he should do so. My opinion is put forward with much hesitation, however, inasmuch as both the learned counsel, who argued this case with much ability, dissented from it, considering that the object of the section was merely to give the County Court jurisdiction to the exclusion of the Superior Courts. I cannot think such was the intention of the Legislature, or that the jurisdiction of the Superior Courts can be ousted without express words to that effect. Indeed, Mr. Chester-Jones was compelled practically to abandon that view when he submitted that, in case the plaintiff was not entitled to recover by virtue of his covenant, yet I had the power to order the defendant to pay—in other words, I had power to impose a liability on the defendant who otherwise was not liable. If this is a correct contention, then surely there must be a correlative power to modify any legal liability on the occupier where the landlord has a covenant in his favour. It appears to me the Legislature intended, in cases where this exceptional expenditure was incurred, that the owner and occupier should bear the cost of it according to the benefit each derived from it, notwithstanding any agreement, not specific in its terms, or want of agreement between them. This view seems borne out by that portion of the same section which empowers the owner to take such steps for providing such means of escape as may be necessary, "notwithstanding any agreement with the occupier." Here it seems clear the Legislature intended to modify any contract between the owner and the occupier which would interfere with the work, being carried out, and, as it must have been known that tenancies exist of many varying terms, from a year to twenty-one years and upwards, it seems reasonable to suppose that the latter portion of the clause was inserted in order that this very exceptional expenditure should be fairly and equitably divided between the owner and occupier, notwithstanding, as I have said, any general agreement between them. If this was not intended, then an occupier at a rental, say of 100*l.* a year or less, who had entered into a general covenant to pay "outgoings," might, in the last year of his term be called upon to pay 500*l.* or 600*l.* for structural additions of which the owner would derive all the benefit. I cannot think this was the intention of the Legislature. If it was, then it appears to me the last clause of the section is wholly unnecessary. If the owner has the right, by covenant, to be recouped the expenses incurred by him in carrying out the statutory obligation, then he may proceed by action in the ordinary way. If he has not such a right, then there is no enforceable right against the occupier unless this

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clause gives him such a modified right on the ground of what is "just and equitable under all the circumstances of the case." It must be noted the right is an equitable one, and it would be contrary to equitable principles if it was one-sided as suggested by Mr. Chester-Jones' argument. It does not appear that this point was raised in *Arding v. Economic Printing and Publishing Company (sup.)*, and it was not raised before me on the first hearing of this case, but it was forced on my attention by the necessity, as it seemed to me, of considering the effect of sub-sect. 2 of sect. 7 of the Act, under which these proceedings are taken. This being my view, I proceed now to consider what order should be made upon the defendant for the payment wholly or in part of the expenses incurred by the plaintiff in complying with the requirements of the London County Council. Of the defendant's term of fourteen years there are ten yet to run, but he may determine the lease in three years if he is so disposed, but that would be by his own act. In my opinion it would not be just and equitable for him to pay the whole of the 368*l.* The works which have been carried out will be permanent, and will, if kept in repair, probably last for the life of the building itself and certainly enhance its value. No direct evidence was given me of the age of the building, but, seeing that the value of buildings in fair condition is usually put at about twenty years' purchase, I think, having regard to all the circumstances of the case, and particularly that the defendant may at his option have the occupation of them for ten years to come, and that the next tenant may not employ more than forty persons on the premises, that the defendant ought to bear a substantial part of the sum expended. My order, therefore, is, that the defendant do pay to the plaintiff the sum of 200*l.* and costs, and that the defendant's covenant to repair contained in clause 4 of the lease be construed to extend to the alterations and additions made in conformity with the statute and the order of the London County Council in pursuance of it. As I understand that both parties differ from my view of the case and desire to take the opinion of the Divisional Court, I give leave, if leave is necessary, to each to appeal. Stay execution for twenty-one days, and, if appeal entered, until its hearing.

Both the plaintiff and defendant appealed, the former on the ground that under the lease the defendant was liable for the whole sum, and the latter on the ground that he was not liable under sect. 7 (2) of the Act of 1891, or the lease.

C. A. Russell, K.C. (Bonner with him) for the defendant.—The question raised here as to sect. 7 of the Factory and Workshop Act 1891 is whether, although on the true construction of the covenant in the lease, there is no liability upon the tenant, yet under that section the County Court judge can compel him to pay a part of the expenses incurred under that section. "Ought," I submit, means "legally ought." The covenant does not include expenditure by the landlord under the Factory Acts, but is limited to cases where the authority has imposed or charged on the premises or the landlord that which ultimately is a liability to pay a sum of money. That is not the case here. [Lord ALVERSTONE, C.J.—You mean that it does not include a liability to indemnify the landlord against a duty.] That is so, for the ultimate result here is not a liability to pay any sum of money. He referred to

Foulger v. Arding, 84 L. T. Rep. 467; (1901) 2 K. B. 151.

The section of the Factory Act deals with two liabilities—namely, to bear or to contribute to the expenses. Where the covenant is like the one

in *Arding v. Economic Printing and Publishing Company* (79 L. T. Rep. 420, 622) then it can be considered how much should be contributed, but here the County Court judge has added a new contract to the one made between the parties. [Lord ALVERSTONE, C.J.—Would not the County Court judge have had jurisdiction where more was done than was necessary, or where there was a large structural alteration and only a short term of the tenant to run? CHANNELL, J.—Has not the Act put the liability on the parties in such proportion as the County Court judge shall think equitable?] I submit, no. He referred to

Arding v. Economic Printing Company (sup.).

It is only where a legal liability on the part of the tenant exists that an order can be made. If that were not so, if the owner sued in the High Court, no order could be made, as it can only be made in the County Court.

Dickens, K.C. (Chester-Jones with him) for the plaintiff.—[He was not called upon as to the question of equitable jurisdiction under the Factory Act.] With regard to the covenant, *Foulger v. Arding (sup.)* does not affect this case at all. The words are: Charges and outgoings in respect of the premises or the landlord in respect thereof. "Outgoings" is the cardinal word. *Arding v. Economic Printing Company (sup.)* is in my favour, and we are within the judgment of Smith, L.J. in that case. These expenses were an obligation cast upon the landlord, and therefore the tenant was liable under this covenant to pay the whole of these expenses. He referred to

Smith v. Robinson, 69 L. T. Rep. 434; (1893) 2 Q. B. 53.

[CHANNELL, J.—Is there any case dealing with "outgoings" which shows that that includes a charge on the landlord which is not a money payment?] He referred to

Aldridge v. Ferne, 17 Q. B. Div. 212;

Cross v. Raw, L. Rep. 9 Ex. 209.

This is an expense, and something that has gone out in respect of the premises, and therefore an outgoing:

Hill v. Edwards, C. & E. 481; 1 Times L. Rep. 253.

Foulger v. Arding (sup.) does not go in opposition to any of the foregoing cases. Where there is a covenant clearly making the tenant liable, there is no jurisdiction to make an order under sect. 7 of the Factory and Workshop Act 1891.

Lord ALVERSTONE, C.J.—The main point raised by this case is as to the meaning and object of sect. 7 of the Factory and Workshop Act 1891 (54 & 55 Vict. c. 75). That Act has nothing to do with landlord and tenant, but the governing consideration of this section is to protect the persons employed at factories from fire. Sub-sect. 1 of sect. 7 provides that every factory erected after a certain date in which more than forty persons are employed is to be furnished with a certificate from the sanitary authority of the district that it is provided with such means of escape in the case of fire as can be reasonably required, and by sub-sect. 2 where a factory is not so provided, the sanitary authority is to serve the owner of the factory with a notice in writing specifying the measures necessary for providing such means of escape and

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requiring him to carry out the same before a specified date, and thereupon such owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements under certain penalties. The sub-section concludes: "If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement he may apply to the County Court having jurisdiction where the factory is situate, and thereupon the County Court, after hearing the occupier, may make such order as appears to the court just and equitable under all the circumstances of the case." The principal object of the section is that of making the factory safe with regard to the persons who are employed there, and that being the object of the Legislature, it did not care on whom the liability for carrying out the requirements of the sanitary authority might fall. Its object was to get the person who had control of the building, and so the section provides that the owner of the factory is to be the person responsible, and the owner is to be the person to whom the notice is to be given. It was then considered that it would be necessary to deal with the question of liability when the factory was property let on lease. It is obvious that where it is necessary to make structural alterations it might be right to impose the whole expense on the tenant if there was a long term to run, or none if there was only a very short period unexpired, whatever the terms of the lease might be. Therefore the section, having provided that the tenant was to have nothing to do with the obligation in the first instance, goes on to enact the words that I have read. Upon those words two contentions arise. It is argued on both sides that the word "ought" in the section means "is liable in law to," and Mr. Russell contends that, as in this case the tenant was not bound to pay anything under his lease, the County Court judge ought not to have ordered him to pay anything. Mr. Dickens, on the other hand, contends that the County Court judge had no jurisdiction to divide the amount, but that he ought to have made the tenant pay the whole amount incurred. In my opinion the County Court judge has taken the right view of the matter. If the Legislature had intended that only questions arising out of the covenant between the landlord and the tenant should be discussed it would have used different words. These are not words giving to the parties what are merely their legal rights. But bearing in mind all the cases which might arise it is obviously right and proper that the County Court judge should have an equitable jurisdiction to determine how the amount which has been expended should be apportioned. He is bound, I think, to take into consideration the contract between the parties, but unless there is something in the lease, and its terms are such as to make it unjust and inequitable that he should apportion the amount between them, I think he has jurisdiction to do so and in such proportion as he thinks just and equitable. It was contended for the defendant that, this interpretation of the section cannot be right because the owner can sue in the High Court on the covenant to pay all outgoings, and as the jurisdiction given by this section can only be exercised in the County Court, and can only be invoked by the owner, such a construction

would work injustice to the tenant. That no doubt raises a difficult question. It may be that that is a *casus omisus*, but I do not think that can prevent us giving their natural meaning to the plain words of the section. I think, therefore, that the plaintiff's appeal fails, and that the County Court judge was right in the view he took. With regard to Mr. Dickens' appeal, I think on the covenant it is impossible to say that a plain obligation was imposed on the tenant, and, therefore, I think that it is certainly a case in which there was jurisdiction in the County Court judge to make the order in question; but I think we must go further and hold that, even if we were satisfied that in an action in this court the landlord could have sustained his claim on the terms of the covenant, yet that the arbitration of the County Court judge is intended to deal with the case of the owner alleging that the occupier is bound to bear the expense of complying with the requirement.

DARLING, J.—I am of the same opinion. The words used in this section are not intended to enable the County Court judge merely to decide the question according to the strict legal rights of the parties under the contract, which would be what he would have had to do if there was no section. I think it is clear that the Legislature must have thought that these questions must arise, and that any order based on the strict rights of the parties under their contract might bear hardly on the one or the other. The Legislature seem to have thought that in such a case the County Court judge ought to have jurisdiction to do something more than make an order which would be according to the strict legal rights of the parties, and that he ought, in regard to any order he might make, to have regard to the whole justice and equity of the case. They intended, in fact, that he should do something more than what is generally understood by justice in the ordinary acceptance of the term—that is, give effect to the strict legal rights of the parties—he was to do what was just and equitable, having regard to the whole of the circumstances of the case. That it seems to me is what was intended, and that I think is what the County Court judge has done here.

CHANNELL, J.—I agree as to the construction of the section. The Legislature, seeing that it would be difficult to say whether this obligation ought to be imposed on the landlord or the tenant of the factory, and seeing that that question would generally depend on the words contained in each particular contract of tenancy, they refrained in this section from imposing the liability finally upon the landlord. They placed this liability on the landlord in the first instance because it was easiest and best in the public interest, to make him primarily responsible, but they put in this clause which gave the County Court judge power to say how, in each particular case, the liability should fall, and for this purpose they gave him, it seems to me, power over the contract of tenancy which had been entered into between the landlord and the tenant. If the parties had by express terms provided for expenses under this section of the Factory Act, so that by that contract the liability for making the staircase as a means of escape from fire fell clearly on either the landlord or the tenant, then

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I do not think it would be just or equitable for the County Court judge to make an order contrary to the contract. But where these expenses are only provided for by reason of some general expression in the covenant, sufficient possibly to include such expenses as these, if the statute had absolutely imposed them on the landlord, but not clearly showing that the parties had really contemplated the case, and intended that one or other of them should bear these expenses, whether incurred at the beginning or end of the term, then I think that would be precisely the case in which the County Court judge ought to make such order as might seem to him just and equitable in all the circumstances of the case. It was suggested in the argument that this construction involved the difficulty that a landlord suing on the covenant in the High Court could not avail himself of the section which applies only to the County Court. Most likely this point was overlooked by the Legislature, but it seems to me that there is a way out of the difficulty, or rather that it does not really arise. There would be no imposition or outgoing on the part of the landlord until he was held to be responsible. So if he were to sue the tenant on the covenant in the High Court, he would be met by the objection that there was no outgoing for which the tenant would be liable on the covenant until the County Court judge had so held. The owner is only made liable by the statute in the first instance, and there must be the decision of the County Court judge to make the expense a real charge on the landlord, for which he could sue under the covenant. That is one way out of the suggested difficulty, but, even if it is not, that difficulty is not sufficient to make me doubt that the construction we are putting on the clear words of the section is the right one—viz., that the County Court judge has a jurisdiction to apportion the amount.

Appeals dismissed.

Solicitors: *Stanley, Evans, and Co.; Shaen, Roscoe, and Co.*

Monday, March 3.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WELD AND OTHERS v. CLAYTON-LE-MOORS URBAN DISTRICT COUNCIL. (a)

Landlord and tenant—Covenant to pay "rates, taxes, assessments, and outgoings"—Paving expenses—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 150.

Apportioned paving expenses under the Public Health Act 1875, which the landlord has paid, can be recovered from the tenant, where the latter has covenanted to pay all rates, taxes, assessments, and outgoings payable, or to become payable, whether by the landlord or tenant, in respect of the premises.

THIS was an appeal from His Honour Judge Coventry sitting at the Accrington County Court.

The action was brought by the plaintiffs to recover 16*l.* 2*s.* 11*d.*, being the amount paid by them for the cost of paving a certain street or back road called Back Sparth-road, in the township of Clayton-le-Moors, being part of the

premises demised to the defendants by an indenture of lease dated the 6th Feb. 1896, and made between the plaintiffs of the first four parts and the defendants of the fifth part.

This indenture contained a covenant that the defendants would pay all rates, taxes, assessments, and outgoings then payable, or thereafter to become payable whether by the landlord or tenant in respect of the said demised premises, or any part thereof, or in respect of the rent or any part thereof.

Notice requiring the paving to be done was duly served under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55), but it having been disregarded, the urban authority did the work, and having apportioned the expenses recovered them from the plaintiffs.

It was now sought to recover this sum from the defendants, but the learned County Court judge was of opinion that the covenant in the lease was not wide enough to cover this.

Abbott for the plaintiffs.—This action was brought for the recovery of certain paving expenses incurred under sect. 150 of the Public Health Act 1875. The County Court judge held that the covenant was not wide enough to cover these expenses. I submit that it is, and the plaintiffs were entitled to recover in the action. He referred to

Foulger v. Arding, 84 L. T. Rep. 467; (1901) 2 K. B. 151;

Brett v. Rogers, 76 L. T. Rep. 26; (1897) 1 Q. B. 525;

Farlow v. Stevenson, 81 L. T. Rep. 589; (1900) 1 Ch. 128.

For the defendants.—Covenants of this kind fall into two classes; the first consists of covenants where the tenant undertakes to do certain acts. These are the indemnity cases, and have nothing to do with the present case; secondly, there are the covenants which refer to payment of sums of money; the present covenant is one of these. The statutes also fall into two classes. Under the Metropolitan Management Act 1855, under sect. 105, there is an obligation on the owner to pay money. The primary obligation, however, of the Public Health Act 1875 is to carry out works. It is the secondary obligation, not the primary one, to pay money. The covenant here aims at the primary and not the secondary obligation. He referred to

Tidswell v. Whitworth, 15 L. T. Rep. 574; L. Rep. 2 C. P. 326.

In that case the payment was held to be not "in respect of the premises" at all, but in the nature of a penalty. Except under a private Act, "outgoings" is the same as "impositions." *Foulger v. Arding* (*sup.*) is in my favour; *Crosse v. Raw* (L. Rep. 9 Ex. 209) is against me, but *Hill v. Edward* (C. & E. 491; 1 Times L. Rep. 253), which was followed in *Arding v. Economic Printing Company* (79 L. T. Rep. 420, 622), was on the same Act as the present case—namely, the Public Health Act 1875—and they are in my favour. The payments are in the nature of a penalty, and cannot be recovered under a money covenant. He referred to

Midgley v. Coppock, 40 L. T. Rep. 870; 4 Ex. Div. 309.

The person in default in landlord and tenant cases is the covenantor, but the reverse is true

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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in cases between vendor and purchaser, where the person in default is the covenantor. In this lease there is no covenant to repair.

Lord ALVERSTONE, C.J.—I will not go through the weary and painful task of dealing with all the authorities, for it is impossible to get any clear principle out of them and to reconcile them one with another. In this case the words of the covenant are that the tenants will pay all rates, taxes, assessments, and outgoings payable, or to become payable whether by the landlord or tenant in respect of the premises. It certainly does look like a covenant that the landlord should get his rent clear, and that being the case, *Crosse v. Raw* (sup.), *Aldridge v. Feme* (17 Q. B. Div. 212), and *Hartley v. Hudson* (4 O. P. Div. 367) are all authorities against Mr. Foa. I cannot say that this covenant does not include money paid by the plaintiffs where the work has been done by the local authority on their default, and proceedings have been brought to recover the expenses thereof from them. In this case the decisions are binding on us, and the County Court judge ought not to have held that the landlords could not recover against their tenants.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Appeal allowed.

Solicitors: *Hare and Co.*, for *Radcliffe* and *Higginson*, Blackburn; *J. C. Jackson*, for *A. E. Britcliffe*, Accrington.

March 13 and 14.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. TEMPEST AND OTHERS. (a)

Licensing—Justices—Likelihood of bias—Justice holding brewery shares—Disqualification—Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 38, 60.

An application was made to the licensing committee of the borough of T. for the removal of a licence to new premises.

Three of the justices were members of the borough council of T., and one held shares in a brewery company that sold beer within the district.

A suggestion was made before the committee that if the transfer was granted another licence would be given up and certain property would be placed at the disposal of the corporation for town improvements. The transfer was granted.

The confirming authority, which included the four justices, confirmed the transfer, but the offer above stated was withdrawn.

Held, that there was not any likelihood of bias on the part of the three justices who were members of the borough council, so as to render the orders made invalid; and

Held, further, that the orders were not invalid by reason of the fact that the fourth justice adjudicated, owing to proviso (3) of sect. 60 of the Licensing Act 1872.

Secus, where actual bias could be shown in fact to exist.

CAUSE shown against a rule nisi for a writ of certiorari to bring up and quash an order dated the 23rd Oct. 1901 confirming and sanctioning an order, dated the 25th Sept. 1901, of the licensing

committee of the borough of Tamworth for the removal of the licence of the Rose and Crown inn to certain new premises to be erected, on the ground of bias on the part of some justices and pecuniary interest on the part of one of them.

From the affidavits filed in support and opposition to the rule it appeared that the owners of the Rose and Crown inn gave orders for the preparation of plans for the erection of a new building on a site opposite to that upon which the Rose and Crown stood. It was arranged that the building line of the new premises should be set back about 7ft., the result of which would be that the corporation of Tamworth would become possessed of a strip of land, 7ft. wide, running the whole length of the new premises.

The plans as arranged were submitted to the Sanitary and Streets Committee of the borough council on the 11th July, and were subsequently approved by them.

Three of the members of the borough council were also members of the licensing committee of the borough, and one of the justices held shares in Allsopps Limited, a brewery company which sold beer in the district.

On the 25th Sept. an application was made to the licensing committee, at the meeting of which the justices above referred to were present, for the provisional removal of the licence of the Rose and Crown to the proposed new premises.

It was stated by counsel at the hearing on behalf of the applicant that if the application was granted the owners would surrender another licence which they held in the town, and would also place the site of the old Rose and Crown and of six cottages at the disposal of the corporation.

The licence for the new premises was granted by a majority of the justices.

On the 23rd Oct. the confirming authority, which consisted, among others, of the above justices, confirmed the order of the licensing committee.

At this hearing the offer made to surrender the old site of the Rose and Crown and give the other property was withdrawn, and after such withdrawal the licence was confirmed as stated.

It was suggested that there was bias on the part of the three justices because of the proposal as to the old site of the Rose and Crown and the cottages having regard to the fact that some of the licensing justices were members of the borough council, and that the corporation would benefit by the transfer being allowed, and that as to the other justice, the orders were bad because he had adjudicated, having a pecuniary interest in the shares of a brewery company, which precluded him from sitting under the Licensing Act 1872, s. 60.

The justices denied that their judgment had in any way been affected either by the acquisition of the strip of land referred to or by the suggestion as to the handing over of the old site of the Rose and Crown and the cottages to the corporation.

Laing (George Elliott with him) showed cause against the rule.—With regard to the justice who had an interest in a brewery I cannot contend that he was not disqualified, but I contend that this would not affect the result, having regard to the proviso in sect. 60 of the Licensing Act 1872. The words of that section are: "No justice shall

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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act for any purpose under this Act or under any of the Intoxicating Liquor Licensing Acts . . . who is in partnership with or holds any share in any company which is a common brewer . . . or retailer . . . of any intoxicating liquor in the licensing district or in the district or districts adjoining to that in which such justice usually acts. . . . No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid." Also by sect. 38 of that Act it is provided: "No objection shall be made to any licence granted or confirmed in pursuance of this section on the ground that the justices or committee of justices who granted or confirmed the same were not qualified to make such grant or confirmation." There was a similar disqualification in the Act of 1828, but there was no proviso. Here with regard to those justices who were members of the borough council, I contend that there was no offer made, but if in fact an offer had been made it was absolutely withdrawn, and did not weigh at all with them when considering the application. The whole question here turns upon whether or no there was any bias in fact. That would no doubt show the distinction between this case and *Reg. v. Justices of Sunderland* (85 L. T. Rep. 183; (1901) 2 K. B. 357). In that case the late Master of the Rolls laid it down as follows: "What is the rule on the subject? If the justice acting is pecuniarily interested there clearly is a bias which disqualifies him. There is, however, no question of any personal pecuniary interest in this case. Then what is the rule with regard to bias in cases other than those in which there is a pecuniary interest on the part of the justice. In *Reg. v. Rand* (L. Rep. 1 Q. B. 230) Blackburn, J., who delivered the judgment of the court, after stating that in cases where there was a direct pecuniary interest in the subject of inquiry, however small, that no doubt disqualifies a person from acting as a judge in the matter, but that in the case before the court there was no such interest in the justices alleged to be biased, proceeded to say: 'But the only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees, and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would from kindred or any other cause have a bias in favour of one of the parties, it would be very wrong in him to act, and we are not to be understood to say that where there is a real bias of this sort this court would not interfere.'" There can be no real bias in this case, and the matter is quite different to the facts in *Reg. v. Justices of Sunderland* (*sup.*)

Hextall in support of the rule.—With regard to sects. 38 & 60 of the Licensing Act, they must be read together. They cannot destroy a disqualification of justices on the ground of bias, and they cannot furnish any answer to a case like the present one. The meaning of those provisions is that any order made would be valid, and not by reason of the constitution of the tribunal on the particular occasion, have to be considered as a nullity. If, for instance, a licence was granted and liquor sold under it, which licence was afterwards found to be bad on the ground of the disqualification of the justices, the seller of

the liquor would be protected. [Lord ALVERSTONE, C.J.—That will not do, for the words are: "No act done by any justice." The act done by the justice is not selling the liquor, but sitting and sanctioning the licence.] I submit that the word "invalid" means this: it does not mean that the section shall have the power of setting up the justice who but for this proviso would have had no jurisdiction on objection being taken, but it means that the innocent third party shall not suffer by being liable to penalties under the Licensing Acts for which in no way he could be held responsible. The facts here clearly show reasonable apprehension of bias, owing to the combination of circumstances. He referred to

Reg. v. Justices of Sunderland (*sup.*);

Reg. v. Rand (*sup.*);

Reg. v. Meyer, 34 L. T. Rep. 247; 1 Q. B. Div. 173.

In *Reg. v. Hain* (12 Times L. Rep. 323) the late Lord Chief Justice, Lord Russell, said: "But could it be said that these three gentlemen approached the consideration of the question of the licence under circumstances free from all probability of bias? Was there not, on the contrary, a strong probability that they would be, consciously or unconsciously, subject to bias?" Again, in *Reg. v. Huggins* (72 L. T. Rep. 193; (1895) 1 Q. B. 563) Wills, J. said: "Here there is no question of Martin having had any pecuniary interest in the result of the litigation, nor is it suggested that he had any actual bias against the defendant. The question is whether there was a reasonable apprehension of bias . . . it is far safer to enlarge the area of this class of objections to the qualifications of justices than to restrict it." I submit the rule should be made absolute.

Lord ALVERSTONE, C.J.—This rule was moved upon affidavits which stated the possible bias of certain justices who were members of the corporation of Tamworth, and also on the ground that one of the justices had an interest which prohibited him from sitting under sect. 60 of the Act of 1872. I adopt the test that was laid down by the Master of the Rolls in the *Sunderland* case, which I well remember, because it was argued at very great length before my brother Lawrance and myself (84 L. T. Rep. 591). We took a view on the facts different from that which the Court of Appeal took. We thought it within the case of *Reg. v. Justice of Stockport* (60 J. P. 552), of which the Court of Appeal have expressed disapproval. The test laid down by the late Master of the Rolls was this: The decision must really turn on a question of fact whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biased. In this case the facts which gave rise to the question were these: Before the licensing committee on which these gentlemen sat the brewers had offered or expressed the intention of giving to the town or giving for the purpose of a street in the town the site of the public-house and some cottages next to it. There was also another reason urged for the grant of the transfer of the licence, that another licence in another part of the town was going to be given up, and that latter consideration has been held to be a legal consideration for the magistrates to bear in mind when dealing with the transfer of a

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licence. Another point raised, which in my opinion is not really material, that when the new premises were going to be fitted up there was to be a widening of the street. It seems clear that the widening of the street was necessitated as a public improvement, and had been practically determined on by the street committee, and did not depend on any offer of the brewers. Before the confirming tribunal, where the objection was taken to the magistrates who were sitting, the offer was stated to be withdrawn. The question is whether we ought to come to the conclusion that the statement made before the licensing committee and withdrawn at the time of the hearing for confirmation was such that the magistrates would be likely to be biased in granting the transfer because of the hope and expectation that the brewers would carry out their original intention though they had withdrawn it, and that therefore these magistrates would not bring to bear on the question an open mind or at any rate that there was a likelihood or probability that they would be biased. Taking the question of fact, and applying strictly the rule laid down in the *Sunderland* case, it seems to me that the evidence was not sufficient. I for myself think we ought to attach importance to this. I do not disregard the affidavit of the magistrates themselves, who said that they considered the matter independently, that they were not influenced, that they thought it was good for the town to have better premises, and that also the number of licences was being reduced. In the face of that ought we to hold that this statement by counsel—probably made imprudently but still made at the original hearing—ought to be enough for us to say there was a reasonable probability of the magistrates not being unbiased, and that there was such reasonable probability of their being biased that we ought to hold they were disqualified? Applying the test indicated by the Court of Appeal, I come to the conclusion there was not sufficient evidence in this case of bias. Then remains the further point, which is not without difficulty. The fourth magistrate who was present at the confirming sessions appears to have a share in *Allsopps*, and it is not disputed he comes within the opening words of sect. 60. The point we have to consider is whether the licence is bad because he adjudicated upon it notwithstanding the provisions of that section. The true meaning of the proviso at the end of that section is not without difficulty. The words are: "No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid." It was argued by Mr. Hextall that comparing that with the analogous provision in sect. 38, it meant to say that no objection should be taken to the sale of liquor in that case, acting under the licence, and if the question had arisen solely under sect. 38, I think that there would be some ground for that argument. But when you look at the actual language of sect. 60, which creates the status of disqualification, it says that: "No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid." In my opinion it is impossible to put such a limited construction as that contended for. I think the words of the Act here occurring in the proviso to a section creating a disqualification against the doing of the act, and creating a penalty, cannot be con-

strued so narrowly; that is to say, that the act was not intended to be protected if that was the only disqualification. I would further point out that this proviso would be no protection where a case of actual bias was raised—where it is said that the interest of the brewer is such that he would be biased. In that case, of course, the section would not be wanted, but it is quite plain to my mind that the section saying "by reason only of such disqualification" means thereby what I may call the technical disqualification created by the Act. But if any brewer was to sit, and the case made was that he was biased in fact, or likely to be biased in fact, different considerations would arise. Under all the circumstances I think neither of the objections are successful, and the rule must be discharged.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Rule discharged.

Solicitors: *Braikenridge and Edwards*, for *Nevill, Atkin*, and *Mathews*, Tamworth; *Andrew Wood and Purves*, for *J. H. Dewes*, Tamworth.

March 13 and 17.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. FRENCH; *Ex parte* ROBERTS AND ANOTHER. (a)

Justices — Jurisdiction — Conviction — Right of common—"Title to any lands . . . or any interest therein"—*Offences against the Person Act 1861* (24 & 25 Vict. c. 100), s. 46.

Where an assault was committed by one commoner on another, and it was alleged that the assault was committed in setting up a claim of right to prevent the complainant from spoiling the pasture of the common by taking a cart and horse across it.

Held, that the jurisdiction of the justices was not ousted under sect. 46 of the Offences against the Person Act 1861, as no question arose as to the title to any lands or any interest therein.

CAUSE shown against two rules *nisi* for writs of *certiorari* to bring up and quash two convictions of one Roberts and his servant Simmonds for assaults on one Freeman.

From the affidavits it appeared that Roberts and Freeman both had common rights in relation to Aspoll Green, in Suffolk, and when Freeman was leading a horse and cart across the green Roberts struck him across the back with a hunting-whip. Subsequently Roberts' servant Simmonds committed another assault on Freeman.

He thereupon summoned Roberts and Simmonds for assault, and they set up a claim of right to prevent Freeman from spoiling the pasture by taking a horse and cart across it.

The justices held that there was no *bonâ fide* claim of right, and convicted Roberts and Simmonds.

The rules *nisi* were obtained on the ground that the magistrates' jurisdiction was ousted by there being a claim of right.

It was contended that the justices' jurisdiction was ousted by the Offences against the Person Act 1861 (24 & 25 Vict. c. 100), which provides by

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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sect. 46 that "nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom."

Walter Stewart showed cause against the rules.—Here there was no question as to the title to any lands or to the title to any interest in lands. The evidence showed that the defendant's claim of right was not *bonâ fide*, and the justices were right in so holding. Both the complainant Roberts and the defendant were commoners, and this was the first time that Roberts tried to raise a contention of this kind though the complainant Freeman had for years taken a horse and cart across the common. A mere assertion by a defendant that he committed the assault in order to support a claim of right cannot oust the jurisdiction of the justices.

Avory, K.C. (Elliston with him) in support.—The justices in this case seem to have considered that, if a *bonâ fide* claim of right was asserted and made out, that would oust their jurisdiction. That is not the case here at all. The jurisdiction of the justices here was ousted by the Offences against the Person Act 1861 (24 & 25 Vict. c. 100), which gives the justices jurisdiction to deal with cases of common assault, and which provides by sect. 46 that "nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom." The question under that section is not as to a *bonâ fide* claim. If one commoner prevents another by force from injuring the grass, there is a dispute as to a right, and the title to an interest in lands is in dispute. It was held in *Reg. v. Pearson* (22 L. T. Rep. 126; L. Rep. 5 Q. B. 237) that under this section all jurisdiction was taken away from justices to determine cases of assault where any such question was shown to arise, and they cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of title to lands. It is quite clear from the authorities that where a disturbance is caused to or any obstruction is placed on the common, the commoner can use force to remedy the interference with his rights. He referred to

Davies v. Williams, 16 Q. B. 546; 15 Jar. 752;
Hall v. Harding, 1 W. Bl. 678; 4 Burr. 2426;
Perry v. Fitzhous, 8 Q. B. 757; 13 Jar. 799;
Jones v. Jones, 1 H. & C. 1; 8 Jar. N. S. 1132;
Reg. v. Cridland, 7 Ell. & Bl. 853; 3 Jar. N. S. 1213.

Stewart, by leave, in reply.—It was admitted in *Reg. v. Pearson* (*sup.*) that the assault was committed in asserting a *bonâ fide* claim of right. The other authorities have no bearing on this case.

Lord ALVERSTONE, C.J.—In these cases two rules have been obtained for writs of *certiorari* to bring up and quash two convictions for assault against a gentleman named Roberts and his servant Simmonds; and the question raised is whether there was any jurisdiction in the magistrates to entertain the charges at all, on the ground that the matter came within the proviso of sect. 46 of the Offences against the Person Act

1861. The facts are not in dispute, and I will state them briefly. The complainant Freeman and Roberts both had rights of common over a certain piece of land; and it appeared that for some two or three days before the assault complained of Freeman had been carting across the grass in a way which Roberts objected to. It does not appear that Roberts had given the complainant any notice of his objection or raised any question as to what he was doing before the day when the assault occurred. On that day, as Freeman was carting a load of swedes, Roberts assaulted him, after some remonstrance, by striking him with a whip. His servant Simmonds came up and there was a subsequent assault. Both defendants were summoned by Freeman, and at the hearing before the justices it was contended that their jurisdiction was ousted as a question was raised as to an interest in land. The justices convicted both the defendants, being of opinion that the objection raised under the proviso to sect. 46 of the Act of 1861 was a frivolous one and not *bonâ fide*. It was argued that they had confused the question they had to decide—namely, they had mixed up the question under sect. 46 with the question of a *bonâ fide* claim of right. I do not think that they have entertained the question otherwise than from a right point of view. That section prohibited the magistrates from adjudicating on any assault and battery in which any question arose "as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom." In the present case it was not denied that the defendant might have been indicted for what had happened, but it was argued that because the question as to the right of common was connected with the assault the justices had no jurisdiction. I think that the decision of the justices was quite right. I do not think that the section can be construed to mean that any question of an interest in land, whenever and however raised, is sufficient to oust the jurisdiction of the justices. Their jurisdiction, I think, is ousted when a question as to the title to any land or any interest therein arises in the course of the proceedings, and it does not make such a question arise in the proceedings because one of the defendants says he owns or possesses land on which the complainant was when the assault took place. In this case no question of title to lands arose at all, nor any question of any title to any interest in lands, as both parties were admitted to be commoners and had rights on the land. Pressed with this difficulty, Mr. Avory raised two points. He said, first, that there was a right on the part of a commoner to remove obstructions, as, for instance, pulling down a house. But the fact that that right exists and questions may arise on it does not throw light on sect. 46 as to its meaning and the conditions necessary for the application of the proviso to that section. He further cited *Reg. v. Pearson*, in which it was decided that on the hearing of a summons for assault, when there was a *bonâ fide* question relating to the title to land involved, the jurisdiction of the justices was ousted. That case is an authority to which we pay the greatest respect, and if it were an authority upon the question now before us it would be binding upon us, but in my opinion the facts of that case are different in substance from those of the present so far as this proviso is concerned. It was uncon-

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tradicted there that the assault was committed in the assertion of title, and it was admitted by both sides that the defendant was raising a claim of title, and that the prosecutor entered on the land to which the defendant laid claim. That case was decided on the ground that the question of title arose in the proceeding which caused the assault. In the judgments in the older cases it appears that the reason for ousting the jurisdiction of the justices in such cases was that, unless this was done, they would indirectly be determining the question of right and title between the parties. No question of the right of one person or another to land or an interest in land arose in the present proceedings. They both had a right to be where they were—namely, on the land, and an assault took place there. The justices came to a right conclusion when they considered that the defence raised by the defendant that there was a claim of right was a frivolous one, and so they were right in considering whether the claim was *bona fide*. I am of opinion that no question of title arose, and both the rules must be discharged.

DARLING, J.—I am of the same opinion. I think to hold otherwise would be to determine that an assault, if committed in a quarrel regarding land, could not be determined by justices. This would be so whether the assault was committed on the land or not. I do not think that the Act meant this, and I think the construction put on the section by my Lord is right.

CHANNELL, J.—I agree. I want to make it clear that our judgment proceeds on the reading of the statute. It must be that the word "title" in sect. 46 governs not only the words "lands, tenements, or hereditaments," but also the words "any interest therein or accruing therefrom." In this case there was no question as to the title of any interest in any land or any interest accruing therefrom. If any question had arisen as to the title to the right of common the statute would apply, for I think that the words would apply to such a right—namely, a *profit à prendre*. This was merely a quarrel between the two parties concerning a right which they both had, and no such question as I have referred to above arose.

Rules discharged.

Solicitors: *Morris and Bristowe, for Lawton, Warnes, and Sons, Eye; Guscotte and Fowler.*

Tuesday, March 25.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. JUSTICES OF KINGSTON; *Ex parte* DAVEY. (a)

Licensing—Objections by justices—No objection taken at meeting—Adjournment—Refusal of renewal—Jurisdiction—Mandamus—Form of—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 42.

Where no notice of objection has been served not less than seven clear days before the commencement of the general annual licensing meeting any objection then made under sect. 42 (2) of the Licensing Act 1872 must be made in open court before the adjournment, otherwise when the

justices deal with the renewal upon the adjournment they will have no jurisdiction except to renew the licence.

An objection can be made under sect. 42 (2) at the general annual licensing meeting by the justices themselves, but such objection must be made in open court.

The court will not by mandamus order a judicial tribunal to act in a particular way, unless it is quite plain that what it has to do is purely ministerial and not judicial.

Therefore, a mandamus will not be granted to justices to hold a further adjournment of the general annual licensing meeting and at such further adjournment grant a renewal of a licence, but it will merely order the justices to hear and determine according to law.

CAUSE shown against a rule nisi for a writ of mandamus directed to the licensing justices for the borough of Kingston commanding them to hold within a reasonable time a further adjournment of the general annual licensing meeting and at such further adjournment to grant to W. G. Davey the renewal of his licence in respect of the premises, the Royal Oak public-house.

The following facts appeared from the affidavits filed in support and in opposition to the rule.

On the 5th March 1902, the licensing justices held the annual general licensing meeting.

No notice was given to Davey of any objection to the renewal of his licence, and at the meeting no objection was made to the renewal by any person whatsoever.

The chairman read out a list of houses, of which the Royal Oak was one, and said that the consideration of the renewal of these licences would be adjourned till the 19th March.

No notice to attend was served upon the applicant, and no notice of objection or grounds was given to him.

On the 19th March the applicant was represented by counsel, who submitted that the justices had no power to refuse the renewal of the licence, because no objection had been made as provided by sect. 42 of the Licensing Act 1872, and no notice requiring him to attend or notice of objection had been given.

The justices, without hearing evidence on oath or otherwise, refused the renewal of the licence.

At the annual licensing meeting of the justices in 1900 an announcement was made to all the licence-holders present, and published in the local papers, that, though all the licences would be renewed that year, a reduction would be made the next year, and the trade were invited to submit specific proposals for effecting such reduction. This notice having produced no result, in 1901 another announcement was made and duly published, to the effect that unless some proposals as to the reduction of licences were received from the trade it would become the duty of the justices to take the matter into their own consideration independently of the trade itself. This notice also being productive of no result, the justices at the licensing meeting on the 5th March 1902, proceeded to consider in the public interest where the reduction in the number of licences should take place, and, finding that the district in which the Royal Oak is situated was one where a considerable decrease of population had taken place in the last few years, they adjourned the considera-

(a) Reported by W. de B. HERBERT, Esq., Barrister-at-Law.

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tion of the renewal of the licences of four houses in that neighbourhood, including the Royal Oak, until the 19th March. The above circumstances were explained to the solicitor for the applicant on the 17th March by the clerk to the justices.

At the adjourned meeting on the 19th March the chairman observed that the renewal of the licences of the four houses had been deferred, as the justices considered that the population had sensibly decreased, and they then refused the renewal.

Avory, K.C. (*Lynn* with him) showed cause against the rule.—As to the case apart from the point as to the form of *mandamus* asked for the question is raised whether, under sect. 42 of the Licensing Act of 1872, the justices themselves can start an objection to the licence, or whether such an objection must be made by a third party. I submit that they can, for otherwise the justices would be deprived of their absolute discretion as to renewals unless some third party objected. As to the point that the applicant had no notice of the adjournment, he was represented at the adjourned meeting, and so must have known. The notice need not necessarily be a formal one given in court. If the court, however, are of opinion that there has not been sufficient notice of the meeting, the justices are quite ready to hear and determine again. As to the form of the rule asked for, it cannot be granted in those terms, because on the authorities that the only form in which it can go would be to direct the justices "to hear and determine and according to law," and not as an order to them to renew the licence. In *Reg. v. Farquhar* (L. Rep. 9 Q. B. 258) a *mandamus* was asked commanding the justices to hold a meeting, and at such meeting to grant a renewal, but the court declined to grant it in that form, and limited it "to hear and determine." Again, in *Reg. v. Howard* (60 L. T. Rep. 960; 23 Q. B. Div. 502), *Reg. v. Farquhar* was discussed. There, where the justices had returned to the writ of *mandamus* that they had heard and determined, that was held to be sufficient.

Hammond Chambers, K.C. (*Rowell* with him) in support of the rule.—No objection was taken either by the justices or by anyone else to the renewal of the licence at the meeting, and that being so, there was no power under the proviso to sub-sect. 2 of sect. 42 to adjourn the meeting. As there was no jurisdiction to adjourn, and no objection was taken at the meeting, the court can only direct them to do what they ought to have done before—namely, renew the licence as a matter of course, and should not direct them to hear and determine the application. Their duty now is merely ministerial, and, therefore, as they can only act in one way there is no objection to the rule going in that form. There was no jurisdiction in the justices to adjourn, as there was no objection under sect. 42 of the Licensing Act 1872. The case of *Reg. v. Merthyr Tydvil Justices* (14 Q. B. Div. 584) shows that the objection must be taken in open court. He referred to

out evidence of any ground of objection to its renewal. In that case the Court of Appeal directed that the licence must be renewed. He referred to

Baxter v. Leche, 62 J. P. 292; 14 Times L. Rep. 352.

Lord ALVERSTONE, C.J.—In this case Mr. Hammond Chambers obtained a rule *nisi* for a *mandamus* calling upon the Kingston justices to show cause why they should not grant a renewal of a licence, and he has pressed us for reasons which are sufficiently obvious to grant the rule in that form. He says that we ought not to make the rule absolute calling upon the justices to hear and determine the application for a renewal. Mr. Horace Avory, who suggests to us that there was a sufficient hearing and determining by the justices in the case on the 19th March, has expressed the willingness of the justices to hear and determine the application of Mr. Davey, on whose behalf the rule has been moved. I think it is better that I should state first what I understand the law to be, and then deal with the actual form of the rule. I think it is quite plain that under sect. 42 (2) of the Licensing Act the objection to the licence must be made in open court before the case can be adjourned, so that the magistrates may deal with it on the adjourned hearing, notwithstanding no notice of objection has been given pursuant to the earlier part of the section, and if it should turn out that no objection was taken in open court then the magistrates, when they deal with this matter, will have no jurisdiction except to confirm or rather to renew the licence. But I think it would be wrong upon the materials before us to come to the conclusion that there was clearly no notice of objection, and therefore act as though there was nothing for the magistrates to hear and determine. I think it is quite unusual to direct a judicial tribunal to act in a particular way unless it is quite plain that what they have to do is purely ministerial and is not judicial. It has been contended by Mr. Avory that the affidavits are sufficient to show that the applicant knew enough about it by what occurred on the 5th March, supplemented by the notice of the 19th March, and supplemented by the fact that one of the four gentlemen whose licences were postponed did go into the merits and contest the matter. Unfortunately it does not appear what the magistrates did when counsel who represented the applicant on the later hearing on the 19th March took the objection that no notice had been given. If they had decided that notice had been given, that there had been an objection taken, and had then called upon the applicant for evidence on the merits, a different question would have arisen. The affidavit, however, stops short of that. It seems to me quite impossible for us to come to the conclusion that there was sufficient evidence of an objection taken upon the 5th March, and of that objection being brought to the notice of the applicant and determined upon the 19th March, and to say that there was a hearing. Therefore I am of opinion that the rule ought to be made absolute calling upon the magistrates to hear and determine the application. Then Mr. Hammond Chambers has pressed us to say that the rule ought to be made absolute to grant a renewal, and

Ruddick v. Liverpool Justices, 42 J. P. 406.

In *Evans v. Conway Justices* (82 L. T. Rep. 704; (1900) 2 Q. B. 224) it was held that on an appeal to quarter sessions against the refusal of licensing justices to renew a licence, the quarter sessions are not entitled to refuse to renew a licence with-

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he bases his argument mainly upon the case of *Reg. v. Merthyr Tydvil Justices* (14 Q. B. Div. 584), and he says that we ought to follow the form of the rule in that case under the circumstances of this case rather than the form of the rule which was adopted in *Reg. v. Farquhar* (L. Rep. 9 Q. B. 258) and in *Reg. v. Howard* (60 L. T. Rep. 960; 23 Q. B. Div. 502). In the first place it seems to me that, even if you take the report of *Reg. v. Merthyr Tydvil Justices* (*sup.*) by itself, it is quite plain that Lord Coleridge did not mean to lay down an absolute rule as to what one must do. In this case, if Mr. Hammond Chambers is right, it is pointed out in which form the *mandamus* should go; in other words, it seems to have been practically conceded that no objection had been taken, and therefore there could be no right in the magistrates to decline to renew the licence. That that is really the true view of the case is, I think, plain when you come to consider the judgment in *Reg. v. Farquhar* (*sup.*), where Blackburn, J., as he then was, points out that the magistrates might themselves take the objection, and they having taken the objection would be entitled to give notice to the applicant, and subsequently hear and determine. In *Reg. v. Howard* (*sup.*) the extent to which Coleridge, C.J. is supposed to lay down the law is commented upon by Mathew, J. It seems perfectly plain to my mind that Mathew, J. took the view which I am suggesting is the right one—namely, that Lord Coleridge, in the case of *Reg. v. Merthyr Tydvil Justices* (*sup.*) could not have intended to lay down the rule that under such circumstances there must be a rule to order the justices to grant a renewal. The actual form of the rule, which my brother Channell has kindly handed to me, was “to hear and determine.” Therefore that shows us what one would have expected—namely, that that particular point was really immaterial for the purpose of Lord Coleridge’s decision, but the actual rule granted was “to hear and determine.” I have only two other observations to make with regard to matters which have been referred to in the argument. It seems to me, for the reasons I have given, that an objection can be started by the magistrates themselves. That was said by Blackburn, J. in *Reg. v. Farquhar* (*sup.*), but it must be stated in open court. That Mr. Hammond Chambers has very fairly conceded, and if stated in open court the case can then be dealt with. I myself think the case must be dealt with on the merits, and if facts are to be proved they ought to be proved in evidence, and I do not think there ought to be casual conversations between justices which are not brought to the knowledge of the person who is applying. Of course nobody can say beforehand what must be done in every case. It may be that the facts which are stated are not disputed by the applicant, and therefore there may not be necessity for the amount of evidence in some cases that there would be in others. Those matters can only be dealt with when the particular concrete case arises. It not being clear in this case to my mind whether an objection was taken on the 5th March, and it certainly not being established that that objection was judicially brought to the mind of the applicant to treat the hearing on the 19th as binding upon him, I think the rule ought to be made absolute to the justices to hear and determine.

DARLING, J.—I am of the same opinion. The question really is whether enough happened on the 5th March to bring into operation the proviso of sect. 42 (2) of the Licensing Act. Now, in order to enable the magistrates to adjourn the consideration of this licence in order to determine about its renewal from the 5th March there must have been on the 5th March an objection in open court. I think it does not make any difference that the objection is taken by one of the magistrates. I think one of the magistrates might have taken the objection, and if he had taken it in open court then there might have been an adjournment, and the applicant might have been required to attend and the matter might have been gone into. I do not see myself any evidence from these affidavits that an objection was taken in open court, but, for all that, it may have been. The fact that an objection may have been taken is enough to show that it would not be proper in this case simply to issue a *mandamus* to the justices that they should do a particular thing which might depend upon whether that objection was taken or whether it was not. The *mandamus* will therefore be to the magistrates to hear and determine according to law. It seems to me that if no objection in open court was in fact taken upon the 5th March then the magistrates would have to renew the licence. If, however, objection was taken then they may renew or refuse to renew it according to the opinion which they form in their discretion. One must assume that when they receive this *mandamus* and proceed to hear and determine they will proceed to hear and determine according to law, and not in some other way. I simply point out that if it is desired to ascertain whether they do or do not hear and determine according to law the proceedings to be taken will be found by Mr. Hammond Chambers and his client in *Reg. v. North Staffordshire Justices* (51 L. T. Rep. 534; 14 Q. B. Div. 13).

CHANNELL, J.—I am of the same opinion. I think it is an important matter which should be thoroughly understood, that this court does not by *mandamus* direct either justices or any public body or anybody else upon whom a duty is cast, how and in what manner they are to perform their duty. They simply direct them by *mandamus* to perform their duty. I think also that even where the facts are all admitted, so that in the particular circumstances of a particular case—as my brother has pointed out in this case—there happens to be but one way of performing that duty, still the *mandamus* goes to perform the duty, and not to perform it in a particular way. There may possibly be cases, but none in fact have been brought to our attention, where, in consequence of the circumstances being such that there is but one way of performing the duty, no one has thought it worth while to question the form in which the *mandamus* should go. Accordingly it has gone to do the particular act because nobody has thought it worth while to trouble about the matter at all. When we see the rule that was granted in *Reg. v. Merthyr Tydvil Justices* (*sup.*), and see what was said in that case, it seems to me that all that Lord Coleridge said was that it did not signify in that particular case in which form the rule went. I do not say I think there is no authority for granting a *mandamus* in the other form. The other case pressed upon us was *Evans*

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v. *Conway Justices* (82 L. T. Rep. 704; (1900) 2 Q. B. 224), but there there was a case stated by the magistrates, and that makes all the difference, because if the magistrates state a case you have to tell them how they are to perform their duty. But it is a totally different thing here. Upon the other matters I entirely agree with what my brothers have said, and I do not think it necessary to add anything. If, on the one hand, the facts are all one way, the justices will have nothing to do but to grant this licence; on the other hand, if there was in point of fact an objection taken in open court, then I think that they can give notice of their adjourned hearing under our order, and I think that they could hear and determine that objection in the way in which they ought to have heard and determined it on the 19th March.

Rule absolute.

Solicitors: *Wilkinson, Howlett, and Wilkinson; Pyke and Parrott.*

March 24 and 25.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.).

GORRINGE (app.) v. MAYOR, &C., OF SHOREDITCH (resps.). (a)

Metropolis—Combined scheme—Order of local authority—Alteration—No order—Drain a sewer.

Certain houses in B. street in 1853 were drained by a combined scheme under the order of the local authority.

In 1889 No. 85, B.-street was disconnected from No. 83 and connected to its adjoining house on the other side, No. 87. No order was made by the authority for this, but it was superintended by their officers.

In 1900 the owner of No. 85 erected a workshop on the garden, and the drainage from that, including an additional w.c., was connected with the drain of No. 87. This was superintended by the respondents' officers, and, although a plan had been approved by the respondents, the work was not in fact carried out in accordance with that plan.

Held, that the drain of No. 87 did not become a sewer.

CASE STATED.

The appellant was the owner of No. 87, Brunswick-street.

In Sept. 1853 one John Hartley, who was then building a row of houses in Brunswick-street, made application in writing to the Metropolitan Commissioners of Sewers asking permission to drain the proposed houses in accordance with the plan accompanying that application. The commissioners by an order duly approved such plan, and the houses and drains were then constructed in accordance with that plan.

In 1889 that part of the drainage from No. 85 which ran into the drain of the house to its left (No. 83) was disconnected from No. 83, and the drain was connected to the drain which drained Nos. 85 and 87. The alteration was carried out under the superintendence of the officers of the late vestry of Shoreditch, but there was no evidence that any plan was submitted to

them, or that they made any order as to that drain.

In 1900 Martin Alfred Robinson, the owner of No. 85, wishing to build a factory or workshop on the garden or yard belonging to and behind his house, presented a plan to the respondents for draining the new factory or workshop showing the drainage as running under No. 85, as it was thought at that time to do, and the respondents duly approved of that plan.

After the factory or workshop had been built it was found that No. 85 had not a separate drain, as described upon the presented plan, but that the drainage from No. 85 ran into the drain which passed through and drained No. 87.

The whole of the drainage work in connection with the alterations in No. 85 was carried out under the inspection of one of the respondents' sanitary inspectors, and all the new drains, including that from an additional water-closet, which was subsequently erected by the directions of the respondents on a portion of the site of the back addition of No. 85, in order to comply with the requirements of the Factory Acts, were connected with the old drain at No. 87.

The appellant contended that the alterations made in the drainage in 1889 and 1900 had caused the old drain on her premises, No. 87, to become a sewer.

The respondents contended that, notwithstanding the alterations and additions, the old drain on the premises Nos. 85 and 87 remained a drain by reason of (a) that there had not been any addition to the combined drain or drainage of any other premises without the same curtilage; (b) that the approval of the plan and the carrying out of the work in relation to the factory in 1900 amounted in law to an order by the respondents for drainage by combined operation; and (c) that the addition to the combined drain of the pipe from the factory roof being for the collection and discharge of rain-water only, which formerly fell into the yard or garden, did not cause the combined drain to become a sewer.

The magistrate held that the drain on the appellant's premises remained a drain and had not become a sewer, and he made an order upon the appellant to abate the nuisance complained of.

Macmorran, K.C. and Mallinson for the appellant.

Courthope-Munroe for the respondents.

LORD ALVERSTONE, C.J.—I am not at all sure that any real question of law arises here, and I am not going to express any opinion upon what could be done upon the curtilage or premises attached to a house, it still being a combined system of drainage and not becoming a sewer. It seems to me that it is not necessary to decide it. We ought not to deal with any case which may involve different facts. In order really to understand this case, and what the magistrate has decided, we have to see what the state of things was under the alteration. There was undoubtedly a combined order for Nos. 85 and 87, and they were both houses. There has been an erection put at the back of No. 85, which has been called a workshop, and which has been called a factory in the case. In consequence of that they added to the old water-closet a second one, and some rain-water, which originally fell in the garden and which drained away somehow, now comes down

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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into this combined drain. That being so, the contention before the magistrate was, on the part of the appellant, that, she being the owner of No. 87, that inasmuch as this alteration had been made, that which had previously been a drain on her premises had become a sewer, because the work of 1889 and 1900 had been done. The contention of the respondents, which I agree with Mr. Macmorran the magistrate must have adopted, were, first, that there had not been any addition to the combined drain of the drainage of any other premises without the curtilage. I will take the third point next, "that the addition to the combined drain of the pipe from the factory roof being for the collection and discharge of rain-water only which formerly fell into the said yard or garden did not cause the said combined drain to become a sewer." It seems to me that those two questions, although they undoubtedly raise a question of law to a certain extent, also involve a question of fact. The magistrate came to the conclusion that such alteration, as it was, did not turn that drain into a sewer. It is contended that it must have done so as a matter of law, because there was a structure put at the back of the garden, the rain-water from which came down into this combined drain. It seems to me perfectly obvious that that mere increase of the sewage burden cannot be sufficient, or otherwise the putting up of a second water-closet in the house originally sanctioned might have increased the sewage burden. The mere fact that more sewage goes to the combined drain cannot be contested. It is equally clear, perhaps I will not say equally clear, but I can imagine a case where the nature of the building and the purpose for which it was put were such, the magistrate would come to the conclusion that it was substantially a fresh drainage system added on to the old combined drain, and therefore it was a sewer. The authorities certainly seem to establish that if a drain or sewer from new premises, meaning thereby new houses and buildings, is added to the drain of houses which were previously drained by a combined drain, the drain becomes a sewer. They have not gone further, and I do not think they ought to go further. Any suggestion of hardship on the owner of No. 87 has been met by the argument of Mr. Courthope-Munroe. The owner buys the property and must be taken to know that there was a combined drain. She did not make the inquiry; therefore it is her own fault. Therefore, unless the state of things is such that there has been established a sewage system for different premises, I think that the magistrate was justified in coming to the conclusion that that which was originally a combined drain has not ceased to be so, and that this appeal should be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I also am of the same opinion. I think that this case is governed by the opinion of my brother Darling and myself in the case of *Greater London Property Company v. Foot* (80 L. T. Rep. 390; (1899) 1 Q. B. 972). Certainly it is within what I personally meant to decide in that case, and I think further that there is no case which has held that a wrongful act by one of the existing owners of two properties can convert what previously was a drain into a sewer. The case of *Kershaw v. Taylor* (73 L. T. Rep. 274;

(1895) 2 Q. B. 471) proceeds entirely on the fact that there had been at some antecedent period a wrongful act, and it was not known by whom it was done. If it had been done by one of the parties, the party who was complaining in that particular case, my recollection of the course of the argument is that the court would have decided the other way. But certainly it is no authority that if the wrongful act is done by one of the parties to the litigation, one of the owners of the two houses, when any question arises, that the wrongful act will have the effect of converting the thing previously a drain into a sewer. There are at least two authorities to the contrary. In reference to *Holland v. Lazarus* (66 L. J. 285, Q. B.; 61 J. P. 282), as reported, it seems to come within *Kershaw v. Taylor* (sup.), because there seems to have been some doubt—very little, I think, but some—as to who had made the alteration. If it is to be taken upon the facts of the case that it is uncertain who made the alteration, then of course it merely follows *Kershaw v. Taylor* (sup.). If, on the other hand, it is to be taken that Holland, the plaintiff, at whose house the alteration had been made, had himself made it, then I cannot help thinking that the case requires some review, and that when it is considered it will not be followed. But, of course, if the true facts were the other way, and the judgment at any rate does not make it quite clear which way they are, it merely follows *Kershaw v. Taylor*, which is an authority on the case.

Appeal dismissed.

Solicitors: *George Brown, Son, and Vardy; H. Mansfield Robinson.*

April 15, 16, and May 3.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS. (a)

Master and servant—Trade union—Inducing breach of contract—Malice—Bona fides—Right of action.

By an indenture the plaintiff was bound as apprentice to W. and W. for three years as a stonemason. At that time he was being employed by them as a labourer and was twenty-five years of age.

Certain rules had been drawn up between the masters and men, which W. and W. had agreed to and signed.

By rule 6 it was provided: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average."

The defendants threatened to withdraw the men employed by W. and W. if the plaintiff was taught the art of a stonemason, and accordingly the plaintiff was not taught by W. and W. in accordance with the indenture.

Held (per Darling and Channell, JJ.), that the plaintiff would have a cause of action against the defendants unless they satisfied the court

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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that when they interfered with the contractual rights of the plaintiff they had sufficient justification for their interference; that such sufficient justification for interference with the plaintiff's right must be an equal or superior right in themselves, and it would be no excuse that they had acted on a wrong understanding of their rights or without malice, or bona fide, or in the best interests of themselves; that under the circumstances there should be a new trial.

Per Lord Alverstone, C.J.: That the facts disclosed negatived any suggestion that the action taken was to protect the interests of the defendants, and that judgment should be entered for the plaintiff.

APPEAL from His Honour Judge Eardley Wilmot sitting at the Ipswich County Court. The facts were thus stated in the written judgment read by Darling, J. :—

In this case the plaintiff sued the defendants for wrongfully and maliciously procuring to be broken an indenture of apprenticeship dated the 1st June 1900, and made between the plaintiff of the one part, and Wigg and Wright, monumental masons, of the other part; and for unlawfully and maliciously conspiring together to procure the said indenture to be broken, and for unlawfully and maliciously conspiring together to molest and injure the plaintiff in his trade or calling, and for otherwise committing or procuring violations of the legal rights of the plaintiff. The plaintiff claimed damages and an injunction. The case was heard before a County Court judge on the 22nd Jan. last, and the facts, so far as they are before us, appear to be these: By a deed of apprenticeship dated the 11th Aug. 1900 the plaintiff was bound to Wigg and Wright for three years as an apprentice stonemason. He was employed and paid by them as a labourer, and was not learning the trade of a mason. All the men employed by Wigg and Wright were members of the trade union of which all the defendants are members. Wigg and Wright were parties to the rules of that trade union, and had signed them. Of those rules, No. 6 is as follows:

That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average.

The letter of the 20th May 1900 written by Wigg and Wright to the defendant Moss as secretary to the trade union and his reply of the 22nd May sufficiently explain what was the action of the defendants as against Wigg and Wright when read together with defendants' answers to interrogatories 4 and 8. The letter of the 20th May was in the following terms:

Dear Sir,—As it appears we have inadvertently taken an apprentice contrary to the rules of your society (for which we are very sorry) we should be glad to give an explanation of how it occurred, as we had no intention whatever of infringing the rules. We had taken an apprentice before on the same condition, with the exception of age, and note the rule says: "And in no case to be more than sixteen years of age, except masons' sons and stepsons." Now, this seems to us to entirely do away with limit of age providing they are masons' sons. What else can it mean? The fact seems to be this rule wants revising and made plainer,

so that there could be no mistakes in future. When Mr. Read spoke to me about taking his son as an apprentice I told him we were not entitled to take another apprentice, but he said, "Oh, yes, you can take him, being a mason's son." Now, this, coming from a member of the society, we took it to be the meaning of the rule, and we never heard a word to the contrary. If we had we should certainly not have taken this one. Well, now he has been bound just a year. We don't know if we are legally bound to keep him, being over age, and we should not be at all sorry to get rid of him, although we should wish to behave honourably in the matter, and it seems to us the best way out of the difficulty would be to let him finish his time out, and we hope you will be able to view the matter in the same light, as we should be exceedingly sorry that there should be any unpleasantness between us and the society.

The letter was signed, "Pro Wigg and Wright W. B. Wigg."

The reply, dated the 22nd May, and signed by the secretary of the society, was as follows:

Your letter of the 20th was laid before the members of my society on that date, and I am instructed to inform you that you have misunderstood the meaning of the rule. It admits of a mason's son learning the trade without being bound apprentice, but we cannot understand a man of twenty-five or twenty-six years of age claiming that right, nor an employer who would take him without first consulting us. Had you done so we should have expressed our intentions in the matter at once plainly. As the matter stands, we regret your firm has placed itself in a difficult position, but my members consider your action a direct infringement of the rules, and if the man in question starts working at the trade we are bound to protest against you for introducing an individual not of the trade, and in accordance with our general rule we have empowered our members working for your firm to take prompt action in the matter. We regret the thing has occurred, but we feel that the blame does not rest with us in any way.

The answers to interrogatories were as follows:

4. (a) At a meeting held the 21st May 1900 it was reported to the meeting that there was a man working at Wigg and Wright's named Mr. Read, bringing a mallet and tools, stating that he was going to be an apprentice, but he was still working as a labourer, but it he should start at the bunker (it was noted on the minutes that) brother Turner had a right to report the same. (b) At an ordinary fortnightly meeting held the 13th Aug. 1900 it was reported that Mr. Read had been made an apprentice, but had not started masonry. It was resolved that if he started work two hours' notice should be given to Wigg and Wright by members working there. (c) At an ordinary meeting held on the 20th May 1901 it was resolved that the secretary write to Wigg and Wright respecting L. Read entering the trade, his age being twenty-five years. (d) The fortnightly meeting held on the 29th July 1901 was specially summoned in consequence of J. Read writing his intention of visiting the meeting resolutions were passed as follows: "That J. Read be admitted to the lodge on his consenting to be duly read in as a member; that J. Read be allowed fifteen minutes to state his case of complaint *re* his son; that after hearing the explanations and arguments of brother Read this society does not see any reason to recede from the position taken up by the society in the letter dated the 24th May sent to Wigg and Wright."

8. The prompt action referred to in my letter of the 22nd May 1901 was that the masons in Messrs. Wigg and Wright's employ should give two hours' notice and leave Messrs. Wigg and Wright's employ if they thought fit.

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The plaintiff was not taught the trade of a mason in consequence of the action taken by the defendants.

Henlé for the plaintiff.

Chester Jones for the defendants.

May 3.—DARLING, J. (having stated the facts, as above set out, read the following written judgment of himself and CHANNELL, J.)—The learned County Court judge held that the facts as proved or admitted before him fell short of giving any ground of action against the defendants, that the defendants seemed to have acted *bonâ fide* in the best interests of the Society of Masons, and were not in any way actuated by improper motives, that the defendants gave a certain interpretation to rule 6 and acted upon it, and that though their interpretation may or may not have been correct, yet, as it was honestly held, he did not consider they had acted improperly in their method of enforcing it. It appears to me that this view is wrong, and that there should be a new trial. To my mind the case presents itself thus. The plaintiff had entered into a contract which entitled him to demand of Wigg and Wright that they should teach him the trade of a stonemason. That was his contractual right. To interfere with that right may give a cause of action against him who does so. For this proposition there is much unquestionable authority, but it is enough to cite these words from the judgment of Lord Macnaghten at p. 291 in *Quinn v. Leatham* (85 L. T. Rep. 289; (1901) A. C. 495): "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference." It was argued before us on behalf of the defendants that they had here such a justification, because they had themselves entered into a contract with Wigg and Wright, the terms of which were inconsistent with the contract between Wigg and Wright and the plaintiff. It may well be that a person or many persons, acting in concert, would have a right to demand the fulfilment of a contract entered into with him or them, even if such fulfilment involves him who performed it in breaking a contract made by him with another person. Many examples might be put. For instance, a man who had affected to sell the same article to two separate purchasers, could not possibly perform one contract without breaking the other, if both insisted upon their rights, yet it would not render the purchaser who insisted on his contractual rights liable at the suit of the other purchaser. But it may well be that the contract here alleged by the defendants is one which, if it were proved, would be by reason of its being in restraint of trade or otherwise illegal, incapable of being enforced, and, in that case, I think that to seek to hold Wigg and Wright to it could not be held "a sufficient justification for the interference" with the contractual right of anyone—i.e., in this case, of the plaintiffs. Whether there was here a contract between the defendants and Wigg and Wright I do not think sufficiently appears upon the evidence. If in form there were one, it might still be as illegal as I have indicated, and to decide this it would be necessary to consider how far it satisfied the words of Erle, C.J.: "Every person has a right under the law as between

himself and his fellow subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." These sentences are expressly adopted by Lord Brampton as part of his judgment in *Quinn v. Leatham* (*sup.*). It may be that the agreement alleged to exist between Wigg and Wright and the defendant is one which, unlawful otherwise, is legalised by the Trade Union Act 1871; but that can only appear when it is ascertained exactly what are the terms of that contract and who were the parties to it. Moreover, when all this is ascertained, it may possibly appear that the defendants combined together to do things hurtfully to the plaintiff and not necessary to the mere enforcement of their own rights, contractual or otherwise. As to this, the evidence before the County Court judge is, I think, not sufficient to enable us to decide. On the new trial the court should have regard to all these considerations. To resume: I think the plaintiff has a cause of action against the defendants unless the court is satisfied that when they interfered with the contractual rights of the plaintiff the defendants had a "sufficient justification for their interference," to use Lord Macnaghten's words. This sufficient justification they may have had and they may prove it; but the facts found by the County Court judge and relied on by him as enough, do not amount to one, for it is not a justification that "they acted *bonâ fide* in the best interest of the society of masons"—i.e., in their own interest; nor is it enough that "they were not actuated by improper motives." I think their sufficient justification for interference with the plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man of whose contract he has procured the breach on the ground that he acted on a wrong understanding of his own rights or without malice, or *bonâ fide*, or in the best interests of himself, nor even that he acted as an altruist seeking only the good of another and careless of his own advantage.

Lord ALVERSTONE, C.J. read the following written judgment:—I am clearly of opinion that the judgment of the learned County Court judge in this case is not satisfactory, but the question upon which I feel considerable difficulty is whether or not the facts before us enable us finally to determine the question which is raised in the action. The action was brought against the Friendly Society of Operative Stonemasons for maliciously procuring and maliciously conspiring to be broken an indenture of apprenticeship made the 1st June 1900 between the plaintiff and the firm of Wigg and Wright, stonemasons, of Ipswich. The facts as I understand them to be agreed and in reality stated by Mr. Chester Jones, who was counsel for the defendants, are as follows: That Read, the plaintiff, being a man of twenty-five years of age, and desirous of improving his capacity for earning wages, entered into the agreement of the 1st June with Wigg and Wright whereby he covenanted to serve them for a period of three years at the wages of 15s. a

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week, which were ordinary labourers' wages, and they in their turn covenanted to the best of their skill and ability to teach and instruct him in the trade or business of stone and marble mason, and all things incidental thereto. Wigg and Wright and the men in their employ were members of the defendant society. Rule 6 of the working rules was in the following terms: [His Lordship read the rule.] The plaintiff entered into Wigg and Wright's service pursuant to the terms of the indenture of apprenticeship, working for them at the specified rate of wages, and, but for the action of the defendants, Wigg and Wright would have carried out their part of contract, and would have instructed him in accordance with the undertaking contained in the indenture. It was stated at the time that the defendants wrote the letters, and took the action to which I am about to refer, Wigg and Wright were employing four masons, and had one apprentice besides the plaintiff. In Aug. 1900 the defendant society resolved that if the plaintiff started work as a mason, or, in other words, if Wigg and Wright commenced to instruct him in accordance with the terms of the indenture, one of their employees was to report the fact to the society within two hours. In consequence of the action of the defendants Wigg and Wright did not employ the plaintiff as a stonemason or instruct him in his trade, and upon the plaintiff remonstrating and asking that they would fulfil their agreement the two letters of the 20th and 22nd May 1901 passed, the material part of which is that in the letter of the 22nd May the secretary of the defendant society told Wigg and Wright that they protested against their introducing individuals not in the trade, and had empowered their members working for the firm of Wigg and Wright to take prompt action in the matter. It was agreed that "prompt action" meant that the defendants would authorise their members to give two hours' notice to quit Wigg and Wright's service. It was further stated that the plaintiff was not being taught his trade owing to the action of the defendants. The law in such a case seems to me to be clearly established. It is sufficient to quote the language of Lord Macnaghten already cited by my brother Darling. This was the same principle that was enunciated by Erle, C.J. at p. 232 in *Lumley v. Gye* (2 E. & B. 216): "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong"; and expressed by Lord Watson in *Allen v. Flood*, 77 L. T. Rep. 717; (1898) A. C. 1, at p. 751, in these words: "A person who procures the act of another can be made legally responsible for its consequences . . . if he knowingly and for his own ends induces that other person to commit an actionable wrong." In my opinion the evidence establishes that in this case the defendants instead of taking action against Wigg and Wright for a supposed breach by them of the contract, if any, embodied in the rules of the association, did for their own ends procure and induce Wigg and Wright to commit an actionable wrong, that is to say, to break the terms of a special contract made with the plaintiff. I have some doubt whether the arrangement embodied in the working rules is protected by the Trade Union Act 1871, but it is possible that the terms of sect. 3

of that Act are sufficient to prevent us from holding that if the rule amounts to an agreement between Wigg and Wright and the defendants, it is void or voidable. In my opinion the first part of the rule down to the words "sons and stepsons" has no application to the facts of this case. This was the case of a contract made by a man of full age in his own right, and not by or on behalf of a boy. The provision as to one apprentice to every four masons creates some difficulty, but I think that in that case—assuming the arrangement embodied in the rule to be binding on Wigg and Wright—the defendants had no right to bring pressure to bear to procure Wigg and Wright to break their contract with the plaintiff. Whether they could have taken any other action against Wigg and Wright is a question not before us. There was no evidence to show that the union or any of its members would in any way be injured by the plaintiff being taught his trade, or, in other words, by Wigg and Wright fulfilling their contract with him. The defendants' action was initiated at a lodge meeting on the 13th Aug. 1900. The further action on the 13th May 1901 was by the secretary of the defendant society, and the action threatened to be taken by Wigg and Wright's men was to be empowered by the defendant society. In my opinion these facts negative any suggestion that the action was taken on behalf of individuals to protect their own interests. For these reasons I think the County Court judge ought to have entered judgment for the plaintiff, but as my brothers are not prepared to go so far, there can only be judgment for a new trial.

Judgment accordingly.

Solicitors: *Leighton and Aldous*, Ipswich; *Shaen, Boscoe, and Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Thursday, Jan. 16.

(Before Sir F. JEUNE, President.)

Re JENNY MORRIS. (a)

Married woman—Protection order—Address of husband unknown—Citation dispensed with—Matrimonial Causes Act 1858 (21 & 22 Vict. c. 108), s. 7—Practice.

A wife had been deserted by her husband, and the only information she had ever been able to obtain as to his whereabouts was a statement made by his brother that he believed he was residing somewhere in Melbourne. Upon an application by the wife in chambers for a protection order, the same was granted without notice being given to the husband.

THIS was a summons by Jenny Morris, a married woman, who had been deserted by her husband, asking for an order to be made pursuant to the Matrimonial Causes Act 1858 "to protect any property in England which she may have acquired, or may acquire, by her own lawful industry, and any property Jenny Morris may have become possessed of, or may at any time become possessed of, after such desertion, against her husband, Neil

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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Morris, his creditors, or any person claiming under him."

It appeared from the affidavit of the applicant that she was married on the 31st Jan. 1877, being then Jenny Macgregor, to Neil Morris at Ranzochlea, St. Andrew's-road, Pollokshields, Scotland. Both parties resided in Scotland before the marriage and also after the marriage until 1879, when they removed to Leytonstone, Essex. They resided there until the 6th Oct. 1897, the date of the desertion of the husband. There were four children of the marriage, and at the date of the desertion three were wholly, and one partly, dependent upon their mother for support. The husband deserted his wife without any cause, and wrote to her from a steamboat on the Clyde saying that he was going away for the sake of his health and would be absent about two years. He gave no address. Since 1897 the wife had had to rely almost entirely upon her own exertions, and some small assistance from relatives.

From another affidavit of Jacob Tyler, a solicitor, it appeared that the present applicant was entitled to a legacy of 2000*l.* under the will of her brother, John Macgregor, formerly of Rangoon, who died at Bridge of Allan on the 24th Sept. 1900.

The will, which was made in Rangoon, was proved in the Chief Court of Law in Burmah on the 6th Feb. 1901, and afterwards in Scotland. It was also proved and registered in the principal Probate Registry at Somerset House on the 17th Sept. 1901.

Considerable correspondence took place between the solicitors of the applicant, and Messrs. Robert Walker and Orr, of Glasgow, the solicitors of the executors of John Macgregor—first, as to the question of the domicile of the parties concerned, and secondly, as to the payment of the legacy.

On behalf of the executors it was contended that the husband of the applicant would be entitled to administer his wife's property according to the law of Scotland, that the payment of the legacy was governed by that law, and that, therefore, the husband must consent to or concur in the payment of the legacy to the wife. The opinion of Scotch counsel had been taken in the matter, and it was further contended that the Married Women's Property Act 1882 did not apply to this legacy, in spite of the fact that the husband and wife had been domiciled in England from 1879 to 1897. The executors were quite willing to pay over the legacy to the applicant upon the production of a protection order.

The whereabouts of the husband were quite unknown. The only information of any kind was that obtained from the brother of Neil Morris, who said that he believed the husband was residing in Melbourne, though he did not know his address.

At the first hearing the summons was adjourned for an examination of the authorities as to the necessity of serving a citation upon the husband, either personally or otherwise.

Barnard for the applicant.—He cited *Ex parte Hall* (27 L. J. 19, P. & M.) and *Ex parte Mullineux* (1 Sw. & Tr. 77) as two cases upon which he relied. The case of *Matthew v. Matthew* (19 L. T. Rep. 662) was not an authority against the application. It only decided that notice must be given to the husband of an application for a protection order if his whereabouts were known.

The PRESIDENT said he would follow the decision in *Ex parte Hall*, and make the order applied for upon the filing of an affidavit that the marriage was valid according to Scotch law.

The following is a copy of the protection order:

"In the High Court of Justice, Probate, Divorce, and Admiralty Division (Divorce).—I, the Right Honourable Sir Francis Jeune, President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, do hereby order that all money or property acquired by the lawful industry of Jenny Morris (wife of Neil Morris), at present residing at 81, Fairlop-road, Leytonstone, in the county of Essex, since the 6th day of October 1897, being the day on which the said Jenny Morris was deserted by her said husband, or which she may hereafter acquire, and all property which she has become possessed of, and all property to which she has become entitled, as executrix, administratrix, or trustee, since the said 6th day of October 1897, and all property which she may hereafter become possessed of, and all property to which she may become entitled as executrix, administratrix, or trustee, shall be protected, and that such money and property be hereby protected against the said Neil Morris, his creditors, and any person claiming, under him, and that all such hereinbefore mentioned earnings and property shall belong to the said Jenny Morris as if she were a *feme sole*.—Dated this 29th day of January 1902.—(Signed) F. H. JEUNE."

Solicitors: Carr, Tyler, and Overy.

Tuesday, March 4.

(Before Sir F. JEUNE, President, and BARNES, J.)

HILL v. HILL. (a)

Appeal from justices—Allowance—Stepchildren—Liability of husband—Discretion of justices—Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), s. 57—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), s. 4.

A husband is liable under the Poor Law Amendment Act 1834, for the support of his stepchildren and the liability is fully recognised by sect. 4 of the Summary Jurisdiction (Married Women) Act 1895. In assessing the amount of the allowance which a husband is to be ordered to pay for the support of his wife, who has obtained a separation order against him, and her family, the justices ought to consider the circumstances of the case—the number of children, whether of the second or a former marriage, and the principles and practice of the High Court in cases of judicial separation upon which allotments of alimony are made. If the court is of opinion that the justices have acted reasonably under all the circumstances of the case the allowance ordered by them will not be interfered with.

THIS was an appeal of the husband from an order of the justices of Southampton, made on the 19th April 1901 and confirmed on the 31st Jan. 1902, by which the appellant, Frederick Penton Hill, was ordered to pay to his wife, Matilda Alice Hill, the sum of 30*s.* a week, 1*s.*

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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being for the maintenance of her children by a former husband.

The order was made under the Summary Jurisdiction (Married Women) Act 1895.

The grounds of appeal were (1) that the husband ought not to have been ordered to pay anything towards the maintenance of his stepchildren; and (2) that the amount ordered was excessive, being more than one-third of his earnings.

Prichard for the appellant.—The order for the maintenance of children ought not to have been made. At common law a man was not liable for the support of his stepchildren. He only became liable if they were chargeable to the parish under the Poor Law Acts. Neither the Matrimonial Causes Act 1878 nor the Summary Jurisdiction (Married Women) Act 1895 gave the justices power to order maintenance at all for the children of the marriage. The father would become liable if they became chargeable to the rates. Under the circumstances there was just a possibility that the father might have to pay twice over. He ought not to be placed in such a position. In any case the amount ordered was excessive. The husband had been earning 3l. a week, but his wages were now only 50s. and out of that sum he had to pay 5s. a week for the support of his own child. He cited

Mortimore v. Wright, 6 M. & W. 482;
Tubb v. Harrison, 4 T. R. 118;
Cooper v. Martin, 4 East, 76;
Cobb v. Cobb, (1900) P. 294;
Nott v. Nott, 84 L. T. Rep. 573; (1901) P. 241;
 43 Eliz. c. 2, s. 6;
 4 & 5 Will. 4, c. 76, s. 56;

Barnard for the respondent.—The justices were right in their order. The facts of the case were somewhat suspicious, and the justices evidently did not believe the evidence of the husband. As to his liability, so long as the mother lives the husband was liable to maintain his stepchildren. She had an implied authority to pledge his credit for necessaries for them. There is no doubt of the liability under the Poor Law Acts:

Bazeley v. Forder, 18 L. T. Rep. 756; L. Rep. 3 Q. B. 559.

There was no hard-and-fast rule that the court must not award more than one-third of the joint income.

The PRESIDENT.—I do not think that it is now necessary to decide what is the exact liability of a husband at common law for the children of his wife by a former marriage. This seems to be so to me, because it is quite clear that there is a liability attaching to him by virtue of the Poor Law Acts, although it is not quite certain what is the extent of that liability. The Matrimonial Causes Act 1886 clearly made the husband liable not only for his wife but also for his wife's family, and this was extended by the Act of 1895. Sect. 4 of the latter Act leaves no doubt whatever in my mind upon the subject. The words are "any married woman whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally bound to maintain." The words "whom he is bound to maintain" clearly must include the stepchildren, and I am of opinion that the husband is bound to provide for them. In estimating the

amount to be paid by the husband to the wife, the justices must take into consideration the number of children to be provided for, and exercise their discretion having regard to the whole facts of the case. The principles upon which they should act in fixing an allowance should, as far as possible, be the same as those which guide this court in the allowance of alimony. But so long as they exercise their discretion properly this court will not interfere with the amount of the order made. In the present case we do not think that the sum of 30s. a week is an excessive one, and the appeal will, therefore, be dismissed with costs.

BAERNES, J. concurred.

Solicitors for the appellant, *Bramall, White, Sanders, and Roberts*, for *Page and Gulliford*, Southampton.

Solicitor for the respondent, *W. W. Stocken*, for *E. D. Godwin and Son*, Southampton.

Tuesday, March 18.

(Before Sir F. JEUNE, President.)

WOOLNOTH v. WOOLNOTH. (a)

Matrimonial cause—Judicial separation—Wife's petition—Husband's desertion and adultery—Custody of children—Guardianship of Infants Act 1886 (49 & 50 Vict. c. 27), s. 7.

Upon a wife's petition for judicial separation on the grounds of her husband's desertion and adultery, the court will require very strong evidence of the aggravated character of the conduct of the husband before making an order, under sect. 7 of the Guardianship of Infants Act 1886, that he is a person unfit to have the custody of his children.

Skinner v. Skinner (58 L. T. Rep. 923; 13 P. Div. 90) distinguished.

PETITION by a wife praying for a judicial separation on the grounds of her husband's desertion and adultery.

The suit was undefended.

The petitioner (*inter alia*) prayed for a declaration that the respondent was a person unfit to have the custody of the children of the marriage.

By sect. 7 of the Guardianship of Infants Act 1886 (49 & 50 Vict. c. 27) it is enacted:

In any case where a decree for judicial separation or a decree, either *nisi* or absolute, for divorce shall be pronounced, the court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children, if any, of the marriage, and in such case the parent so declared to be unfit shall not upon the death of the other parent be entitled as of right to the custody or guardianship of such children.

Newson for the petitioner.—As the case was undefended he submitted that after the evidence of adultery it was unnecessary to establish an aggravated case of misconduct. The judgment in *Skinner v. Skinner* (58 L. T. Rep. 923; 13 P. Div. 90) was an authority for that proposition. But if further evidence were necessary, there were the facts that the husband had never contributed towards the support of his children for more than ten years, and that he was now living in open adultery. The court ought not to shrink from

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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BRENNAN (otherwise ROBERTS) v. BRENNAN.

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making a declaration of unfitness. Such a declaration would not be an absolute bar for all time. It would put upon the husband the onus of proving himself to be a fit and proper guardian of his children, in any proceedings with respect to their custody after their mother's death. If he could show that he was a reformed character he might induce the court to give him the custody of his children, after their mother's death, in spite of the declaration. He cited

Handford v. Handford, 63 L. T. Rep. 256;
Webley v. Webley, 64 L. T. Rep. 839;
Hitchings v. Hitchings, 67 L. T. Rep. 530;
Forshall v. Forshall, *Times*, Dec. 20, 1901.

The PRESIDENT (after stating that there must be a decree for judicial separation with costs, and giving the petitioner the custody of her three children, proceeded:—) I do not think that the present case is one in which a declaration such as is prayed for ought to be granted. The case of *Skinner v. Skinner* (*ubi sup.*) is certainly not on all fours with it. There the facts proved showed offences of a most abominable character. But there is nothing here approaching it. Adultery, desertion, and cruelty are the common incidents of suits instituted for judicial separation; but it does not follow, as a matter of course, that the party found guilty should be for ever deprived of the custody of his children. The court is not inclined to cast such a stigma upon a husband without a very strong case is made out against him. That is not so in the present instance, and the declaration must be refused.

Solicitors: Curwen and Carter.

March 21 and 24.

(Before Sir F. JEUNE, President.)

BRENNAN (otherwise ROBERTS) v. BRENNAN. (a)

Matrimonial cause—Bigamy—Nullity of marriage—Domicil—Jurisdiction—Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), ss. 22, 42—Application to make decree nisi absolute at once—Discretion of court—Practice.

The petitioner was a native of Wales, and married the respondent, who was a native of Ireland, and domiciled in that country, in the Isle of Man. At the time of the celebration of the ceremony the first wife of the respondent was still alive. Upon a suit being brought by the petitioner for a decree of nullity of marriage it was held that the test of the jurisdiction of the court in cases of this kind was not domicil, but residence.

The practice is provided for by sect. 22 of the *Matrimonial Causes Act 1857*, following that of the *Ecclesiastical Courts*. The judgment of the Privy Council in *Le Mesurier v. Le Mesurier* (72 L. T. Rep. 873; (1895) A. C. 517) has overruled that in *Niboyet v. Niboyet* (39 L. T. Rep. 486; 4 P. Div. 1) only as to suits for dissolution of marriage. It has no application to a suit for a decree of nullity of marriage.

Although there is no *prima facie* necessity for a petitioner to seek the relief of the court in a suit of this kind, where the respondent has committed bigamy, the court will not consider it a case of so exceptional a character as to

justify it in exercising its discretion in shortening the period of six months which must elapse between the dates of the decree nisi and the decree absolute.

THIS was a petition of Margaret Brennan, otherwise Roberts, for a decree of nullity of marriage, on the ground that at the time she went through a form of marriage with the respondent, Christopher Brennan, his wife was still alive.

It appeared that the petitioner, who was a native of Wales, went through a ceremony of marriage with the respondent, who was a native of Ireland, at Douglas, Isle of Man, on the 19th Sept. 1898. The petitioner was unaware at the time that the respondent was a married man. They subsequently lived together in the Isle of Man and at Glasgow.

In May 1901 the respondent came home in a state of intoxication, and informed the petitioner that his first wife was living. She immediately left the house, and never cohabited with him again. From inquiries which were made she ascertained that the respondent had been married to Annie Eliza Horsfall, at St. Peter's Church, Liverpool, on the 20th Jan. 1896.

On the 10th Feb. 1902 the petitioner and the first wife were present and identified the respondent when he was served with the citation and petition at Tyrell's Pass, county Westmeath, Ireland.

Pritchard for the petitioner.—The facts of the case were clear, and the petitioner was entitled to the relief she asked. It was true that the domicil of the respondent was Irish, but the petitioner was not barred from bringing her suit on that account. This was a suit for nullity, not for dissolution. The test of jurisdiction in suits of dissolution was domicil, but in suits for nullity it was residence. In the case of *Harford v. Morris* (2 Hagg. Cons. 423), Sir George Hay said: "The Ecclesiastical Court certainly has jurisdiction in all cases whatsoever, with respect to the marriage of English subjects, wherever celebrated. If celebrated in any foreign country, and it can be shown that such marriage was contrary to the general law, to the principles that obtain everywhere with respect to marriage; that it was under force or restraint of either of the parties; that it was incestuous, or liable to any other impediment, under which, by the law of nations, it is not allowed to marry—upon any such objection, it is proper to bring a suit of this nature before the ecclesiastical judge; and wherever such marriage was celebrated, it may, upon such objection, be set aside. The Ecclesiastical Court has complete jurisdiction to decide the marriages of English subjects by the English law; and therefore if there was anything to show the marriage void by the general law respecting marriage, or by any particular law of the realm, or that a marriage celebrated in evasion of the law of the realm was to be set aside, if that proposition was anywhere tenable, certainly the court has full jurisdiction to enter into the cause of nullity, upon those accounts." The old Ecclesiastical Courts had, therefore, jurisdiction, and sect. 22 of the *Matrimonial Causes Act 1857* provided that "In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which, in the opinion of the said court, shall be as nearly

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." In *Armstrong v. Armstrong* (78 L. T. Rep. 689; (1898) P. 178), in the course of the argument, the statement in Shelford's Marriage, Divorce, and Registration (edit. 1841), p. 146, was quoted: "In matrimonial causes the power of the court is in *personam* and depends upon the locality of the person cited. Though the defendant may usually reside out of the kingdom, yet if he is served with a citation within the jurisdiction of the Ecclesiastical Court in London, as that of the Consistory Court of London, in a suit for nullity of marriage, that court has jurisdiction to try the validity of the marriage, wherever it may have been contracted." Further, it was provided by sect. 42 of the Act of 1857: "Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the court shall by any general or special order from time to time direct, and for that purpose the court shall have all the powers conferred by any statute on the Court of Chancery: Provided always, that the said court may dispense with such service altogether in case it shall seem necessary or expedient so to do." In pursuance of that section the respondent in the present case had been served with the citation and petition in Ireland. It would be hard if the petitioner could not obtain the relief she asked, seeing that the circumstances were such that she was not really bound to come at all. He cited

Morse v. Morse, 2 Hagg. Ecc. 608;

Donegal v. Donegal, 3 Phill. 597;

Niboyet v. Niboyet, 39 L. T. Rep. 486; 4 P. Div. 1;

Le Mesurier v. Le Mesurier, 72 L. T. Rep. 873; (1895) A. C. 517.

The PRESIDENT.—Although it is quite true that the judgment of the Court of Appeal in *Niboyet v. Niboyet* has been practically overruled by that of the Privy Council in *Le Mesurier v. Le Mesurier*, still it only applies to suits for dissolution of marriage, and the reasoning in the former case is still applicable in suits for nullity. In my opinion the doctrine of domicile does not apply at all to cases of nullity, as it does to those of dissolution, but only that of residence. It is quite clear that a case like the present could have been brought before the Ecclesiastical Courts, since their jurisdiction depended upon the matrimonial residence of the parties. That being so, this court has also jurisdiction to entertain the present suit.

Proof having been given of the validity of the *Manx* marriage the President granted a decree *nisi*, with costs.

Pritchard then further applied that the decree *nisi* should be made absolute at once, and that the delay of six months should be dispensed with. The petitioner was anxious to get married, and she was not bound to have come to the court at all. This was such a special circumstance as to entitle the court to use its discretion in shortening the interval between the date of the decree *nisi* and the decree absolute. It was quite clear the court had power to do this. He referred to

M. (falsely called B.) v. B., 30 L. T. Rep. 345; L. Rep. 3 P. & D. 200.

The PRESIDENT.—I am very sorry that I do not see my way to accede to your application. It is just possible that all the facts of the case are not before the court, and it might even turn out that the first marriage was bad. The interval of six months is given for the purpose of enabling the King's Proctor to investigate the circumstances of the case. In the case that has been cited I notice that the Judge Ordinary referred to the case of *Fitzgerald v. Fitzgerald* (31 L. T. Rep. 270; L. Rep. 3 P. & D. 136). But the circumstances of that case were very peculiar. The judge there said: "The matter had been investigated more than once, leading to great delay, and the Queen's Proctor had intervened, and had had every opportunity to inquire into the particulars of the case." That is not so here. To allow the decree to be made absolute at once would form a bad precedent, and the court would be asked to exercise its discretion of reducing the time on every occasion.

Solicitors: *Pritchard, Englefield, and Co.*, for Earle and Sons, Manchester.

CROWN CASES RESERVED.

Saturday, April 26.

(Before Lord ALVERSTONE, O.J., LAWRENCE, WRIGHT, BRUCE, and KENNEDY, JJ.)

REX v. WILLIAM MALLISON. (a)

Criminal law—Larceny—Fish taken at sea—Possession of owner of smack—Skipper of smack.

Fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny.

A., who was employed as skipper of a smack used for trawling outside territorial waters, during the course of a fishing voyage put into port, sold the fish he had taken, and appropriated the proceeds to his own use.

Held, that he was properly convicted of larceny.

THIS case, stated by the Recorder of Grimsby, was, so far as is material, as follows:—

The prisoner, William Mallison, was tried before me at the quarter sessions of the peace held in and for the borough of Grimsby on the 15th April 1902 on an indictment charging him in the first count with having on the 25th Jan. 1902 feloniously stolen, taken, and carried away certain fish the property of the Grimsby and North Sea Steam Trawling Company Limited. A second count charged him with having received the same fish knowing them to have been stolen.

The prisoner was in Jan. 1902 in the employment of the prosecutors, the Grimsby and North Sea Steam Trawling Company Limited, as master or "skipper" of the fishing smack *Cassiopeia*, of which the prosecutors were the owners.

The *Cassiopeia* was engaged in making voyages from the port of Grimsby to the North Sea and back for the purpose of catching fish for the prosecutors, who sold the fish on the return of the vessel after each voyage. A voyage usually lasted from about ten to fourteen days.

(a) Reported by A. A. BATHURNE, Esq., Barrister-at-Law.

CR. CAS. RES.] REX v. FREDERICK WALTER HADWEN AND ALFRED INGHAM. [CR. CAS. RES.]

The prisoner's employment was for a term of six months from the commencement thereof. He had full charge and control of the vessel during the voyages, and he was paid by the prosecutors for his services by receiving at the end of every third voyage (the voyages being divided into sets of three for this purpose) a certain proportion of the net profits produced by the sale of the fish which had been sold by the prosecutors at the end of each of the three voyages.

On the 17th Jan. 1902 the *Cassiopeia*, with the prisoner in charge of her as skipper, left the port of Grimsby on the first of one of the sets of three voyages to the North Sea and back.

On the 25th Jan. she was returning to Grimsby with a cargo of fish which had been caught by the prisoner and the crew in the North Sea and deposited in the usual receptacle provided for that purpose in the hold of the vessel and called the "fish magazine."

On the same 25th Jan. the prisoner took the vessel into Bridlington Harbour and there sold the fish, the subject of the indictment. He did not account for the proceeds of the sale to his employers, and had never been authorised to sell fish during the continuance of a voyage. It was submitted by counsel for the prisoner that the fish had never been in the possession of the prosecutors, the owners of the smack, that the prisoner being captain of the smack had the fish in his possession properly and lawfully from the time when they were reduced into possession, and that therefore there was no evidence on which the prisoner could be convicted of larceny. The learned recorder overruled this objection, and directed the jury that they could convict the prisoner on the first and second counts of the indictment if they were satisfied that the prisoner took the fish from the vessel in Bridlington Harbour with a fraudulent intention to convert them to his own use and benefit and permanently to deprive the prosecutors of their property in them. The jury convicted the prisoner.

The question for the opinion of the court was, Whether there was evidence that the prisoner took the fish which he sold at Bridlington out of the possession of the prosecutors.

Cracroft for the prisoner.—The fish never were in the possession of the prosecutors. They were in the possession of the prisoner as skipper of the smack; and consequently there was no larceny, for the possession of the servant is not the possession of the master:

Waite's case, 2 East P. C. 570;

R. v. Basely, 2 Leach 835;

Abraham's case, 2 East P. C. 569; 2 Leach 824.

Again a fish is *feræ naturæ*, and an animal *feræ naturæ* must be reduced into possession before it can be the subject of larceny:

R. v. Townly, 24 L. T. Rep. 517; 12 Cox C. C. 59; L. Rep. 1 C. C. 315;

R. v. Petch, 38 L. T. Rep. 788; 14 Cox C. C. 116.

A. Moresby White, for the prosecution, was not called upon.

Lord ALVERSTONE, C.J.—We are all of opinion that these fish were reduced into the possession of the owner of the smack, and that therefore the prisoner was properly convicted.

LAWRANCE, WRIGHT, BRUCE, and KENNEDY, JJ. concurred.

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Solicitors for the prosecutors, *Hicks and Sons*, for *H. E. and R. Mason*, Great Grimsby.

Solicitors for the prisoner, *Read and Bloomer*, Great Grimsby.

Saturday, April 26.

(Before Lord ALVERSTONE, C.J., LAWBRANCE, WRIGHT, BRUCE, and KENNEDY, JJ.)

REX v. FREDERICK WALTER HADWEN AND ALFRED INGHAM. (a)

Criminal law—Practice—Evidence—Cross-examination of prisoner by co-defendant—Evidence of person charged—Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1.

A person charged with an offence is made, by the Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1, a competent witness for the defence. The effect of this is to make him, if he gives evidence, an ordinary witness in the case, and therefore liable to be cross-examined on behalf of a person jointly indicted with him.

THIS case reserved for the opinion of the court by Ridley, J. was as follows:—

1. These two prisoners were jointly indicted before me at the assizes held for the West Riding of the County of York, at Leeds, and tried before me on the 14th and 15th March 1902 upon an indictment whereby they were jointly charged in thirty counts with the following offences: (a) Offences under the Debtors Act 1869, s. 11, sub-s. 10, in making and being privy to the making of certain false entries in a document relating to their affairs—namely, a certain balance sheet—within four months before the presentation of a bankruptcy petition by them, with intent to conceal the state of their affairs. (b) Offences under sect. 13 of the same Act by obtaining credit under false pretences in incurring a debt to the Halifax and Huddersfield Union Banking Company. (c) Conspiring together to cheat and defraud the said banking company.

2. The prisoners had for many years before their trial carried on business in co-partnership as silk spinners, under the style of Hadwen and Sons, at Triangle, near Halifax, and the banking account of the firm was kept with the Halifax and Huddersfield Union Banking Company.

3. Each prisoner pleaded "not guilty" to the whole of the indictments, and was separately defended by counsel.

4. Upon the close of the case for the Crown, each prisoner elected to give evidence upon oath, and each prisoner then gave evidence exculpating himself, and also gave evidence against the other prisoner who was charged with the same offences.

5. Counsel on behalf of each prisoner then claimed the right to cross-examine the other prisoner upon the evidence given by him against his co-prisoner.

6. It was objected and contended that such cross-examination was not permissible, and I upheld that contention, and excluded all cross-examination of one prisoner on behalf of the other prisoner, but agreed to state a case for the opinion of this court.

7. The jury found both prisoners guilty upon all the counts.

8. I respited sentence and let the prisoners out

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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on bail to appear at the next general gaol delivery for the county of York if called upon, and reserved this case for the consideration of the court.

9. The question for the opinion of this court is whether, under the above circumstances, counsel for one prisoner was (as he claimed) or was not entitled to cross-examine the other prisoner upon the evidence given by the latter upon oath against him.

If I was right in excluding such cross-examination, the conviction is to be affirmed. If I was wrong it is to be quashed.

Tindal Atkinson, K.C. (with him *Waugh*) for Hadwen.—The learned judge should have allowed the cross-examination. The Criminal Evidence Act 1898, s. 1, makes a defendant a competent witness for the defence, and being a witness he is liable to cross-examination. His position if he goes into the box is analogous to that of a respondent giving evidence in divorce proceedings, and it was held by the Court of Appeal in *Allen v. Allen and Bell* (70 L. T. Rep. 783; (1894) P. 248) that a judge was wrong in refusing to allow a co-respondent to cross-examine a respondent who had given evidence. A prisoner who gives evidence may be practically a witness for the prosecution in the case of a co-defendant. If the prisoner confines himself to giving evidence in his own defence, a prisoner jointly indicted might have no right to cross-examine. But *aliter* where the effect of the evidence is to incriminate the co-defendant. A witness called for the defence of one prisoner is liable to be cross-examined on behalf of another prisoner:

Reg. v. Burdett, 6 Cox C. C. 458; 3 C. L. R. 440; Dears. 431.

And in a case under the Prevention of Cruelty to and Protection of Children Act 1889 (52 & 53 Vict. c. 44), repealed but re-enacted by the Prevention of Cruelty to Children Act 1894 (57 & 58 Vict. c. 41), *Wills, J.* held that a wife giving evidence in her own defence must be treated as a witness in the case of her husband jointly indicted with her:

Reg. v. Martin, 17 Cox C. C. 36.

[*WRIGHT, J.*—Sect. 7 of the Act of 1889 provides that the wife may be called as “an ordinary witness in the case.”] That was done to get rid of the disability of the wife, and to enable her to give evidence for or against her husband. But this is not that case, for the person charged is to be a competent witness for the defence only if he applies to be called. But his evidence may be evidence incriminating his co-defendant.

Scott-Fox, K.C. (with him *R. A. Shepherd*) for Ingham.—In *Allen v. Allen (sup.)* *Lopes, L.J.* applies the doctrine there discussed to the case of a co-defendant, and refers to *Lord v. Colvin* (3 Drew 222). Directly he gives evidence, a defendant becomes an ordinary witness, and may say anything against a co-defendant. A jury may be charged to disregard what one prisoner has said against another prisoner, but in practice the effect of the evidence would remain in their minds. A prisoner can only be called with his own consent, but the consent of his co-defendant is not necessary. The case of the Crown must always be that both defendants are guilty, and it is quite possible that where a prisoner inculpates

his co-defendant counsel for the Crown would not cross-examine; it is, therefore, necessary that the co-defendant should be allowed to cross-examine. Sect. 1, sub-sect. (f) (iii.) of the Criminal Evidence Act 1898 points to a cross-examination.

Harold Thomas (Milvain, K.C. with him) for the Crown.—A prisoner giving evidence in his own defence is a witness for the defence, and if his evidence is against a co-defendant, that co-defendant should apply to the court for permission to cross-examine him as a hostile witness. If in giving evidence a person charged with an offence asperses the character of a co-defendant he may be cross-examined as to his own character. If he alleges that a person charged with him has committed an offence—e.g., that the person charged with him, and not he, destroyed a document—he may be cross-examined. That is the case provided for by sect. 1 (f) (iii.) But in each of these cases the cross-examination permitted is a cross-examination by the prosecution. The Criminal Law Amendment Act 1895 (48 & 49 Vict. c. 69), s. 20, makes a person charged a “competent witness,” but the Criminal Evidence Act 1898, s. 1, enacts that the person to be charged is to be a “competent witness for the defence,” that precludes the idea of a cross-examination by a co-defendant.

Lord ALVERSTONE, C.J.—The simple question is whether, where two persons are jointly indicted for an offence and one elects to give evidence, as he may under sect. 1 of the Criminal Evidence Act 1898, he may be cross-examined on behalf of his co-defendant. It is not disputed that he can be cross-examined by counsel for the prosecution; the only question is, Can he be cross-examined by counsel for the other prisoner? If the statute does not prevent us from holding that he can, it is obvious that it is in the interest of justice that he should be liable to cross-examination. Counsel for the prosecution might not think it his duty to cross-examine strictly, or the evidence of the co-prisoner might start quite a new point. In the interest of justice, when evidence is given before a jury, every opportunity of testing it should be given. There are cases in which the remarks of a judge, especially in a long trial, would lose their effect. In the case of *Reg. v. Woods and May* (6 Cox C. C. 224) counsel for the second prisoner had special rights given to him. He was allowed to cross-examine and to address the jury. In the case of *Reg. v. Burdett* (6 Cox C. C. 458) it was expressly decided that a defendant might cross-examine witnesses called for the defence of a co-defendant, and I think that the reasoning of *Jervis, C.J.* is especially useful, because that learned judge said that the evidence for the prisoner became tacked, as it were, to the evidence for the prosecution. Knowing the clear mind and the learning of the judge, it is clear to me that he had in his mind the idea that evidence once given would not be disregarded. That was the state of the law at the time of the passing of the Criminal Evidence Act 1898. It is provided by that statute that the prisoner cannot be called without his own consent, but I think that it did occur to Parliament that a prisoner might give evidence which would incriminate other persons. Sect. 1 (f) (iii.) limits the liability of a person charged who has elected to give evidence, to the case where he has given evidence against

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another person charged with the same offence. Now, the common and ordinary case of a person giving evidence against a co-defendant is where several persons are charged together, and there is a strong temptation for each to endeavour to exculpate himself by incriminating the others. Speaking for myself, I think that if it was intended to exclude a cross-examination by a co-defendant, it would have been so expressly enacted. That does not quite dispose of the matter. If a general cross-examination is to be allowed, it is said that the cross-examination must be by the prosecution only, and not on behalf of a prisoner. But Jervis, C.J. and the whole court thought cross-examination should be allowed, because when a prisoner has given evidence he becomes a witness for the prosecution. I think that must be right not only on that principle, but because the prisoner has given evidence against another person, and should therefore be liable to cross-examination on behalf of that person.

LAWRANCE, J.—I concur.

WRIGHT, J.—The only question is whether the evidence which a prisoner has given in his own defence is legally admissible to inculpate another defendant, because, if it is, it follows that he is liable to be cross-examined by his co-defendant. I find nothing in the Act except sect. 1 (f) (iii.) that tends to abrogate the ordinary rule (see *Reg. v. Payne*, 26 L. T. Rep. 41; 12 Cox C. C. 118; L. Rep. 1 C. C. 349; *Allen v. Allen*, *sup.*) that what one defendant says should not be admissible as evidence against another defendant, founded on the obvious temptation to one co-defendant to endeavour to shift the blame on to his co-defendant. If this rule is abrogated, I agree with the judgment of my Lord.

BRUCE, J.—I concur.

KENNEDY, J.—I agree.

Solicitors: *Solicitor to the Treasury*; for the defendant Hadwen, Van Sandau and Co., for Mills and Co., Huddersfield; for the defendant Ingham, Helliwell, Harby, and Co., for Jubb, Booth, and Helliwell, Halifax.

House of Lords.

Feb. 7, 10, and May 15.

(Before the LORD CHANCELLOR (Halsbury), LORDS MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON, and LINDLEY.)

LORD ADVOCATE v. STEWART AND ANOTHER. (a)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Revenue—Estate duty—Entailed estate—Money directed to be laid out in the purchase of land—Finance Act 1894 (57 & 58 Vict. c. 30), s. 23, sub-s. 16.

A testator left money to trustees with a direction to invest it in the purchase of land to be entailed in accordance with the Scotch law. By a codicil he gave the trustees a discretion to purchase land in England to be entailed according to English law.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Held, that the money was not "entailed estate" within the meaning of the provisions in sect. 23 of the Finance Act 1894 applicable to Scotland, and was not liable as such to settlement estate duty.

Judgment of the Court of Session affirmed for different reasons.

Per Lord Shand (agreeing with the Court of Session): Money so left could not under any circumstances be considered as "entailed estate" within the Act.

Per Lord Macnaghten and Lord Robertson (differing from the Court of Session): But for the provision in the codicil, it would have been "entailed estate" within the Act.

THIS was an appeal from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Balfour), Lords Adam, Kinnear, and M'Laren, who had reversed a judgment of the Lord Ordinary (Lord Stormonth-Darling).

The case is reported 3 F. 440; 38 Sc. L. Rep. 318.

The respondents were the trustees of the late Mr. James Sprot, of Spott, Haddingtonshire.

Mr. Sprot, who died in 1832, left 100,000*l.* to be applied by his trustees in the purchase of lands which were to be entailed on his nephew, Mr. Edward William Sprot, and a series of heirs.

Until the purchase should be made, and the entail executed, the income or rents, as the case might be, were to be paid to Edward William Sprot, whom failing, to the substitutes of entail.

In pursuance of these directions, the trustees spent part of the sum intrusted to them in the purchase of the estate of Drygrange, and they conveyed that estate to Mr. E. W. Sprot and the substitutes of entail in 1888.

Mr. E. W. Sprot died on the 1st Feb. 1898, at which date there remained unexpended a balance of about 60,000*l.*, which was still held in trust for the purchase of lands, in terms of Mr. James Sprot's will.

On the death of Mr. Edward W. Sprot, his son succeeded to Drygrange, and to the income of the entailed money.

Estate duty and settlement duty were paid on Drygrange in Feb. and Sept. 1899.

Estate duty was also paid on the unexpended balance of 60,000*l.*, but the defenders said that they made this payment in error, and they reclaimed it from the Crown. The present question, therefore, although it related in form only to settlement estate duty, was really whether estate duty and settlement estate duty were exigible in respect of the unexpended balance of 60,000*l.*, as they admittedly were in the case of Drygrange.

Settlement estate duty, in respect of the entailed money, was claimed as due under the Finance Act 1894 (57 & 58 Vict. c. 30), but was refused, and an action of accounting and payment was therefore raised.

The Lord Ordinary, being of opinion that this money was "entailed estate" within the meaning of the Act, gave judgment in favour of the appellant.

The First Division took an opposite view, and, holding that the term "entailed estate" had reference only to lands or other feudalised heritable estate, recalled the Lord Ordinary's interlocutor, and assoilzied the respondents.

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The testator by a codicil authorised the trustees (if in their discretion they should think it desirable) to purchase land in England to be entailed according to English law.

The claim for duty was founded by the appellants particularly on the provisions of sect. 23 of the Act, provisions which are exclusively applicable to Scotland.

Sub-sect. 14 of sect. 23 provides that "settled property," which is property held in trust for certain persons, by way of succession, shall not include property held under entail. Sub-sect. 15 provides that an institute, or heir of entail, in possession of an entailed estate, shall, whether *sui juris* or not, be deemed for the purpose of the account to be a person competent to dispose of such estate; and sub-sect. 16 enacts that where an entailed estate passes to an institute or heir of entail, who is not entitled to disentail without consent, settlement estate duty as well as estate duty shall be paid in respect of such estate, but neither duty is to be again payable on the estate until it is disentailed, or until the death of a subsequent heir, who can disentail without consent.

The appellants maintained that the term "entailed estate" was to be taken in the legal sense, which it had according to the law of Scotland, and, therefore, it should be read as comprehending whatever was entailed estate within the meaning of the Entail Acts; that it applied not merely to land, but to money left in trust to acquire land to be strictly entailed; and that in this case the entailed fund, being subject to the same destination, formed with Dryrange an entailed estate, which was created by the will of Mr. James Sprot, flowed from him as testator, and had existed from his death.

By sect. 3 of the Entail Act of 1875 (38 & 39 Vict. c. 61) it is provided that entailed estate shall include all heritages which by the law of Scotland may be made the subject of entailed estate shall include all heritages held in trust for the purpose of being entailed, and all money or other property, real and personal, invested in trust for the purpose of purchasing land to be entailed, and also all money consigned in respect of the taking of any land forming part of an entailed estate.

The appellant contended that the term "entailed estate" must be taken to cover money in the position of the 60,000*l.* in this case, and that entailed estate must be what the Entail Acts which created it declared the term to signify. The respondents said that the 60,000*l.* was held by them under a deed by which the fund stood for the time being in trust for those described in the trust deed by way of succession. Accordingly, on the death of Edward William Sprot, the interest in the fund passed to his son in succession, and was now enjoyed by him in *liferent*. The section which conferred the exemption, the respondents said, was the 21st of the Finance Act, which provides, sub-sect. 1, that estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the 2nd Aug. 1894 in respect of which property probate duty and account duty, under the Act of 1881, or inventory duty under a prior Act, has already been paid, unless the deceased was competent to dispose of the property. This last

exception, they said, did not apply here, for Edward William Sprot was not at his death in 1898, and had not been since he succeeded in 1883 competent to dispose of the trust fund. Here the 60,000*l.*, as part of James Sprot's personal estate, paid inventory duty on his death in 1882, and Edward William Sprot never was competent to dispose of it, for it was held under settlement. The trust fund of 60,000*l.* was, according to the respondents, "settled property" and not "entailed estate" within the meaning of the Finance Act 1894.

The *Solicitor-General for Scotland* (Scott-Dickson, K.C.) and *A. J. Young* (both of the Scotch Bar) appeared for the appellant.

The *Dean of Faculty* (Asher, K.C.), *Campbell Lorimer* (both of the Scotch Bar), and *R. G. Seton* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 15.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: I do not think it necessary in this case to say more than this—that the question is whether a sum of money resulting in a balance from certain investments in Scotland is or is not entailed estate within the meaning of the Scottish Finance Act. I suppose that no one, apart from some interpretation clause, would say that it was entailed estate, nor do I think it important to consider that the Court of Chancery in this country, when money has been irrevocably devoted to the purchase of land, may apply to it the considerations which would apply to it if it were land itself. The questions which have been argued in the Scottish courts have been applied only to the first hypothesis which I have suggested, and the division of opinion appears to have been on the question whether a technical phraseology applicable to Finance Acts is supposed to run through all the Finance Acts when they are enacted to be read together, or whether the technical phraseology is only to be so interpreted as to belong to the particular statute in which it is found. I hesitate to express any opinion on that question, because I think it inaccurate to say that that question arises here. The sum which was devoted by a trust in the first instance in trust for purchasing land in Scotland to be entailed in accordance with the directions of the testator's will was materially altered from the disposition originally made by a codicil to his will, the effect of which never seems to have been suggested as influencing the discussion to which I have referred in the Scottish courts. To my mind it has completely altered the question. The codicil permitted the money in trust to be invested at the discretion of the trustees in England, to which, of course, the interpretation clause of the Scottish Act does not attach. That discretion and the consequence of it appears to me to dispose of the argument, and I am prepared, therefore, to move that the appeal be dismissed, though, as I have said, without determining the question which appears to have been decided by the Scottish Courts without reference to the matter to which I have referred.

Lord MACNAGHTEN.—My Lords: The question in this case is whether the unexpended balance of the estate of Mr. James Sprot, who

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died on the 5th May 1882, is or is not "property held under entail" and "entailed estate" within the meaning of the Finance Act 1894 as applied to Scotland. Mr. James Sprot, by a trust disposition dated the 17th May 1879, gave a large sum of money, afterwards reduced by a codicil to the sum of 100,000*l.*, in trust for the purpose of purchasing land in Scotland to be entailed in accordance with the directions of his will. The Lord Ordinary held that the unexpended balance of this sum (now about 60,000*l.*) was "entailed estate." The First Division, on appeal, held that it was not. Unfortunately the attention of neither court was called to the provisions of the codicil of the 17th May 1879, which authorises the trustees (if in their discretion they should think it desirable), in place of purchasing land in Scotland to purchase land in England to be entailed according to English law. The effect of this codicil was that the money was no longer dedicated to the sole purpose of purchasing lands in Scotland to be entailed according to the law of that country, and therefore it seems to me impossible to hold that the money, or so much of it as for the time being remains uninvested in land, comes within the meaning of the expression "entailed estate" in the provisions of the Finance Act applicable to Scotland. Under the directions of the codicil the trust to purchase lands in Scotland ceased to be imperative. On this ground I think that the decision of the First Division must be upheld. Inasmuch, however, as the question on which the courts in Scotland were divided was argued at length at the Bar, it seems to me that it would not be right to pass it over in silence. On this point I am inclined to agree with the Lord Ordinary, for the reasons which will be stated presently by Lord Robertson. It seems to me that when you have to construe a technical expression introduced into the legal vocabulary by a series of statutes forming one code, you naturally turn to the code for light and help. The key to the true meaning of the expression will, I think, be found in the latest development of legislation rather than in its earliest effort. I think that the appeal must be dismissed with costs.

LORD SHAND.—My Lords: I am of opinion that as the testator has provided that his money may be invested in England to be entailed according to the law in England, it cannot be said that this makes the property entailed estate within the meaning of the Finance Act 1894, as applicable in its provisions to Scotland. But I must add that, apart from the provision of the codicil of 1879, I should arrive at the same result, for I agree with the views expressed by the First Division of the court in reversing the judgment of the Lord Ordinary. The question is one of difficulty having regard to the provisions of the Entail Acts of 1875 (38 & 39 Vict. c. 61) and 1882 (45 & 46 Vict. c. 53), but I find nothing in these statutes which makes money directed to be invested in the purchase of land "entailed estate" in the ordinary acceptance and meaning of that term, or anything which can be held to enact that the words "entailed estate" shall, except for a defined and limited purpose, be held to include such money, which is otherwise personal estate. Such money is not entailed. It is money which, in the first place, must be converted into land, for money does not admit of being entailed.

Again, even after land has been purchased, it does not become entailed estate till the land purchased has been entailed by a deed of strict entail, which has been duly registered as such in the appropriate register of entails. In this case lands were not even acquired, much less entailed by the necessary deed duly registered. The direction to convert the money into land and to entail the land did not, and, as I think, could not, entail the money, which remained purely personal estate, though directed to be used in a particular way. What, then, is the effect of the provisions of the entail statutes? Not, I think, to convert personalty into realty, and to entail that realty by enactment, but merely that for the purposes of these statutes in disentailing and otherwise providing that the property of entailed proprietors may, with the requisite consent of expectant heirs, be made free from the restrictions of entails, money which has been directed to be converted and employed in the purchase of lands to be entailed shall be treated as if these directions had been carried out and lands had been bought and entailed. In short, that the entire estate, land entailed, and money, shall be treated in the same way and under the same conditions as one estate. I agree in the judgment of the First Division that the statutes enact only that in these statutes, and only for the purpose of these statutes in their provisions (which are really intended and calculated to break down entails and not to enforce or enlarge their provisions), money which is there called "entailed money" shall be regarded as "entailed estate." The words of the statute of 1882 are that—"In this Act" the following words shall have the meanings hereby assigned to them, and the enactment to that limited effect is made very properly to apply to the proceeds of entailed land which has been sold, and money ordered to be invested in land to be entailed, which money is made subject to the same provisions for obtaining freedom from the fetters of the entail as the entailed lands themselves. There is no such general provision, and one could scarcely conceive of such a provision, that in all circumstances—*e.g.*, in contracts and in all future statutes—the words "entailed estate" shall include in their meaning money directed to be converted into land to be thereafter entailed. The Entail Act of 1875 does not seem to be in any way different in the effect of its provisions from the Act of 1882. On the whole, then, I am of opinion that the words "entailed estate" in the Finance Act of 1894 must be taken in their ordinary and proper signification as referring to estate which has been entailed, and not to money intended and directed to buy lands to be entailed, and that the latter entail statutes give a wider meaning to these words only where used in these statutes, and only for the special purpose of making such money liable to be dealt with, as the lands really entailed may be dealt with, under the general provisions of the statute.

Lord BRAMPTON concurred in the judgment of the Lord Chancellor.

LORD ROBERTSON.—My Lords: The proposition maintained by the appellant, affirmed by the Lord Ordinary, and negatived by the First Division is that money held in trust and directed to be laid out in land to be strictly entailed is entailed estate in the sense of the Finance Act

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1894. Subject to one limitation, that proposition seems to me to be sound; but the limitation, in my opinion, excludes from the proposition the money now in dispute. In order to be entailed estate in the sense of the Finance Act, the money must be directed to be laid out in land to be strictly entailed according to the Scotch law of entail, and therefore in Scotland. This, as it seems to me, is not merely the necessary condition of the doctrine maintained by the appellant, but is its foundation, and without it the doctrine seems to me to have no support at all. Yet this condition renders the doctrine inapplicable to the appellant's case. His whole argument (which I think sound) is founded on Scotch statutes which form part of the land laws of Scotland, and have no application to land or to entails outside Scotland. But it turns out that in a due exercise of the discretion of the trustees who hold this money it need never go into Scotch land at all. In order to show the limitation of the doctrine in question it is necessary to examine its origin and ascertain its merits. No one has denied that the only power to execute an entail, using that word in the only operative sense of the term, must be found in the Act of 1685, or has asserted that under that statute you can entail money. I fully allow that this is a good beginning to the argument against the appellant; and the statute of 1685 is regarded by the First Division as the proper criterion of the meaning of the words in question. Again, it is quite true, as far as it goes, that all the entail statutes subsequent to 1685 have gone towards breaking down rather than towards constructing entails. But when from this fact the inference is drawn that those statutes are unlikely to contain the means of determining the scope of the term entailed estate my assent is less readily given. We are in search of the sense in which those words are used in a statute in 1894; the vocabulary of that day is to be looked to, and if, as is the case, the words entailed estate and their equivalents are now in fact more in use in relation to relaxing than to constructing entails, that does not invalidate the criterion to which appeal is made. The purpose for which men speak of a thing is immaterial if they have occasion to speak of it. Now the case of the appellant is that in 1894 the word "entailed" had come to be applied to moneys which stood in certain relations to entailed land, either as being its proceeds and standing under the same trusts or as destined and held in trust for the purchase of land to be entailed. I think that this is true in point of fact, and I must say that I think that the Act of 1882, let alone the Act of 1875, demonstrates this. The 27th section declares that the price of an entailed estate shall be entailed estate within the meaning of the entail Acts; the 28th assumes (which is even more than asserting) that an entailed estate may consist of money, and that this assumption is not rested on the 27th section is manifest, for the 28th is applying the provisions of the 27th to other entailed estates than those which fall under its terms. Not less significant is the use, without any explanation or apology, of the words "entailed money" in both the 4th and the 5th sub-sections of sect. 23. The Act of 1882 has this double significance in the present question—it was in 1894 the latest expression of the Legislature on Scotch entail (and there is none since 1894), and it gathers up and brings together

all the preceding statutes. But when we go seven years back, to the Act of 1875, we find that the term entailed estate had been already expressly extended to include all money held in trust for the purposes of being entailed. Now I am willing to assume, as is quite justly pointed out, that this is (and it could hardly be otherwise) for the purposes of that Act (observing only that the same criticism can hardly be applied to the Act of 1882 in view of its 2nd section). But the Act of 1875 covers a large area of the law of entail, and accordingly the use in their wider sense of the words "entailed estate" became from 1875 onwards correspondingly frequent, and made the additional sanction and stimulus given to that use in 1882 all the more decisive. If, as the learned counsel for the appellant invited us to do, we observe the progress of legal thought antecedent to 1875 as illustrated in judicial decisions, we see evidence that the working of the earlier of the modern entail Acts, particularly that of 1848, had fully prepared men dealing with those matters to call moneys so situated (as they were, in fact, being treated) "entailed estate." Accordingly the legislative appellation or description in the Acts of 1875 and 1882 of such moneys as "entailed estate" is not a case of the Legislature calling one thing by the name of another, but is a recognition of the fact that for practical purposes those moneys had come to possess the attributes of entailed lands, so far as such now remained. (This topic might be more fully developed, but the matter does not admit of dispute.) What I deduce from these considerations is that if the existing state of the law, especially as exhibited in its most unmistakable form, legislation, be the proper criterion of the meaning of words descriptive of legal rights, "entailed estate" did in 1894 include moneys directed to be applied in purchase of lands to be entailed. The principle that in statutes words are to be taken in their legal sense has, as Lord Stormonth Darling points out, a special cogency when the words in question represent only legal conceptions. The popular use of such words does not represent the primary meaning of the words, but some half understanding of them. I say this because I observe that in the judgment delivered by Lord McLaren some reliance is placed on the "ordinary use of language." Now, it seems to me that this would prove too much in the present case. If the phrase in question represents anything definite in popular use, I suspect the meaning is determined quite as much by a misuse of the word "estate" as equivalent to landed property as by any intelligent use of the word "entailed," and that popular use would reject the words if applied to anything else than a landed property. Yet it is perfectly certain that other estate than landed property may be the subject of entail, as, for instance, a right to salmon fishing. In what I have hitherto said it has been assumed that the words to be construed in the Finance Act are "entailed estate" and that the Act itself gives no further aid in the construction of that term. This however, is to understate the appellant's case. The words directly descriptive of "settled property" (which is the appellation under which the respondents seek to claim exemption) are those in the 14th sub-section of sect. 23—"The expression 'settled property' shall not include property held under entail"; and then in sub-sect. 15

occurs the phrase "entailed estate," manifestly used as equivalent to what is in sub-sect. 14, the indefinite article "an" entailed estate being inserted because the form of illustration postulates an individual estate in relation to an individual proprietor. The matter, however, may be brought to a much sharper point. In the face of the express and direct enactments in the Acts of 1875 and 1882 which I have cited. I am at a loss to see how it can be affirmed of money directed to be applied in purchase of land to be entailed that it is not entailed estate, at least in some sense and to some effect. And if this be so, then *quomodo constat* that it is not in the sense of this Finance Act? I have not myself realised in what sense it is not entailed estate except that some of the many provisions about entails do not apply to it. But this, again, proves a good deal too much. Some of the empowering entail Acts assert that it would be for the public benefit if villages were built on entailed estates. Now exactly the same reasoning as the respondent advanced would deduce from this that salmon fishings do not fall within the scope of the entail Acts, because you cannot build villages on salmon fishings or the right to salmon fishings. But when we are told that, at all events, a Finance Act cannot be supposed to view as entailed estate moneys situated as those which I have been considering, I completely fail to see the reason. Even if a more rationalistic method be applied than is permissible in taxing Acts, I should have thought that, in a definition, sect. 23 (14), the object of which is to distinguish something from settled property, the subject-matter of the rights, as land or money, was very much less relevant than the quality and correlation of the rights in that subject-matter; and, so far as these are concerned, it is just because they are practically identical in the one case, and in the other that land and money are now massed under the common denomination entailed estate. From the somewhat detailed examination now made of the question argued in the Court of Session it is at least apparent that the argument of the appellant begins and ends in the Scotch entail statutes. The third section of the Act of 1875, which puts at its sharpest the appellant's contention, requires that money in order to be entailed estate must be "invested in trust for the purpose of purchasing land to be entailed." The whole theory of the identification of such money with land is that it is directed and destined to be put into land, and its inevitable fate is merely anticipated in order to prevent circuity of procedure. But if, instead of it being so inevitably destined, the trustees may or may not so apply it, the whole ratio of those enactments is gone. Now it seems to me that the combined effect of Mr. Sprot's will and his first codicil was simply to make it discretionary and optional to the trustees whether they bought Scotch land or bought English land, and the mere circumstance that the will "directed" Scotch land to be bought has no effect at all in saving that direction from being reduced to an option by the codicil. The appellants vainly endeavoured to save the situation by relying on the direction to "entail" whether the land was in Scotland or in England. But an English entail is one thing and a Scotch entail is another. And the whole argument of the appellant on the main question

rests, not on the word entail, but on statutes which have no application to England. On this sole ground I am of opinion that the appeal must fail.

Lord LINDLEY concurred in the judgment of the Lord Chancellor.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, *F. C. Gore*, Solicitor of Inland Revenue, for *Philip J. Hamilton Grierson*, Solicitor of Inland Revenue, Edinburgh. Solicitors for the respondents, *Martin and Leslie*, for *Blair and Cadell*, Edinburgh.

April 25, 28, 29, and May 15.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY.)

PARISH COUNCIL OF RUTHERGLEN v. PARISH COUNCIL OF GLASGOW. (a)

ON APPEAL FROM THE COURT OF SESSION IN SCOTLAND.

Law of Scotland — Poor law — Deserted wife — Settlement.

By the law of Scotland a wife deserted by her husband is not in the position of a widow, and cannot acquire a settlement for herself, but is remitted to her husband's settlement.

Gray v. Fowlie (9 D. 811) approved; *Hay v. Skene* (12 D. 1019) distinguished.

Judgment of the court below reversed.

THIS was an appeal from a decision of the Court of Session in Scotland, reported 3 F. 705; 38 Sc. L. Rep. 528.

The question for determination was whether Mrs. Faulds, wife of a miner, had acquired by residence a settlement for poor law purposes in the parish of Rutherglen.

The respondents maintained that she had, and the appellants that she had not, and that her settlement was in the parish of Glasgow.

Mrs. Faulds was deserted by her husband in 1893. The birth settlement of both husband and wife was the Barony parish of Glasgow, now part of the respondents' parish.

In 1893 the wife applied to the Barony parish for relief for herself and her five children, who were under age, and her application was granted. After about four months Mrs. Faulds left the Barony poorhouse, taking with her the eldest child.

After the release of Faulds from prison for desertion, he contributed nothing to the support of his wife and the child she took with her; but he sent small sums to the respondents for the maintenance of the other four children up to 1896, when he ceased to contribute.

It was admitted that Mrs. Faulds resided continuously in the appellants' parish without application for parochial relief for three years and ten months prior to March 1899, when she became chargeable to the parish.

The appellants contended that Mrs. Faulds not being a deserted wife, at least until the date of her husband's disappearance, was not capable of acquiring a settlement apart from him, that even if it were held that she was deserted before

(a) Reported by C. E. M'KEN, Esq., Barrister-at-Law.

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that she was not restored to the legal capacity of an unmarried woman, but that her right to relief was derivatively through her husband against the parish in which he had his settlement, and that if it were held that she was deserted from and after the date of the conviction of her husband she herself had become a pauper by the respondents' maintenance of her four children.

The appellants did not dispute that the desertion of a husband was equivalent to his death, that upon that event parochial relief to his dependants was due derivatively through him from the parish that would have been liable had he died at that date, but contended that there was no principle of the common law which would justify the position that a married woman deserted by her husband was by reason of her desertion restored to the legal capacity of an unmarried woman.

For the respondents it was maintained that Mrs. Faulds, by reason of desertion, was in the position of a widow, and consequently during desertion might acquire for herself a residential settlement.

The case was argued before seven judges, and the Lord President (Balfour), the Lord Justice-Clerk (Macdonald), Lords Trayner, Adam, and Kinnear held that Mrs. Faulds had acquired a settlement in the appellants' parish. Lords Young and Moncreiff dissented.

The *Lord Advocate* (Graham Murray, K.C.), *Orr Deas* (both of the Scotch Bar), and *W. C. Henderson* appeared for the appellants, and argued that a deserted wife was not in the position of a widow, and could not acquire a new settlement, and was therefore chargeable to her husband's parish. Further, she had received relief constructively from the fact that her children were supported by that parish. The case is governed by the decision in *Gray v. Foulis* (9 D. 811), which was decided in 1847 and has never been overruled. The cases which seem to point the other way are only dicta. They also referred to

Gibson v. Murray, 16 D. 926;

Greig v. Adamson, 3 Macph. 575.

Shaw, K.C., *Clyde, K.C.*, and *R. B. Pearson* (all of the Scotch Bar), for the respondents, contended that the pauper was capable of acquiring, and had acquired, a settlement in the appellants' parish by an industrial residence for three years. The rule that desertion puts the deserted wife in the position of a widow, so as to enable her to obtain a settlement of her own, has been followed in practice in Glasgow for many years, and it would lead to great inconvenience to disturb it. No such thing as constructive pauperism by children becoming chargeable is known to Scotch law. They cited

Mason v. Greig, 3 Macph. 707;

Hay v. Skene, 12 D. 1019;

Greig v. Simpson, 3 R. 642;

Carmichael v. Adamson, 1 Macph. 452;

Johnston v. Wallace, 11 Macph. 699;

Beattie v. Brown 11 R. 250;

Wallace v. Turnbull, 10 Macph. 675.

Cockburn, C.J. explains what desertion is in his judgment in *Reg. v. Maidstone Union* (41 L. T. Rep. 586; 5 Q. B. Div. 31).

The *Lord Advocate* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 15.—Their Lordships gave judgment as follows:—

Lord ROBERTSON.—My Lords: For the clearer discussion of the important general question raised by this appeal, I intend to assume, without reservation, that Alexander Faulds had deserted his wife from and after the 16th Oct. 1893. By the time she became chargeable she had resided for the statutory period (without begging or receiving relief) in the appellants' parish; and if it be legally possible for the wife of a living Scotsman who himself has a parochial settlement in Scotland to acquire an industrial settlement for herself in a different parish from his, and so to relieve her husband's parish, then the appellants are liable. But the starting point of the case is that the respondents are the parish of the husband's settlement; and what they have got to make out is that they are freed of their liability for his wife by the fact that he deserted her; for, but for the fact of his desertion, it is not, in the meantime at least, maintained that her separate residence in Rutherglen would of itself avail. Why this distinction should be drawn, and what is the special virtue of desertion in releasing the husband's parish from his liability to maintain his wife are, however, questions which it is difficult to evade, and they will recur in what I have to say. The question before your Lordships' House is simplified by the clearness with which it is stated in the opinions of the learned judges. What their Lordships have held is, to quote the words of Lord Kinnear, that "it is settled now in law that the desertion by a husband of his wife is the death of the husband, and that the desertion by the husband puts the wife in the position of earning a residential settlement for herself, because it enables her or compels her to earn her own living, and to earn her own living as if she were an unmarried woman or a widow." Now, there is certainly some show of authority for this proposition, although of itself it sounds rather startling, and although the boldness of its expression invites criticism. But, while the majority of the seven judges, whose decision is under review, may have been right in thinking themselves bound by the more recent instead of the earlier statements of the law on the subject, I am almost sorry that so strong a court as was constituted to consider this question did not critically examine the grounds upon which the formula rests, for they might ultimately have deemed themselves free to act on their independent judgment. The very careful argument to which your Lordships have listened has compelled such an examination by this House; and, as far as I am concerned, I am unable to support the judgment appealed against. First of all, the proposition that the desertion of a husband is equivalent to his death is, no doubt, suggested by the juridical position of a widow under the Scottish poor law. A widow, it had been held in *Heritors of Crieff v. Heritors of Foulis-Wester* (4 D. 567) in 1842, can acquire a residential settlement for herself, and for children living with her, in a parish where she has resided industriously as the head of the family. This seems a very sound proposition, and for present purposes I have nothing to say against it. The woman in that case has no husband; she is under no disability, and there is nothing and nobody to prevent her from acquiring a settle-

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ment for herself. But when it is proposed to assimilate to a woman having no husband a woman who has one, a question of the gravest principle arises. Now, this question did arise in Scotland, five years after the *Crieff* case in *Gray v. Fowlie* (9 D. 811), in circumstances which, for practical purposes, are exactly the same as the present (the husband being a living but deserting Scotsman with a Scottish settlement), and it was decided by the whole court (by nine to four) that a deserted wife was not in the same position as a widow, but presented a case distinguished by the most vital difference. The case was deliberately considered. All and more than all the arguments which have been submitted to your Lordships' House on the present occasion on behalf of the respondents are to be found in the judgments of the minority of the court. It was then said that the law recognised in a deserted wife capacities to act independently, in contracts and in suits, which made it reasonable that she should be held to acquire by her independent and industrious residence an independent settlement, and this view was supported by full illustrations of the common law. The reply of the Lord Justice-Clerk Hope shows that this view of the question, at its best, was fully realised and fully met. His Lordship pointed out, in a passage of great merit, that the Scottish law in the chapter referred to did no more than come to the aid of a deserted wife by relaxing her disabilities so far as is necessary for the business of life in her isolated position, that the law in making such exception did not proceed on any view that the marriage was dissolved, or the woman's status altered, or that third parties can plead liberation of obligations towards her because of the husband's illegal conduct in deserting her. The right to separately contract and separately sue, where this conduces to or facilitated her gaining her living while left alone, did not, in the view of the Lord Justice-Clerk, and of the majority in *Gray v. Fowlie*, involve any change of liability on the part of third parties to support her as the wife of the deserter. Now, if this case of *Gray v. Fowlie* stood alone, it is admittedly directly in point; it is a decision of the whole court, and it meets, directly, the argument on the common law rights of a deserted wife, which at your Lordships' bar has been indicated rather than developed. No one can pretend that *Gray v. Fowlie* is not in diametrical opposition to the doctrine that desertion is the same as death; and what is said is that *Gray v. Fowlie* is no longer law. Now I think it is true that, in later decisions, the Divisions of the Court of Session have disregarded this decision of the whole court, and have pronounced judgments inconsistent with it, but it has never been formally overruled. What is more, from *Gray v. Fowlie* down to the present time, there has been no revival of the theory that the common law capacities of a deserted wife led to, or opened the door for, her acquisition of a residential settlement in the parish where she had exercised those capacities. As will immediately appear, the cases which set up the doctrine that desertion is death were not cases of a residential settlement at all but of a maiden settlement. The theory that desertion is death may be good or bad, but it does not pretend to rest on the common law about deserted wives being able to contract and to sue. How the

newer and conflicting doctrine came into vogue was thus: A series of cases occurred in which, instead of the deserting husband having, as in *Gray v. Fowlie*, a Scottish settlement, he had (or was supposed to have) no settlement available for attack by the relieving parish. This was the case in *Hay v. Skene* (12 D. 1019), in *Gibson v. Murray* (16 D. 926), and in *Carmichael v. Adamson* (1 Macph. 452). What was said in those cases was that you must find a settlement somewhere, and that as the husband had none you must turn to the wife's own settlement (which in all these three cases was her maiden settlement, and not a residential settlement.) Now, in passing it may be observed that in more recent times there would probably not be held to be any compelling necessity to discover for the relieving parish some other parish liable to it; and also that where the husband was an Englishman it did not follow that the relieving parish had no remedy under the 77th section of the Act of 1845 merely because that remedy was troublesome. But I will assume, as the court did, that the husband had no settlement; and this is, past all doubt, the ground of decision in the first and most referred to of these three cases—*Hay v. Skene*. The theory of *Hay v. Skene* was that a wife does not lose her maiden settlement unless she gets one from her husband in exchange. This is most distinctly laid down by every one of the three judges who were parties to the decision, and, indeed, is repeated to elaboration in the leading opinion. This, moreover, is stated as the justification for distinguishing the case from *Gray v. Fowlie*—"here the wife has direct interest in the question raised;" that is to say, in *Gray v. Fowlie* she got, and here she did not get, a new settlement. Now it is observable that, in the later development of the doctrine, this case of *Hay v. Skene* was appealed to as settling that desertion was the same as death. In the reported judgments there is no direct expression of such a theory. The view taken was that the woman had her own settlement all along, until she or her husband got another, whereas in *Gray v. Fowlie* she exchanged her own for her husband's. From the decision in *Hay v. Skene* Lord Moncreiff dissented, on the ground that the proposed judgment was in conflict with the decision of the whole court in *Gray v. Fowlie*, and Lord Moncreiff (who had been in the minority in the decision of *Gray v. Fowlie*) says: "The principle is that a wife cannot be separated from her husband except by death, divorce, or other legal process, and must be considered as still part of himself, for whom no claim can be made except through him and against parties liable on his account. But the plea of the pursuer assumes a *persona standi* in the wife apart from her husband, to the effect of creating rights in one third party against another without any provision to that effect in any statute." *Gibson v. Murray*, the second of the cases I have named, is distinguished from the present by two vital differences; first, it is the case of a husband having or assumed to have no settlement; and, second, it is not a case of desertion at all but of death, the dispute being whether, the husband being dead, the children took their own birth settlement or their mother's maiden settlement. Its bearing is therefore too remote to justify further comment. *Carmichael v. Adamson* has much

more importance, for several reasons. Here we have, launched for the first time, this maxim that desertion is equivalent to death—received as it was by Lord Justice-Clerk Inglis with the remark that he could “find for it no reasonable or intelligible ground.” The question in the case was whether an Englishman, assumed to have no settlement, having deserted his wife, the settlement of his child was that of its own birth or its mother’s birth, and the whole court held that it was the latter. The minority was headed by Lord Justice-Clerk Inglis, and included Lord President Colonsay. I have grouped these three cases together because they are all cases where the husband had no Scottish settlement. We next come to a case—*Mason v. Greig* (3 Macph. 707)—where it was held to be doubtful in fact whether he had or had not a Scottish settlement, and the decision is to that extent unsatisfactory. It was a First Division case in the time of Lord Colonsay. The respondents can fairly claim at least two of the judges as acquiescing in the desertion-equal-death theory, and it is ascribed by Lord Ardmillan to *Hay v. Skene*. *Johnston v. Wallace* (11 Macph. 699) is another case of a man without a Scottish settlement deserting his wife; he was an Irishman by birth. It was decided on the authority of *Carmichael v. Adamson*, the Lord President Inglis remarking that he could not say that that decision obtained any support from him, “but it is now a settled rule.” Now, down to this point it cannot be said that there was any decision or even dictum to the effect that the same rule would be applied where the deserting husband had a Scottish settlement. But, curiously enough, this was said afterwards, *obiter* in *Greig v. Simpson* (3 R. 642) by Lord President Inglis, who had most strenuously resisted the rule to which he now yielded, but it was said in a case in which the dispute was between the birth settlement of the husband (of course Scottish) and his alleged residential settlement (also, of course, Scottish)—said, too, on the authority of a decision (*Beattie v. Greig*, 2 R. 923) about a deserting Englishman. *Greig v. Simpson* accordingly seems a rather significant case. The “rule” that desertion is equal to death had now hardened into inflexibility and had lost all relation to its original principle. The question to be decided in that case was whether by efflux of time (five years), during which the man was *de facto* absent from the parish where he had acquired an industrial settlement, he had not lost it; and the decision was that, having deserted his wife, he must be held to have been dead and therefore not absent, and not to have lost the settlement. The great lawyer who thus followed and extended decisions from which he had vigorously dissented cannot but have seen in this application of the rule a new confirmation of his original opinion that it had no “reasonable or intelligible ground.” This closes the catena of cases on which the respondents rely. Of them all there is but one (*Mason v. Greig*) where, on any possible view of the facts, the deserting husband had a Scottish settlement. The most definite statement of judicial opinion in favour of the respondents on the case of a deserting husband having a Scottish settlement occurs, as I have shown, in a case where neither of the disputants represented either the wife’s maiden settlement or her residential settlement, and where, therefore, the vital element

in the present controversy was wanting. In these circumstances, on a review of the authorities, *Gray v. Foulie* stands out as the only decision directly determining the present question, and it is a decision of the whole court. Its authority might be adequate for the decision of the present appeal. But some of the more recent judgments on which the respondents rely are irreconcilable with *Gray v. Foulie*, and the “rule” that “desertion is death” is in direct conflict with the principle of *Gray v. Foulie*. It seems to me to be, therefore, impossible to avoid dealing with the question on a somewhat broader ground than at first sight might seem adequate for the disposal of the case. It is not necessary to go back to the origins of the Poor-law, but it is well to remember that, while by the old Scots Acts birth and residence gave statutory right to relief in the parishes of birth or residence, the two other modes of acquiring such rights—viz., parentage and marriage—are, in the words of the Lord Justice-Clerk Inglis in *M’Rorie v. Cowan* (24 D. 723), “engrafted on statute law by the necessary application to the statutory system of certain essential and inflexible rules of the common law in the relations of husband and wife and of parent and child.” We are taken, therefore at once to the common law of husband and wife, and the general rule about such matters as are on hand is so clear that the only question is whether some exception arises where a wife is deserted. In order to judge of this question, however, it is needful to notice the ground of the general rule. For this purpose I am going to refer to a case, not cited at the Bar, but highly relevant to the present question, in which this subject was considered by the whole court—the case of *M’Rorie v. Cowan*. The question before the court was whether the Scottish birth settlement of the wife of an Irishman, resident in Scotland but having no settlement in Scotland, could be made liable for moneys expended on her maintenance in a lunatic asylum by the parish from which she has been sent to the asylum under the Lunacy (Scotland) Act. “To that question,” said Lord Justice-Clerk Inglis, “I am prepared to give an unhesitating answer in the negative, on the broad and simple ground that a married woman is in law incapable of having any settlement in her own right, or independently of her husband. If her husband has a settlement, that also is her settlement. If her husband has no settlement, just as little has she. She is, in my opinion, as completely incapable of possessing a settlement in her own right during the subsistence of the marriage as she is of having a separate domicile from her husband or of enjoying any other personal status or franchise in her own right.” I turn to the joint opinion, in the same case, of the Lord President (Colonsay) and Lords Ivory, Curriehill, Ardmillan, and Kinloch, and I find this as the ground of their judgment: “The demand is resisted (*inter alia*) on the ground that by her marriage with Donaldson her birth settlement was suspended or put in abeyance, and that it cannot revive so long as the marriage subsists; that, being a married woman, she cannot have any settlement of her own apart from her husband, or any settlement that is not his settlement; that her fate in that respect is linked to his; and that the circumstance which here occurs of her husband not having a settlement in any parish in Scotland does not exclude the

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application of the general rule. We are of opinion that, in reference to the present case, this defence is well founded, that it is sufficient for the decision of the settlement, and that the parish of Monkton (the wife's maiden settlement) ought to be assolized." I cite these considered utterances of eminent judges as enunciations of the general law and its grounds; and the grounds are of high and peremptory principle. But occurring, as this case did after *Hay v. Skene*, it is evident that *M'Rorie v. Cowan* was sent by Lord Justice-Clerk Inglis to the whole court because of *Hay v. Skene*, and in *M'Rorie v. Cowan* the Lord Justice-Clerk Inglis declared himself "unable to reconcile the judgment now to be pronounced with the decision in the case of *Hay v. Skene* or to save the authority of that case in pronouncing this judgment." His Lordship examined the grounds of decision in *Hay v. Skene*, and pronounced them unsound: "The loss of the maiden settlement does not depend on the acquisition of another settlement, but on the complete merging of the person of the wife in that of the husband by force of the marriage." As I am referring to *M'Rorie's* case I may explain that, as it is not a case of desertion, its bearing on the series of cases now before the House is through the principles which it laid down. But historically it is quite clear that it went to the whole court, because of that relation to *Hay v. Skene*; and, again, that *Carmichael v. Adamson*, which occurred the following year, and as already seen, was a case of desertion, went to the whole court because the Lord Justice-Clerk Inglis again saw that, after the decision in *M'Rorie v. Cowan*, the rule of *Hay v. Skene* could only be reapplied, if reapplied at all, by the whole court. After *Carmichael v. Adamson* the Lord Justice-Clerk Inglis seems to have seen that nothing more could be done in the Court of Session, and he gave (in *Greig v. Simpson*) free play, or perhaps more than free play, to the rule. The general principle, then, being that the wife is disabled by marriage from having a settlement of her own, how does the fact of desertion effect a change? I have already referred to the judgment of Lord Justice-Clerk Hope as containing an admirable discussion of this question, and I repeat that the common law in the case of separation goes no further towards enlarging the capacities of the wife than is required by the necessities of her efforts at self-maintenance. But all these legal facilities lead no distance towards changing her settlement, and the only reason suggested for that result—viz., the justice of making the community which—conjecturally—has profited by her residence bear the burden of maintaining her is founded on totally different considerations, not relating to the interests of the wife at all but to the equities of parishes. But, further, what is now asked is that we should hold that the fact of desertion operates as a release of the liability of the wrongdoer's parish and deprives the wife of her claim against that parish. I cannot say that I think this a very rational proposal, but it is at least plain that it bears no relation to the aid given by the law to separated wives, and can claim no support from that chapter of law. I may add that the inapplicability to the present question of the common law appealed to is further illustrated by the fact that the law so appealed to is at once too wide and too narrow for the present case. In some of

the aids given to separated wives the law takes no account of the reason of separation, while in others the husband must be abroad in order to give rise to them. It seems to me that the true principle to be applied in all these cases is that laid down by the Lord Justice-Clerk Inglis in the case of *M'Rorie v. Cowan*, that it is of universal application, and that adherence to this principle is the only solution of the numberless complications which otherwise arise. The same rule which was laid down by your Lordships' House in *Adamson v. Barbour* (1 Macq. 381) in the case of children applies to the wife. The wife is a part of the husband's family. The fact of the husband's desertion cannot avail to alter his own parish's liability for wife any more than for children. But the existence of children in the present case affords another test of the question. One of the children, Catharine, was living with her mother in the appellant's parish. In which parish is Catharine's settlement—in her father's or her mother's? This challenge was not met by the respondents, and their difficulty in answering it is increased by the fact that there are other four children who have not been living with their mother. Where is their settlement? The only way in which these questions can be answered rationally and in accordance with *Adamson v. Barbour* is by keeping the whole family to the settlement of its head. I regret that it should be necessary to pronounce a judgment which may disturb a certain amount of practice, and I entirely share the reluctance of the learned judges to unsettle Poor-law decisions. But what has already occurred has shown how an erroneous maxim once asserted is drawn into analogies and deductions alien even to its original conception. The only safeguard against such consequences is adherence to clear and dominant principles, and I have the satisfaction of knowing that the motion which I support does no more than re-establish the doctrine of the earliest and most authoritative Scottish case upon the subject.

THE LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, and LINDLEY concurred.

Interlocutors appealed from reversed. Respondents to pay to the appellants their costs in this House and below.

Solicitors for the appellants, *Burchells and Co.*, for *H. B. and F. J. Dewar*, Edinburgh, and *Montgomerie and Flemings*, Glasgow.

Solicitors for the respondents, *Grahames, Currey, and Spens*, for *Charles George*, Edinburgh, and *R. P. Lamond and Turner*, Glasgow.

CHAN. DIV.]

MAYOR, &C., OF DEVONPORT v. TOZER.

[CHAN. DIV.]

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 14, 15, 17, and March 28.

(Before JOYCE, J.)

MAYOR, &C., OF DEVONPORT v. TOZER. (a)

Local government—Bye-laws—"Laying out new street"—Penalties—Injunction—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 157.

The bye-laws of a local authority framed under sect. 157 of the Public Health Act 1875 made certain provisions with respect to the laying out and construction of new streets, as to level, width, construction, &c. Bye-law 97 provided that persons who should offend against the foregoing bye-laws should be liable to penalties; and bye-law 98 that, if any work, to which any of the bye-laws relating to new streets might apply, should be begun or done in contravention of any such bye-law, then, if such person should fail to show sufficient cause why such work should not be removed, altered, or pulled down, the sanitary authority should be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work.

The defendants owned a piece of land within the jurisdiction of the local authority and abutting on two public highways, H.-lane and T.-road, the latter being a main road. On this land they erected certain houses without removing the fence on either side, but making the necessary openings here and there so as to provide means of entrance to and exit from the houses; they had not attempted to alter or interfere with H.-lane or T.-road.

On the plaintiffs seeking an injunction to restrain the defendants from erecting or continuing the erection of any building upon, and from laying out any new street intended for use as a carriage road upon or in connection with, the defendants' land in contravention of the above bye-laws; and for an order on the defendants to remove, alter, or pull down all the works begun or done by the defendants contrary to the bye-laws, or, alternatively, a declaration that the plaintiffs were entitled to remove, alter, or pull down the same:

Held, first, that the defendants were not laying out or constructing a new street within the meaning of the above bye-laws; and, secondly, that the plaintiffs could not enforce the bye-laws by an action for an injunction.

THE facts are fully set out in his Lordship's judgment.

Macmorran, K.C., Hughes, K.C., and R. J. Parker for the plaintiffs.—In *Robinson v. Local Board of Barton Eccles* (46 L. T. Rep. 193; 47 L. T. Rep. 286; 50 L. T. Rep. 57; 21 Ch. Div. 621; 8 A. C. 798) it was held that the words "new street" in sect. 157 of the Public Health Act 1875 are not confined to a street constructed for the first time, but also apply to an old highway, which, by the building of houses on each side of it, has recently become a street in the popular

sense of the term. Now, the defendants plainly intend to build along the highways of Tavistock-road and Ham-lane, and are accordingly laying out "new streets." The court should then restrain the defendants from laying out such new streets otherwise than in accordance with the bye-laws. They referred to

Williams v. Powning, 48 L. T. Rep. 672;

Gossett v. Maldon Sanitary Authority, 70 L. T.

Rep. 414; (1894) 1 Q. B. 327;

St. George's Local Board v. Ballard, 72 L. T. Rep. 345; (1895) 1 Q. B. 703.

This is not an unusual mode of enforcing a bye-law, and is not precluded by the fact that disobedience to the bye-laws can be punished by penalties before the justices. This is, moreover, a very proper and convenient way of trying a case of this kind. They referred to

Hendon Local Board v. Pounce, 61 L. T. Rep. 465; 42 Ch. Div. 603;

Cooper v. Whittingham, 43 L. T. Rep. 16; 15 Ch. Div. 501;

Hayward v. East London Waterworks Company, 52 L. T. Rep. 175; 28 Ch. Div. 138;

Stevens v. O'connor; *Stevens v. Clark*, 84 L. T. Rep. 796; (1901) 1 Ch. 894;

Bromley Local Board v. Lloyd, 66 L. T. Rep. 462; Public Health Act 1875, s. 183.

Danckwerts, K.C. and A. Glen for the defendants.—It is true that an old highway may be converted into a "newstreet"; but here the defendants are not laying out a street at all. It is plain from the case of *Robinson v. Local Board of Barton Eccles* (*ubi sup.*) that "street" refers to that along which the public have a right to pass; it applies to the footways and carriage-way only. There can be no laying out of a new street by the defendants, where they confine their building operations to their own land and keep within the lines of the highways. And this is what the defendants are doing; they are not disturbing the highways in any respect. They referred to

Baker v. Mayor, &c., of Portsmouth, 37 L. T. Rep. 381; 3 Ex. Div. 157;

Harrison v. Duke of Rutland, 68 L. T. Rep. 35; (1893) 1 Q. B. 142;

Taylor v. Metropolitan Board of Works, L. Rep. 2 Q. B. 213;

Gossett v. Maldon Sanitary Authority (*ubi sup.*);

Williams v. Powning (*ubi sup.*);

St. George's Local Board v. Ballard (*ubi sup.*);

Davis v. Board of Works for Greenwich District, 73 L. T. Rep. 674; (1895) 2 Q. B. 219.

Moreover, this court has no jurisdiction to grant an injunction, the proper remedy for an infringement of the bye-laws being by way of penalty before the justices. And this is the more so since the fact that a penalty can be recovered shows the offence to be one of a criminal nature. Certainly the court cannot grant an injunction unless the Attorney-General is made a party. They referred to

Wallasey Local Board v. Gracey, 57 L. T. Rep. 51; 36 Ch. Div. 593;

Tottenham District Council v. Williamson, 75 L. T. Rep. 238; (1896) 2 Q. B. 333;

Attorney-General v. Logan, 65 L. T. Rep. 162; (1891) 2 Q. B. 100;

Cooper v. Whittingham, 43 L. T. Rep. 16; 15 Ch. Div. 501;

North London Railway Company v. Great Northern Railway Company, 48 L. T. Rep. 695; 11 Q. B. Div. 30;

(a) Reported by SYDNEY DAVEY, Esq., Harriester-at-Law.

Kitto v. Moore, 71 L. T. Rep. 676; (1895) 1 Q. B. 253;
Hayward v. East London Waterworks Company,
 52 L. T. Rep. 175; 28 Ch. Div. 138;
Stevens v. Chown; *Stevens v. Clark* (*ubi sup.*);
Emperor of Austria v. Day and Kossuth, 4 L. T.
 Rep. 494; 3 De G. F. & J. 217;
Institute of Patent Agents v. Lockwood, 71 L. T.
 Rep. 205; (1894) A. C. 347;
Barracough v. Brown, 76 L. T. Rep. 797; (1897)
 A. C. 615;
Ward v. Duncombe, 69 L. T. Rep. 121; (1893)
 A. C. 369.

In the cases of *Bromley Local Board v. Lloyd* (*ubi sup.*) and *Hendon Local Board v. Pounce* (*ubi sup.*) the question as to the jurisdiction of the court was not raised; and in each case it was merely a matter of an injunction till trial. They also cited

Quinton v. Corporation of Bristol, 30 L. T. Rep. 112; L. Rep. 17 Eq. 524;
Cook v. Ipswich Local Board, 24 L. T. Rep. 579;
 L. Rep. 6 Q. B. 451.

Cur. adv. vult.

JOYCE, J. read the following judgment:—This is an action by the corporation of Devonport, as the urban authority for the district of the borough, against the defendants, the owners of a piece of land described in the statement of claim as a building estate and known as "Great Three Corners." This piece of land contains a little more than three acres, and is in the shape of a triangle, one side abutting upon a public highway for all kinds of traffic, known as Ham-lane, and another side upon a similar public highway known as Tavistock-road, which last is or was prior and down to Nov. 1900 a main road leading from Devonport to Tavistock, and as such vested in the county council: (Local Government Act 1888, s. 11 (6)). The roadway of Ham-lane is within the borough of Devonport, the fence of the defendants' land being, down to Nov. 1900, the boundary of the borough there. But the defendants' land, together with the portion of Tavistock-road—meaning thereby the roadway thereof—upon which the defendants' land abutted, was within the rural district of Plympton St. Mary, the land on the opposite side up to the fence of the road being, as it still is, in the borough of Plymouth. Within the rural district of Plympton St. Mary there were and are certain bye-laws, with respect to new streets, framed under sect. 157 of the Public Health Act 1875. Such bye-laws provide (*inter alia*):

1. Width, applied to a new street, means the whole extent of space intended to be used, or laid out so as to admit of being used, as a public way.

With respect to the level of new streets: 3. Every person who shall lay out a new street shall lay out such street at such level as will afford the easiest practicable gradients throughout the entire length of such street for the purpose of securing easy and convenient means of communication with any other street or intended street with which such new street may be connected or may be intended to be connected, and as will allow of compliance with the provisions of any statute or bye-law in force within the district for the regulation of new streets and buildings.

With respect to the width and construction of new streets: 4. Every person who shall lay out a new street which shall be intended for use as a carriage-road shall so lay out such street that the width thereof shall be 36ft. at the least.

5. Every person who shall construct a new street which shall exceed 100ft. in length shall construct such street for use as a carriage-road, and shall, as regards such street, comply with the requirements of every bye-law relating to a new street intended for use as a carriage-road.

7. Every person who shall construct a new street for use as a carriage-road shall comply with the following requirements.

Then follow specifications as to the mode of construction, levels, and so on. Then bye-law 90 provides that every person who shall intend to lay out a street shall give to the sanitary authority certain notices and deliver plans and sections of such intended street, and bye-law 97 provides that—

Every person who shall offend against any of the foregoing bye-laws shall be liable for every such offence to a penalty of 5l., and in the case of a continuing offence to a further penalty of 40s. for each day after written notice of the offence from the sanitary authority. Provided nevertheless that the justices or court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if they think fit, adjudge the payment as a penalty of any sum less than the full amount of the penalty imposed by this bye-law.

And 98—

If any work to which any of the bye-laws relating to new streets and buildings may apply be begun or done in contravention of any such bye-law the person by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk of the sanitary authority, and shall be duly served upon or delivered to such person, shall be required on or before such day as shall be specified in such notice by a statement in writing under his hand or under the hand of an agent duly authorised in that behalf and addressed to and duly served upon the sanitary authority to show sufficient cause why such work shall not be removed, altered, or pulled down; or shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorised in that behalf before the sanitary authority and show sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to show sufficient cause why such work shall not be removed, altered, or pulled down, the sanitary authority shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work; the statutory provision there referred to being, as I understand, sect. 158 of the Public Health Act 1875. By part 5 of the Devonport Corporation Act 1900 it was in effect enacted that as from the 9th Nov. 1900—the date of the commencement of that part of the Act—the boundaries of the borough and parish of Devonport should be extended so as to comprise the piece of land in question—that is to say, "Great Three Corners," belonging to the defendants, and the portion of Tavistock-road adjoining thereto, the land on the opposite side of that road remaining, as it previously was, in the borough of Plymouth. Sect. 43 of the Act incorporated (*inter alia*) art. 12 of the Devonport Extension Order 1898, which order was confirmed by the Local Government Board's Provisional Order Confirmation (No. 10) Act 1898. The combined effect of the said sect. 43 and of the said art. 12 was to provide that all bye-laws and regulations and any list of tolls and table of fees made by the corporation which at the commencement of the Devonport Corporation Act 1900 should be in force in the existing

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borough should thenceforth apply to the borough as extended by the said last-mentioned Act until or except in so far as any such bye-laws or regulations or list of tolls or tables of fees might be altered or repealed, and all bye-laws and regulations made by the council of the said rural district should on that date cease to be in force or have any effect in any part of the added area, but without prejudice to anything duly done thereunder, provided that any proceedings which might have been taken by the council of the said rural district against any person for any offence against such last-mentioned bye-laws and regulations committed before the commencement of part 5 of the Devonport Corporation Act 1900 might be taken by the plaintiffs as if those bye-laws and regulations had remained in force and the plaintiffs had been substituted therein for the local authority of the added area. The defendants' land, though now within the borough of Devonport, is at a considerable distance from any town. The bye-laws of the borough of Devonport, though differently numbered, are, so far as material to this case, for all practical purposes, to the same effect as the bye-laws of Plympton. Now, it is alleged that the defendants prior to the 9th Nov. 1900 had commenced to lay out and construct, and were then laying out and constructing, Ham-lane and Tavistock-road as "new streets" in a manner which contravened the bye-laws of Plympton and also of the borough of Devonport. What they had really done and were doing was to erect certain houses upon their own land without removing the fence on either side, but making the necessary openings here and there so as to provide means of entrance to and exit from the houses that were being built. They have done nothing more than this. In particular, they have not attempted to alter or interfere with the roadway either of Ham-lane or Tavistock-road; and, as it appears to me, they would have been liable to be indicted, and to an action for an injunction, if they had done so, or had in any way intermeddled with the laying out or construction of either of these highways. In reference to the erection of the defendants' houses, considered merely as houses, proper plans had been deposited with and all necessary notices, if any, given to the rural authority under the bye-laws relating thereto. Such authority, in fact, did not formally either approve or disapprove of these plans, but they instituted no proceedings for penalties under the bye-laws, nor did they do anything under the 98th bye-law and sect. 158 of the Public Health Act 1875. Upon the transfer effected by the Act of 1900, the previous right, if any, of the rural authority to take proceedings for penalties under the bye-laws was transferred to the corporation of Devonport, the plaintiffs in this action. They have not taken any proceedings before the justices for penalties, but have instituted this action, seeking thereby (1) an injunction to restrain the defendants from erecting or continuing the erection of any building upon and from laying out any new street intended for use as a carriage-road upon or in connection with the defendants' said estate without having previously delivered to the plaintiffs, in accordance with the said bye-laws, and obtained their approval to proper plans and sections of such building and street respectively, and from laying out or constructing any such street as aforesaid so that the width thereof shall

be less than 36ft., or being a street exceeding 200ft. in length and intended to form the principal approach or means of access to any domestic building, public building, or building of the warehouse class with a carriage-road of less than 24ft. in width or without a footway on each side thereof of a width not less than one-sixth of the entire width of such street, or otherwise in contravention of any of the provisions of the said bye-laws; (2) an order on the defendants to remove, alter, or pull down all works begun or done by the defendants as aforesaid contrary to the said bye-laws or any of them; (3) alternatively a declaration that the plaintiffs are entitled to remove, alter, pull down, or otherwise deal with any works begun or done by the defendants as aforesaid contrary to the provisions of the said bye-laws or any of them. It was admitted in the course of the argument that there was no case for an injunction as to building, except if and so far as the buildings might contravene the bye-laws as to the laying out of a new street. I may therefore treat par. 1 of the claim as a claim to an injunction to restrain the defendants from laying out Ham-lane and Tavistock-road, or either of them, as new streets or a new street in contravention of the bye-laws, and the question is whether the defendants have commenced or threatened or intended to do this. Now, were the defendants laying out or constructing Ham-lane and Tavistock-road, or either of them, or any part thereof, as new streets or a new street within the meaning of the bye-laws in reference to the laying out or constructing of new streets? It is clear that there has not been any laying out or constructing by the defendants of a new street in the ordinary, popular, and natural sense of the words, and that the defendants never intended to do anything of the kind. In fact, it was the one thing of all others which they intended not to do. They have not done, and had no power to do, anything outside the fence of their own land. They have simply begun to build within their own boundary. No ordinary person would think of saying that what they were doing was laying out or constructing a new street, although for anything I know the effect of what the defendants are doing, in conjunction with what other people are doing or may do on the opposite side of Tavistock-road, may be that at some future time the portion of Tavistock-road adjoining the defendants' property may be or become a street or even a "new street" within the meaning of that term in some Act of Parliament or statutory bye-law. The word "street" has various significations in different Acts of Parliament, but, *prima facie*, the meaning of the word "street" in the bye-laws, as well of Plympton as of Devonport, with respect to the laying out and construction of new streets is, in my opinion, limited to what is used or intended to be used as a roadway; and my reasons for this view are those stated by Lord Selborne, L.C. in *Robinson v. Barton-Eccles Local Board* (50 L. T. Rep. 57; 8 App. Cas. 798). I am unable to see how what the defendants have done or are doing is laying out or constructing a new street or anything of the kind within the meaning of the bye-laws, unless there be some judicial decision which compels me so to hold. I do not think there is any such decision. On the contrary, *Williams v. Powning* (48 L. T. Rep. 672),

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Gossett v. Maldon Sanitary Authority (70 L. T. Rep. 414; (1894) 1 Q. B. 327), and *St. George's Local Board v. Ballard* (72 L. T. Rep. 345; (1895) 1 Q. B. 703) appear to me to support the conclusion which I have stated. As to par. 1, therefore, of the relief claimed, the case of the plaintiffs in my opinion fails upon the merits; and as to pars. 2 and 3, which are in very general terms, it would suffice for me to say that the defendants have not been shown to have contravened any bye-law. But an objection was raised and it is contended on behalf of the defendants that the bye-laws in question and any similar bye-laws cannot be enforced in this court by an action on the part of the authority for an injunction, but only by the special remedies, viz., proceedings for penalties, provided by the statute and bye-laws, or otherwise by an action formerly called an information by the Attorney-General. It is obvious that by any breach of these bye-laws the authority, as such, does not sustain any damage, none of its rights of property are interfered with, and the public alone are injured if at all. It appears, however, that in various cases injunctions have been granted at the instance of local authorities to restrain an infringement or contravention of bye-laws; and I may mention particularly *Hendon Local Board v. Pounce* (61 L. T. Rep. 465; 42 Ch. Div. 603) and *Bromley Local Board v. Lloyd* (66 L. T. Rep. 462). The action of *St. George's Local Board v. Ballard* (*ubi sup.*) previously mentioned, which was for an injunction to restrain the defendant from laying out or constructing a new street of less width than 36ft., contrary to the bye-laws of the plaintiffs, was dismissed on the merits. In none of the cases, however, does any such objection appear to have been taken to the right of the plaintiffs to maintain the action as is now insisted upon. In the first place it is clear, I think, that no breach of the bye-laws constituted an offence or gave a right of action at common law. But any breach of the bye-laws is a criminal matter, as was held in *Mellor v. Denham* (40 L. T. Rep. 395; 5 Q. B. Div. 467) in reference to the contravention of the bye-laws of a school constituted under the Elementary Education Act 1874. In *Doe v. Bridges* (1 B. & Ad. 847, at p. 859) it is laid down by Tenterden, C.J. at p. 859, that "when an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." This was cited and approved by Lord Halsbury and Lord Macnaghten in *Pasmore v. Oswaldtwistle Urban Council* (78 L. T. Rep. 569; (1898) A. C. 394). In *Wolverhampton New Waterworks Company v. Hawkesford* (6 C. B. N. S. 336) the judgment of Willes, J. contains the following passage: "There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to one merely, but provides no particular form of remedy; then

the party can only proceed by action at common law. But there is a third class—viz., when a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue." In *Cooper v. Whittingham* (43 L. T. Rep. 16; 15 Ch. Div. 501) Jessel, M.R., says at p. 506: "There was a point not insisted upon but mentioned during the course of the argument. It was said that the 17th section of the Act created a new offence of importation, and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened, the court will interfere and prevent the act being done—and, as regards the mode of granting an injunction, the court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated. The second exception is that created by the Judicature Act, s. 25, sub-s. 8, which enables the court to grant an injunction in all cases in which it shall appear to the court to be just or convenient. This section may be said to be a general supplement to all Acts of Parliament. I think that in this particular case an injunction can issue on both those general grounds." But after the decision in *North London Railway Company v. Great Northern Railway Company* (48 L. T. Rep. 695; 11 Q. B. Div. 30) I do not think that *Cooper v. Whittingham* is any authority for granting an injunction in such a case as the present. At all events it would not be just or convenient. In *Grand Junction Waterworks Company v. Hampton Urban Council* (78 L. T. Rep. 673, at p. 679; (1898) 2 Ch. 331, at p. 345) Stirling, J. said: "Now, whether or no there be jurisdiction in the court to restrain by injunction such an application, it seems to me that the granting of an injunction in such a case is a matter which ought to be done with the greatest possible caution, and I respectfully adopt the language of the Master of the Rolls in that case: 'Where the Legislature has pointed out a mode of proceeding before a magistrate, it is not, as a general rule, for another court to interfere to stop that proceeding by injunction.' I desire to add that in contests between local authorities and private owners it seems to me that that rule ought to be adhered to somewhat strictly. In these matters as to building lines the Legislature has provided a cheap and short mode of obtaining a decision on the point in question, and it would be a matter of regret if a different and more expensive mode of obtaining a decision were to be habitually

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resorted to, or resorted to in the absence of very special circumstances. I confess my own experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark in costly litigation without any equivalent benefit to the public or the ratepayers whom they represent; and I should be sorry if either private individuals or public authorities were, when a cheap and speedy mode of settling a dispute is provided by the Legislature, to resort to a more expensive one. I think, therefore, that in the exercise of the discretion which is vested in the court, it ought, even as regards the granting of an injunction, to be very slow to grant an injunction against taking proceedings before the magistrate when the Legislature has pointed out that as the proper mode of proceeding" (of course that is not exactly the same as this); "and *a fortiori* it seems to me that when the court is simply asked to make a declaration of right without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances." And Lord Herschell, L.C. in *Institute of Patent Agents v. Lockwood* (71 L. T. Rep. 205, at p. 208; (1894) A. C. 347, at p. 361), says: "You have here for the first time a new offence created—the offence of practising as a patent agent without being on the register. But for the enactment creating that offence, the defender has nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it—namely, a penalty of 20l. Can it possibly under these circumstances be open to bring the individual, not before the summary court at small expense to determine the question of his liability to a 20l. penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and, then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the 20l. penalty, but would be liable to imprisonment for breach of the interdict? My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to show that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that a party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison"—all of which seems to me to apply to the present case. Upon the whole, then, I am of opinion that this action could not have

been maintained by the urban authority even if it had been right upon the merits. In regard to the 3rd paragraph of the claim for relief, *Barraclough v. Brown* (76 L. T. Rep. 797; (1897) A. C. 615) is an authority that no such declaration ought to be made, and I have already read what Stirling, J. said in the case of *Grand Junction Waterworks Company v. Hampton Urban Council* (*ubi sup.*) in reference to making declarations of right under similar circumstances. The result is, in my opinion, that this action is misconceived and must be dismissed with costs.

Solicitors for the plaintiffs, *Cunliffe and Davenport*, for A. B. Pilling, Devonport.

Solicitors for the defendants, *Surr, Gribble, and Oliver*, for Jno. Walter Wilson, Plymouth.

Friday, Jan. 24.

(Before EADY, J.)

Re NORRIS. (a)

Solicitor—Mortgagee—Negotiation.

N., a solicitor, arranged that a mortgage on D.'s property should be paid off, and that N. should lend his own money on the security of the property.

Held, that N. was entitled to the scale fee for negotiating the loan.

WHILE acting as solicitor for Mrs. Davies, the legal personal representative of her husband, A. J. Norris arranged for payment off of a mortgage on certain lands belonging to the estate. After the property had been reconveyed to Mrs. Davies, she executed a mortgage to Norris to secure the repayment of a sum of 1041l. and interest advanced by him.

A fee of 10l. 10s. for negotiation of the loan was struck out by the taxing master on the taxation of Norris' costs.

By the Mortgagees' Legal Costs Act 1895 (58 & 59 Vict. c. 25, s. 2:

(1) Any solicitor to whom either alone or jointly with any other person a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducting and investigating the title to the property, and preparing and completing the mortgage, all such usual professional charges and remunerations as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagee. (2) That section applies only to mortgages made after the commencement of this Act.

This was a summons to vary the taxing-master's certificate.

Stokes for Norris.—Sect. 2 of the Mortgagees' Legal Costs Act applies. The scale charge has not been exceeded. Here there has in fact been negotiation:

Re Macgowan, 63 L. T. Rep. 793; (1891) 1 Ch. 105.

Gatey for Mrs. Davies.—The solicitor took over the mortgage, he did not arrange and obtain the loan. Sect. 2 of the Mortgagees' Legal Costs Act

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

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1895 does not mean negotiation fees are to be paid where there has been no negotiation:

Re Eley, 57 L. T. Rep. 253; 37 Ch. Div. 40.

EADY, J.—On behalf of the client it is said that the disallowance is right. Did the solicitor in this case arrange and obtain the loan? The property was already mortgaged, and he arranged that the property should be reconveyed to Mrs. Davies, and that he should lend her the money on a mortgage of it. In my judgment, Norris did arrange and obtain the loan. But he did not obtain the loan from any other person, and it is contended that the Mortgagees' Legal Costs Act 1895 does not apply where a solicitor who is not in partnership himself lends the money. I think that is too narrow a construction of the section. Norris would clearly have been entitled to a negotiation fee if he had obtained a loan from a client. Then the Act says that a solicitor mortgagee shall be entitled to such remuneration as he would have been entitled to if the mortgage had been to someone else who had employed him as his solicitor to transact the business. The summons to vary must be allowed.

Solicitors: *Norris and Norris*; *Prestons*, for *Ivor Harris*, *Rhayader*.

March 11 and 12.

(Before EADY, J.)

Re SCOTT AND EAVE'S CONTRACT. (a)

Vendor and purchaser—Contract for sale of lease—Underlease—Outstanding day—Declaration of trust.

By an indenture made in 1865 a lease was granted to J. G. P. for a term of ninety-nine years from the 25th March 1865 at a rent of 3l. 16s. 4d. The lease became vested in H., who on the 6th Aug. 1885 granted S. H. an underlease for the whole of the term, less eleven days, at a rent of 12l. H. then mortgaged for the whole term, less one day, of which there was a declaration of trust, and on the 29th Sept. 1896 the mortgagees sold to W. S. The vendors were the legal personal representatives of W. S., and the purchaser had entered into a contract to buy what was described in the particulars as "an improved leasehold ground rent of 8l. 3s. 8d. arising out of a ground rent for 12l. amply secured on property held on lease . . . having fifty-three years unexpired in March, and subject to an original ground rent of 3l. 16s. 4d." The conditions provided that the title should commence with an indenture of underlease dated the 6th Aug. 1885, and that the purchaser should not question the validity of the underlease, but should assume a good title was vested in W. S. for the residue of the term. The purchaser contended that he was entitled to an assignment of the original lease, and that, as there was an outstanding day, he was entitled to a declaration that the vendor had not made out a good title, and to the return of his deposit. The vendor said that he had only contracted to sell the term for which the ground rent of 12l. was payable. The purchaser, moreover, had delivered no requisitions, and it was submitted that the objection was out of time.

Held (1) that the objection was not out of time, as the objection was one of conveyance and not of title; (2) that what was contracted to be sold was the improved ground rent for the whole term during which it was payable.

Semble, even if the contract had been to assign the whole of the original term, the vendor could have enforced the contract, as there was a declaration of trust of the last day of the term.

THIS was a summons under the Vendor and Purchaser Act to determine the true construction of a contract for sale.

On the 25th March 1865 a freeholder granted J. G. Potter a lease of certain premises for ninety-nine years at the rent of 3l. 16s. 4d. This term was in 1885 vested in S. H. Hughes, who on the 6th Aug. 1885 granted an underlease of the term, less eleven days, at a ground rent of 12l.

S. H. Hughes mortgaged the term, less one day, and covenanted to stand possessed of the last day in trust for the mortgagees.

On the 29th Sept. 1896 the mortgagees sold under their power to W. Scott.

The particulars of sale were:

Lot 4. An improved leasehold ground rent of 8l. 3s. 8d. arising out of a ground rent for 12l. amply secured on property . . . having fifty-three years unexpired in March last, and subject to an original ground rent of 3l. 16s. 4d.

The conditions of sale provides that the title as to lot 4 should commence with an indenture of underlease dated the 6th Aug. 1885.

Clause 11. The purchaser shall not question the validity of the underlease, but shall assume the underlease vested in W. Scott a good title for the residue of the term.

The purchaser required the assignment of the outstanding day.

Tanner for the purchaser.—The condition requires the purchaser to assume what is incorrect to the vendor's knowledge. The misdescription is a fatal objection:

Madeley v. Booth, 2 De G. & Sm. 718;

Re Beyfus and Masters Contract, 59 L. T. Rep. 740; 39 Ch. Div. 110;

Re Tanqueray; *Williams v. Landau*, 45 L. T. Rep. 281; 20 Ch. Div. 465;

Want v. Stallibrass, 29 L. T. Rep. 293; L. Rep. 8 Ex. 175.

It is a question of contract and not of title, and is not covered by the condition:

Hayford v. Criddle, 22 Beav. 477.

[EADY, J.—The mortgagee had a good equitable title to the outstanding day. Are you prepared to pay for a vesting order? The purchaser is not willing to pay. Someone is a trustee for the vendor, and ought to assign the day at his expense.

Cave for the purchaser.—The matter is one for compensation. Anyhow, the objection is out of time, as no requisitions were sent in.

Tanner replied.

EADY, J. read the particulars and conditions of sale, and said:—The purchaser says what is described is a lease; the vendor says that it is not described as a lease. The vendor has the whole term, in respect of which 12l. per annum is payable and ten days expectant on that term. In my judgment, the true construction of the contract is that what was sold

was an improved leasehold ground rent for the whole term during which it was payable. The result is that the purchaser is wrong. What is contracted to be sold is the residue of the term during which the ground rent of 12l. per annum is payable. It is said that the purchaser is too late to raise the point; but he is not out of time, because the point is one of conveyance and not of title. The mortgage contains a provision the reversion is to be held in trust for the purchaser, so the outstanding day must be conveyed as the purchaser directs. The abstract shows a good equitable title in the vendor. It is said that the contract binds the purchaser to assume what the vendor knew not to be the case—that the whole term vested in Mr. Scott. But the purchaser can have an assignment in the form the vendor is willing to give—namely, the whole of the original term, less one day, with the equitable interest in the outstanding day. The applicant must pay the costs of the summons.

Solicitors: *Jaques and Co.; Woodcock, Ryland, and Co.*

April 10, 11 and May 1.

(Before EADY, J.)

MITCHINSON v. SPENCER. (a)

Solicitor—Mortgage—Transfer of solicitor's own security—Insufficient security.

In July 1892 the trustees of an indenture of settlement, dated the 3rd Sept. 1890, had a fund of 1100l. for investment. By an indenture dated the 15th Feb. 1877 a sum of 2100l. had been secured, but part of the mortgaged premises had been sold for 1000l. The balance consisted of three brick and stucco houses, held for ninety-nine years at a ground rent of 9l. 2s. 6d. S., the solicitor of the trustees, transferred this mortgage to the trustees and received the 1100l., without explaining what he was doing. It was alleged that at this time the property, which was in one of the worst districts in the town, was only worth 200l., and the evidence for the defence did not prove that it was worth more than 600l. in 1892. S. paid interest until his death, and this action was brought by the trustees claiming that the security should be realised and the balance made good by S.'s executor. The Trustee Act did not apply, it was said, as S. retained the money and converted it to his own use. For the defendant it was said the claim was one for negligence, and was barred by the Statute of Limitations. The money was not still held by a trustee. Even if S. ought to have had a valuation made, his omission to do so was a mere common law tort.

Held, that the property was now, and also at the date of the transfer, an insufficient security for 1100l., and that the solicitor had transferred a security belonging to himself with knowledge that to take the security involved a breach of trust; that the trustees never knew the facts, and that S. had received the 1100l. as cash, and that the defendant, admitting assets, an order must be made for the realisation of the security, and that the defendant must make up the deficiency and pay the costs of the action.

By an indenture dated the 3rd Sept. 1890, being a settlement made on the marriage of G. R. Ekins, certain funds were vested in trustees upon certain trusts.

An indenture dated the 15th Feb. 1877 purported to secure a sum of 2100l. Some of the hereditaments comprised in the mortgage were sold for 1000l., and Spencer, a solicitor in Cardiff, was the owner of the security. The only property subject to the mortgage in 1892 consisted of three brick and stucco houses, held for a term of ninety-nine years from the 29th Sept. 1855, at a ground rent of 9l. 2s. 6d.

In 1892 the trustees of the settlement of the 3rd Sept. 1890 had a sum of 1100l. for investment. Spencer, who was the solicitor to the trust, without telling the trustees of the true facts, transferred his security to them and received the 1100l.

Until Spencer's death interest was regularly paid. Upon his death the trustees discovered the true facts and brought this action against his legal personal representative, asking for a declaration that the 1100l. had been improperly invested by Spencer, that the security might be realised, and the deficiency made good out of his estate. There was evidence that the property was not worth more than 600l. in 1892.

Vernon Smith, K.C. and Brodie Cooper for the plaintiffs.—The action was not brought during Spencer's life because he was solicitor to the trust, and the interest was duly paid. The Trustee Act 1888, s. 8, does not apply, because the proceeds of the breach of trust were converted by Spencer to his own use:

Scar v. Ashwell, 69 L. T. Rep. 585; (1893) 2 Q. B. 390;

Re Bowden, 45 Ch. Div. 444;

How v. Earl Winterton, 75 L. T. Rep. 40; (1896) 2 Ch. 626.

Mickletham, K.C. and J. G. Wood for the defendant.—This is a claim for negligence, and is barred by the Statute of Limitations. Time began to run from the date of the act of negligence, not from the date at which it was discovered:

Howell v. Young, 5 B. & C. 259.

Even if the solicitor ought to have had a valuation of the security made, that is only a tort. The trustees knew the circumstances and acquiesced.

Vernon Smith, K.C. replied.

Cur. adv. vult.

May 1.—EADY, J. referred to the facts and said: The trustees trusted to Spencer and made no inquiry. They had no knowledge that Spencer was making them take over his own mortgage. Spencer transferred his own mortgage without consulting the trustees or explaining to them what he was doing. At this date the property was in one of the worst districts in Cardiff, and was in a most dilapidated condition, and, according to the plaintiffs' evidence, would realise 200l. at most. The defendant has produced evidence that in 1892 property in Cardiff sold fairly well, but 600l. is the highest figure suggested as to the value of the property when it was taken over. Until Spencer's death the interest was paid; it does not appear what sums he received from the property. The result is that the property is now, and was at the time of the transfer, an insufficient

(a) Reported by G. B. HAMILTON, Esq., Barrister at-Law.

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security for 1100*l*. The solicitor transferred a mortgage belonging to himself, and knew of the breach of trust. He received 1100*l*. as cash, and cannot discharge himself of the liability to make it good. It is said that the claim is one for negligence and is barred, but the trustees never knew the true facts until after Spencer's death. The defendant admitting assets, I must direct the realisation of the security, and order the defendant to make the deficit good. The defendant must pay the costs of the action.

Solicitors: *R. Brooks, for S. B. Carnley, Alford, Lincolnshire; Crowders, Vizard, and Oldham.*

KING'S BENCH DIVISION.

Feb. 28 and March 3.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

LONDON AND INDIA DOCKS COMPANY (apps.) v. MAYOR, ALDERMEN, AND COUNCILLORS OF THE BOROUGH OF WOOLWICH (resps.) (a)

Rating—Metropolis—Woolwich—Partial exemption of land covered with water—Continuation of exemption under London Government Act 1899—Land covered with water not separately assessed in valuation list—Appeal to quarter sessions against rate—Right to appeal without objecting before assessment committee to valuation list—London Government Act 1899 (62 & 63 Vict. c. 14), ss. 10, 19—Poor Relief Act 1743 (17 Geo. 2, c. 38), s. 4.

Prior to the London Government Act 1899 the district of Woolwich was subject as to rating to the Public Health Act 1875, and general district rates therein were made under sect. 211 of that Act, under which the occupiers of land covered with water were assessed to general district rates at one-fourth only of the net annual value of such lands. The London Government Act 1899, in sect. 19, sub-sect. 1, provided that a scheme under the Act should provide for placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the Public Health Acts; and in sect. 10, sub-sect. 1, that a scheme under the Act should make provision for protecting the interests of owners and occupiers of any hereditament exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments; and a scheme was made and confirmed accordingly. The owners and occupiers of certain lands in Woolwich, part of which was land covered with water, and was, as such, prior to the Act of 1899, assessed at one-fourth of its net annual value only, were in 1900 assessed in one assessment for the whole hereditament, and in 1901 were rated to the full amount of the rate. They appealed to quarter sessions against the rate without having made any objection before the assessment committee against the valuation list as to the description of the hereditaments appearing therein, and without having asked for a division of the property, so as to show the part which was exempt.

Held, that the partial exemption of land covered with water was preserved in Woolwich, so far as existing hereditaments were concerned, and that

the occupiers of such lands were assessable only at one-fourth the net annual value of the lands.

Held, also, that the occupiers were entitled to appeal to quarter sessions against the rate without having first objected before the assessment committee against the valuation list that the hereditaments ought to have been divided.

CASE stated by the Quarter Sessions for the County of London under sect. 11 of the Quarter Sessions Act 1849 (12 & 13 Vict. c. 45).

The appellants on the 23rd May 1901 gave notice of appeal to the next General or Quarter Sessions for the County of London against a general rate made by the respondents for the metropolitan borough of Woolwich, and allowed by the justices on the 1st May 1901, and afterwards by consent of the parties and by order of Channell, J., the following special case was stated for the opinion of the King's Bench Division, the parties agreeing that a judgment in conformity with the decision of the King's Bench Division should be entered on motion by either party at the sessions next or next but one after such decision.

The appellants were the owners and occupiers of certain hereditaments in the metropolitan borough of Woolwich, and in a general rate for the borough made by the respondents under the London Government Act 1899 on the 21st March 1901, and allowed by the justices on the 1st May 1901, the appellants were rated as the occupiers of the hereditaments under two entries in the rate. In these entries the appellants were entered as the owners and occupiers of the hereditaments. The description of the property rated was in the first entry: "Royal Albert Dock (part of) with tidal basin, quays, buildings, and machinery," and in the second entry: "Old and New Dock entrances, Galleons Reach, and appurtenances." The rateable value in the first entry was 15,000*l*. and the amount of the rate at 3*s*. 6*d*. in the pound was 2625*l*.; and in the second entry the rateable value was 5000*l*. and the rate 875*l*. The property was stated to be in North Woolwich. The appellants were rated in respect of the hereditaments upon the full net annual value thereof, to the full amount of the rate.

The hereditaments included in and intended to be rated under each of the two entries appearing in the rate consisted in part of land covered with water, and under and by virtue of the Acts herein-after referred to, before the 1st April 1901, the appellants were liable to be assessed and were in fact assessed to general district rates for the parish of Woolwich made under the Public Health Act 1875 as the occupiers of such land covered with water upon one-fourth part only of the net annual value thereof, in pursuance of sect. 211 of that Act.

The appellants in Oct. 1900, being aggrieved by the unfairness or incorrectness of the valuations of the hereditaments in the valuation list for the parish of Woolwich made on the 22nd June 1900, duly gave notice of their objections to the same to the overseers of the parish of Woolwich and to the assessment committee of the Woolwich Union, and specified the corrections which they desired to be made, and the committee on the 26th Oct. 1900 heard and decided such objections on the basis of an alteration in the amounts of the assess-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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ments. No objection was made by the appellants to the description of the hereditaments in the valuation list. The notice of objection to the valuation list was on the grounds that the appellants were in the valuation list over assessed in respect of the gross value and the rateable value of the dock and premises, and (2) that sufficient deduction had not been made in the list from the gross value to arrive at the rateable value.

By the Public Health Supplemental Act 1852 (No. 2) (15 & 16 Vict. c. 69), s. 8, the Public Health Act 1848 (11 & 12 Vict. c. 63) was made applicable to Woolwich.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) Woolwich was included in the metropolis as one of the parishes mentioned in sched. A to that Act; but by sect. 238 the application of that Act to Woolwich was limited, so that general district rates continued to be made in Woolwich under the Public Health Act 1848, and not under sects. 158-169 (the rating sections) of the Metropolis Management Act 1855.

The Public Health Act 1848 was as to other places repealed by sect. 343 of the Public Health Act 1875 (38 & 39 Vict. c. 55), but as by sect. 2 of the last-mentioned Act, that Act did not extend to the metropolis "save as by this Act is expressly provided," it followed that as Woolwich was within the metropolis and was not specially mentioned in the repealing sections, the repeal of the Public Health Act 1848 did not apply to Woolwich. Consequently the Public Health Act 1848 continued in force in Woolwich after 1875, and was expressly declared so to be in force by the Local Government Board's Provisional Orders Confirmation (Amersham Union, &c.) Act 1880 (43 & 44 Vict. c. lix.), s. 2.

The Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 102, applied to Woolwich certain provisions of the Public Health Act 1875, including (*inter alia*) sects. 209-227 of that Act, which relate to the making of rates.

The effect of the enactments above cited was that general district rates were made by the Local Board of Health in Woolwich from 1852 to 1891 under the Public Health Act 1848, and after 1891 under the Public Health Act 1875.

By sect. 88 of the Public Health Act 1848, general district rates are to be made and levied upon the occupier

Of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property. . . . Provided also that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof. . . .

The material words of the section set out in the preceding paragraph are repeated verbatim in sect. 211 of the Public Health Act 1875, under which general district rates under that Act are made.

Under sects. 15 and 16 of the London Government Act 1899 a committee of the Privy Council may make orders and schemes for carrying the

Act into effect. The orders and schemes herein-after mentioned have been made under the Act.

By sect. 19 of the London Government Act 1899 it was enacted as follows:

(1) A scheme under this Act shall provide for placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts and other enactments not applying to London, and for the application thereto of the Metropolis Management Acts 1855 to 1893, and other enactments applying to London. (2) Subject to the provisions of any such scheme, this Act shall apply to Woolwich in like manner as if the Local Board of Health thereof were an administrative vestry.

By sect. 4 of the London Government Act 1899 the powers and duties of the vestry were transferred to the borough council, and by sect. 10 (1) of that Act it is provided that "A scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments."

By the London (Woolwich) Scheme 1900, which was confirmed by an order in council on the 7th Aug. 1900, it was provided as follows:

1 (2). This scheme shall have effect subject to the provisions of any future scheme made under the Act, and in particular to the provisions of any such scheme making provision for the protecting the interests of owners and occupiers of any hereditaments which are exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments.

2. Subject to the provisions of this scheme the general law applying to metropolitan boroughs shall, as from the day on which the first borough councillors elected under the Act come into office, apply within the parish of Woolwich in like manner as it applies to the rest of London, and accordingly the Public Health Acts and the other enactments not applying to London shall, as from that date, and so far as they apply to the parish of Woolwich, be repealed, and the Metropolis Management Acts 1855 to 1893, and the other Acts applying to London, so far as they do not before that date apply to the parish of Woolwich, shall apply to that parish in like manner as they apply to the rest of London. Provided that (a) Nothing in this section shall affect the nature of any rate to be levied in the parish of Woolwich between the said day and the 31st day of March 1901, and in the meantime sects. 207 and 209 to 227 of the Public Health Act 1875 shall continue to apply to Woolwich as if the council of the metropolitan borough of Woolwich was the council of an urban district outside London, and the parish of Woolwich was a parish in that district.

By the London (Rating) Scheme 1901, which was confirmed by an order in council on the 9th March 1901, it was provided as follows:

2 (1). In levying the general rate after the first day of April, one thousand nine hundred and one, effect shall be given to any exemption from any existing rate (whether that exemption is given by way of reduced assessment or by levying a differential rate in the pound or in any other manner) by means of the deduction from the total amount of the general rate which would otherwise be payable in respect of any hereditament to which the exemption applies of a proportionate part (corresponding to the exemption) of the amount produced by the rate in the pound which is treated as

levied for the purposes in respect of which the exemption exists or in the case of a total exemption equal to the whole amount so produced. . . . (2) Where in any metropolitan borough the owners or occupiers of any hereditaments or any class of hereditaments are entitled to any exemption, the council of that borough shall apportion the total rate in the pound amongst the various purposes for which the general rate is levied, so as to show approximately the rate in the pound required for any purpose or any number of purposes in respect of which there is such an exemption, and shall enter the rates in the pound so apportioned in the heading of the rate, and the rates in the pound so apportioned and entered shall be treated as levied for the purposes in respect of which the exemption exists.

6. For the purposes of this scheme the expression "existing rate" means any rate leviable in a metropolitan borough before the 1st day of April 1901.

7 (1). This scheme may be cited as the London (Rating) Scheme 1901 and shall have effect subject to the provisions of any future scheme and to the provisions of any scheme dealing with any particular exemption from rates or liability to be assessed.

The appellants contended: (a) That the combined effect of the London Government Act 1899 and the orders and schemes made thereunder was that the partial exemption of land covered with water from the general district rate formerly levied in Woolwich was preserved. (b) That the general rate against which the appellants appealed should be apportioned among the various purposes for which the general rate is levied so as to show approximately the rate in the pound required for any purpose or any number of purposes in respect of which the partial exemption of land covered with water existed. (c) That the appellants in respect of land covered with water were entitled to a partial exemption, as to so much of the general rate as was made for the purposes for which the general district rate was made before the commencement of the operation of the London Government Act 1899 and the orders and schemes, and that a proportionate part (corresponding to the partial exemption) should be deducted from the total amount of the general rate which would otherwise be payable by the appellants in respect of the hereditaments, or, alternatively, that the rate should be amended by striking out the entries relating to the hereditaments or that the rate should be quashed.

The respondents contended: (1) That the appellants, having objected before the assessment committee of the union only to the amounts of the assessments, were not aggrieved by any decision of the assessment committee, and were not therefore entitled to appeal to the Court of Assessment Sessions. (2) That the appellants were liable to be assessed to the general rate in respect of the land covered with water upon the full net annual value thereof for the following amongst other reasons—(a) Because sect. 211 of the Public Health Act 1875, under which such partial exemption was claimed, had been as from the 1st Nov. 1900 repealed in its application to the parish of Woolwich by sect. 19 of the London Government Act 1899 and the order and scheme made thereunder (sect. 2), and that the exemption was not preserved by the Act or any order or scheme made under and by virtue thereof. (b) Because the provisions of the London (Woolwich) Scheme 1900 provided (*inter alia*) by sect. 2 (a) that sects. 207 and 209 to 227 of the Public Health

Act 1875 should continue to apply to Woolwich to the 31st March 1901 only, and did not provide that such sections should continue to apply to Woolwich after the 31st March 1901. (c) Because the intention of the Legislature as expressed in sect. 19 of the London Government Act 1899 and given effect to by the orders and schemes, was to place Woolwich for all purposes under the general law applicable to the metropolis, to which it had prior to the passing of the Act been an exception, and not for any purpose to continue the application thereto of the Public Health Act 1875.

It was agreed between the appellants and respondents that if the respondents' contentions were not correct the proportionate part which ought to have been deducted from the total amount of the general rate which would otherwise be payable by the appellants in respect of the hereditaments numbered 2869 in the rate should be 499*l.* 1*s.* 10*d.*, and the proportionate part which ought to have been deducted in respect of the hereditaments numbered 2870 in the rate should be 60*l.* 18*s.* 9*d.*

The questions for the opinion of the court were (a) whether the appellants were entitled to appeal, and, if so, (b) whether the appellants were liable to be assessed to the general rate in respect of land covered with water upon the full net annual value thereof, or were entitled to such partial exemption as aforesaid from the general rate. If the court should answer either of the questions in favour of the respondents, then the court might either confirm the rate or make such other order as to the court should seem fit. If the court should answer both the questions in favour of the appellants, then either the rate was to be quashed or was to be amended in the manner contended for by the appellants, or by altering the amounts of the rate in the last column thereof so as to give effect to the agreement as to figures in this case, or the court was to make such other order as to the court should seem fit.

The Poor Relief Act 1743 (17 Geo. 2, c. 38) provides:

Sect. 4. In case any person . . . shall find himself aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, . . . it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled are hereby authorised and required to receive such appeal, and to hear and finally determine the same, &c.

The Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67) provides:

Sect. 32. Any ratepayer, . . . who may feel aggrieved by any decision of the assessment committee, on an objection made before them to which he was a party, or by any decision of special sessions, whether he was a party or not, may appeal against such decision to the assessment sessions, &c.

Sect. 45. The valuation list for the time being in force shall be deemed to have been duly made . . . and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of

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the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted, &c.

Ryde (Balfour Browne, K.C. and Boyle, K.C. with him) for the appellants.—The first question is whether the appellants were entitled to appeal to the quarter sessions, as they had objected to the assessment committee only as to the amounts of the assessments and on the basis of an alteration in those amounts, and had not applied to the committee for a division of the rateable values, so as to show the part of the property which was exempt. The appellants have a right of appeal to quarter sessions in this case. In dealing with the metropolis it is important to bear in mind the difference between an appeal against a valuation list and an appeal against a rate. In the metropolis an appeal on the ground of over-assessment is not against the rate, but is against the valuation list before it comes into force; outside the metropolis the appeal may be against each fresh rate. The appeal in this case is brought under sect. 4 of the Poor Relief Act 1743 (17 Geo. 2, c. 38), which is still in force and applies to the metropolis, giving a right of appeal from the assessment committee to the next general or quarter sessions to any person aggrieved by any rate or assessment. The section gives an appeal on almost any conceivable ground. The next section dealing with appeals is sect. 6 of the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96), which was limited to appeals on questions of value only, but that section has been repealed as to the metropolis. Then the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103) created for the first time the valuation list, and any person who was aggrieved by this list might object to the assessment committee (sect. 18), and if on appeal against a rate, the rate were amended, then the valuation list was to be altered (sect. 22, repealed as to the metropolis). Then sect. 1 of the Union Assessment Committee Act 1864 (27 & 28 Vict. c. 39) made it a condition precedent to the right of appeal against a rate made in accordance with the valuation list, that notice of objection should have been given to the assessment committee, and that the person should have failed to obtain relief from the committee. If that section applied the appellants would be out of court, but it was repealed as regards the metropolis by sect. 77 of the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), which in sect. 45 made the valuation list conclusive evidence in certain matters, but not in the matter now in question. It made the valuation list conclusive evidence of the gross and rateable values, and it is said that that section limits the right of appeal in the metropolis, and that there is no appeal to quarter sessions unless the appellant is aggrieved by the decision of the assessment committee. That section leaves untouched the right of appeal in everything except as to values or amounts; and the right of appeal to quarter sessions, under sect. 4 of 17 Geo. 2, c. 38, is preserved, except as to amount. If this were not the true view, then in *Reg. v. Institution of Civil Engineers* (42 L. T. Rep. 145; 5 Q. B. Div. 48), in 1879, after the Act of 1869 came into force, the wrong thing would have been appealed against and the wrong court would have been appealed to. In *Smith v. Lambeth Assessment Committee* (48 L. T. Rep. 57; 10 Q. B. Div. 327),

the appellants appealed to quarter sessions under sect. 4 of 17 Geo. 2, c. 38, against a rate, on the ground that they were not occupiers; if they had been limited to the right of appeal under the Act of 1869 they must have appealed against the valuation list, and have gone, not to quarter sessions, but to the assessment committee. So the valuation list is not conclusive as to an exemption of the hereditament by statute: (*Art Union of London v. Overseers of Savoy*, 71 L. T. Rep. 40; (1894) 2 Q. B. 609). If this had been an appeal against the valuation list, sect. 45 of the Act of 1869 would have applied, but the appeal here is against the rate, and that section has no application: (per Lord Esher, M.R. in *Gordon v. Williamson*, 67 L. T. Rep. at p. 217; (1892) 2 Q. B. at p. 463). With regard to the second point, it is expressly provided by the London Government Act 1899, in sect. 10, and in the schemes made under the Act, that the interests of those whose hereditaments were before wholly or partially exempt from any rate should be protected. [He was stopped on this point.] He also referred to

North-Eastern Railway Company v. York Union, 82 L. T. Rep. 201; (1900) 1 Q. B. 733.

Marshall, K.C. (*Courthope-Munroe* with him) for the respondents.—As to the first point, the appellants have no right of appeal to the quarter sessions. If they were aggrieved they ought to have gone to the assessment committee, and have asked the assessment committee to correct the valuation list by dividing the assessment so as to show the portion of the hereditaments entitled to the exemption. Sect. 45 of the Act of 1869 clearly shows that the valuation list is conclusive for these purposes, and there is no appeal unless the appellants can show that they are aggrieved by a decision of the assessment committee on an objection made by them to the valuation list. That is clearly shown by sect. 32. Here no such objection to the valuation list was made, and as the valuation list is, by sect. 45, made conclusive evidence of the gross and rateable values of the hereditaments included therein, the appellants cannot now, for the purposes of this appeal, either contest the total amount or raise the question that the hereditaments ought to have been divided. The valuation list ought to show the hereditaments as separated into the parts in respect of which the exemption was claimed and those parts as to which no exemption was claimed. Sect. 11 of the Act of 1869 sets out the grounds on which persons may object before the assessment committee, and they may appeal if they complain of unfairness or incorrectness of the valuation, or of the insertion or incorrectness of any matter in the valuation list, and so on. That section gives larger powers of appeal to the assessment committee than are given by sect. 18 of the Union Assessment Committee Act 1862, as under sect. 11 there is power to go to the assessment committee in respect of the "incorrectness of any matter in the valuation list." What was complained of by the appellants was an incorrectness of a matter in the valuation list. They complained that the valuation list did not give them the exemption which they said they were entitled to in respect of part of the hereditaments; and they ought to have gone to the assessment committee and have asked them to

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separate the hereditaments, and the assessment committee would have had power to separate the hereditaments and correct the list. No notice of objection was given, and no objection was taken, upon that ground, and to have taken the objection at all they must have given notice specifying that as one of the grounds of their objection: (per Bruce, J. in *Reg. v. Justices of London* (1897) 1 Q. B. at p. 437). Therefore on the construction of sects. 11, 32, and 45. the appellants have no right of appeal. With regard to the second point, sect. 19 (1) of the London Government Act 1899 provides that any scheme under the Act should provide for placing Woolwich under the general law applying to the metropolis and for the repeal of the application thereto of the provisions of the Public Health Acts. The intention clearly was to place Woolwich under the general law as to these matters which apply in the metropolis, and there is no such exemption as is here claimed applicable in the metropolis. It was not intended that the exemptions given by the Public Health Acts should continue. The exemptions referred to in sect. 10 (1) are exemptions of particular hereditaments, and are not such exemptions as were allowed under the Public Health Acts. To allow this exemption would be to defeat the object of the Act, which was to place Woolwich under the general law applicable to the metropolis.

Ryde in reply.

Cur. adv. vult.

March 3.—Lord ALVERSTONE, C.J.—The actual facts of this case are somewhat complicated, and I do not think it necessary to state them in detail, as they must be gathered from the special case in the event of its being necessary to consider the facts of this case as bearing upon any other case. Prior to the passing of the London Government Act 1899 the district of Woolwich, in which this property of the dock company was situate, had been subject to the Public Health Act 1875, and under sect. 211 of that Act there was an exemption that land covered with water should only pay at the rate of one-fourth in respect of certain rates. The district was also subject at that time to the Valuation (Metropolis) Act 1869, and therefore for the purposes of rating procedure, the procedure of that Valuation (Metropolis) Act had to be followed. By the London Government Act of 1899, a scheme was enacted for bringing Woolwich into the general law applicable to the metropolis, and that Act did, in sect. 19, sub-sect. 1, provide, in general terms, that a scheme under the Act should provide for placing Woolwich under the general law applying to the metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts. The Act also contained a provision in sect. 10, sub-sect. 1, that a scheme under the Act should provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate—which were rates as to which, under certain circumstances, there would be this lesser liability—but should make provision for protecting the interests of owners and occupiers of any hereditament which was exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments. Then came the London (Rating) Scheme 1901, which came into operation on the 9th

March 1901, and which did provide for a particular method of maintaining the exemption; but it is not necessary to describe it. It is stated in sect. 2, sub-sect. 1 of that scheme, and it practically maintained the one-fourth exemption, assuming it to be valid and binding in a proper case, by a particular method of levying the rate. The particular valuation list on which the present question arises was the valuation list for 1900. The respondents sought to charge the appellants with an assessment for the full amount of the rate, and they justify that on two grounds: First, they say, on the merits, that by the provisions of the Act of 1899 it was intended to bring Woolwich within the general law applying to metropolitan boroughs, and therefore, inasmuch as some parts at any rate of the metropolitan boroughs had not got the protection of the Public Health Act in this respect, though they had certain other protection under certain other Acts, it was not intended that this exemption under the Public Health Act should be continued in Woolwich. We are all clearly of opinion that that ground cannot be maintained. Sect. 10, sub-sect. 1, is precise, and expressly says that a scheme “shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount.” We think it was clearly intended that, although generally Woolwich and other outlying places were to come within the metropolis, the scheme should continue that exemption. It has continued the exemption, and, if so, it cannot be said that the scheme is not valid and binding. Therefore the objection on the merits taken by counsel for the respondents, we think, does not prevail. The more troublesome and difficult contention is whether or not it was open to the appellants to raise the point because they had not objected before the assessment committee and obtained from them a distribution of the rateable value, which in the total was not objected to, between the part of the hereditament which was land, and which was therefore not exempted property, and the part which was exempted property. The assessment was one total of 15,000*l.* for the dock, with tidal basin and quays, and although the total amount was agreed to after discussion, the appellants had not asked the assessment committee to divide the assessment between so much of the hereditament as was land covered with water and so much as was not. We are also of opinion that this objection cannot prevail, and that the appellants are entitled to raise the point. The original right of appeal goes back to the Act of 17 Geo. 2, c. 38, s. 4. There was intermediate legislation as to which we may only add the fact that it does not apply to the metropolis—namely, the Parochial Assessment Act of 1836 and the Union Assessment Committee Acts of 1862 and 1864. Those Acts do not apply to the metropolis, but I must not be taken as expressing the opinion that this kind of objection ought to have been raised before the assessment committee even under those Acts. I do not express any opinion upon that, because it is not necessary, and the matter may be argued before us in some other case. I should doubt whether any owner of a mixed hereditament can force the assessment committee to make the sub-division. There are certainly cases in which he could not, such as the simple and

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ordinary case of a man who has got a park with a lake in it. It is, however, unnecessary for us to decide whether under those Acts the party assessed could force the assessment committee to make a sub-division. No doubt it is very convenient that there should be a sub-division, because it possibly then provides a standard which the parties would acquiesce in as to how these differential rates should be levied. When we come to the metropolis the case is somewhat different, and the rights and liabilities of the owners or occupiers of properties depend upon the Valuation (Metropolis) Act. I do not pause to notice the procedure under that Act, which is very well known—that there is an appeal against the valuation list instead of against the rate. Under that Act it was contended by counsel for the respondents that because it was provided by sect. 45 that the valuation list should be conclusive evidence of the gross and rateable value of the several hereditaments included therein, therefore the appellants were not entitled for the purpose of this appeal either to contest the total amount or to raise the point that the assessment ought to have been sub-divided so as to enable them to raise their point as to the exemption. If there had been anything in the Valuation (Metropolis) Act which showed that this question was intended to be raised at that stage, there might have been something in that contention for the respondents; but it is, in my opinion, much too late to contend that the right of appeal on other grounds than those mentioned in that section—sect. 45—has been taken away. There have been many cases in which it has been held that upon an appeal against the rate other questions can be raised than those determined by the assessment committee, or by the sessions upon appeal against the valuation list, as, for instance, non-occupation or invalidity of the rate in other respects, and I see no reason why we should hold that a person is not entitled on an appeal against the rate to raise this question that he is the occupier of property in respect of the whole or part of which he is subject only to a differential rate. In fact, when I put the question to counsel for the respondents he did not dispute that, if the whole of the property was land covered with water, and the person had been rated in respect of the whole, he would be entitled on appeal against the rate to say in respect of that rate he was only liable to pay one-fourth of the rate. I am of opinion that the old right of appeal in respect of such a matter still remains, and that the only effect of the Valuation Act on the valuation list for this purpose is that the total valuation in the list is conclusive, and that if in any case there has been a sub-division of the assessment, and either by the original adjudication of the assessment committee or on a subsequent appeal the amount of the valuation of that separated item has been settled, then the valuation list would be conclusive as to the amount of such divided part. I cannot hold that there was any obligation upon the appellants to get this sub-division made at the stage of the making of the valuation list. There is another ground which also seems to us to be conclusive in favour of the appellants in this case. I think that the argument for the appellants was well founded, that at the time the valuation list was going through its initial and preparatory stages, Woolwich really

did not know what the actual position would be. They did not know what steps would be taken, or in what way the scheme would provide for the preservation of their exemptions, and I think that within the principle of Lord Bowen's judgment in the case of *Gordon v. Williamson* (*ubi sup.*) it was not possible to contend that in that state of things Woolwich were bound to get what I will call a hypothetical division in view of what might possibly happen. Speaking for myself, both on the special grounds of this case and on the general view of the construction of the Valuation (Metropolis) Act, I am of opinion that this was no bar to the appeal. The parties agree about the figures. It is obvious that the conclusion we come to is in accordance with justice, because we do not think it was intended to remove the exemption either under the Act or the scheme, and it is satisfactory to know that what we think is the true state of the law can be carried out. The result is that the appeal must be allowed.

DARLING, J.—I agree.

CHANNELL, J.—I entirely agree with what my Lord has said, but I think I ought to say that my view of the matter is that so far as any future hereditaments are concerned, if, for instance, a new dock were made in Woolwich, it was intended to apply to Woolwich the general law applicable in the metropolis, and not the law applicable outside the metropolis. I understand that sect. 10, sub-sect. 1, by providing that a provision should be made for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate, and the provision that in fact was made in the scheme that effect should be given to any exemption from any existing rate of any hereditament to which the exemption applies—that is the exemption from the existing rate—showed that it was intended to prevent the particular persons in Woolwich who had at the time got hereditaments of that character, from being rated in the future at any higher rate. That is the reason why I do not think that our present decision is in any way contradictory to the express enactment that Woolwich should be put under the general law applicable to the metropolis. I think that Woolwich is put under the general law applicable to the metropolis in regard to the future; and therefore if any new dock were made it would come under the later law applicable to the metropolis and not under the earlier law. That is how I understand it, and it is on that ground, as it seems to me, that what has been called the point upon the merits is perfectly clear. That also is the answer to the argument for the respondents, which otherwise was quite a logical argument, that Woolwich is specially dealt with.

LORD ALVERSTONE, C.J.—The point taken by my brother Channell as to future hereditaments had not occurred to me. I do not differ from him except to say that I should like to hear that particular point argued. It does not, however, arise in this case.

Appeal allowed. Judgment for the appellants with costs. Leave to appeal.

Solicitors for the appellants, *Turner, Son, and Foley.*

Solicitor for the respondents, *Arthur B. Bryceson, Town Clerk, Woolwich.*

K.B. Div.] MINISTER AND CO. v. APPERLY AND OTHERS—BROWNE v. BRANDT. [K.B. Div.]

Friday, March 7.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MINISTER AND CO. v. APPERLY AND OTHERS. (a)
Practice—Costs—Appeal—Official referees—Reference of whole action—Discretion of referee as to costs—Right to appeal as to costs without leave—Judicature Act 1873 (36 & 37 Vict. c. 63), s. 49—Order XXXVI., r. 55 (b); Order LXV., r. 1.

Where by an order of the court the whole of an action is referred for trial to an official referee with power to direct judgment to be entered and to deal with the whole action, and the order gives no direction as to costs, the decision of the official referee as to costs within his discretion cannot be appealed against except by his leave.

APPEAL as to costs from a decision of an official referee in an action for damages for negligence.

The action was, by order of the court, referred to the official referee for trial, with all the powers of certifying and amending of a judge of the High Court, and with power to direct judgment to be entered, and otherwise deal with the whole action.

The official referee awarded damages to the plaintiffs, and he ordered judgment to be entered for them for a certain sum, and he gave the plaintiffs their costs up to the date of a certain letter written after action brought by the defendants to the plaintiffs, in which the defendants offered to the plaintiffs a certain sum in satisfaction of their cause of action. He directed that from and after the date of that letter each party should pay their own costs; and he did not give any leave to appeal from his order as to costs.

The plaintiffs now moved by way of appeal, and asked the court to set aside so much of the decision of the official referee as deprived the plaintiffs of their costs after the date of the letter, on the grounds that no good cause was shown for depriving the plaintiffs of their costs, and that the official referee had acted on a wrong principle in depriving them of their costs.

Sect. 49 of the Judicature Act 1873 provides:

No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the court, shall be subject to any appeal, except by leave of the court or judge making such order.

Order XXXVI., r. 55 (b) provides:

Where the whole of any cause or matter is referred to an official referee under an order of court, he may, subject to any directions in the order, exercise the same discretion as to costs as the court or a judge could have exercised.

By Order LXV., r. 1, the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the court or judge, "provided that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court shall, for good cause, otherwise order."

By the Arbitration Act 1839 (52 & 53 Vict. c. 49), s. 15, sub-s. 1, in all cases of reference to an official referee under an order of the court or a judge, the official referee is to be deemed to be an

officer of the court, and by sub-sect. 2 "the report or award of any official referee shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury."

Mackaskie, K.C. (Bremner with him), for the defendants, took the preliminary objection that the appeal was as to costs only, and that, as the official referee had not given leave to appeal, there was, under the above section and orders, no right of appeal against his decision as to costs:

Arbitt v. Henry, 99 LAW TIMES, 233;

Garr Brothers v. Dougherty, 67 L. J. 371, Q. B.;

Adlington v. Coningham, 79 L. T. Rep. 232; (1898)

2 Q. B. 492;

Bew v. Bew, 81 L. T. Rep. 234; (1899) 2 Ch. 467.

A. T. Lawrence, K.C. and Montagu Lush for the plaintiffs.—The plaintiffs have a right of appeal in this case. The official referee has proceeded upon a wrong principle in dealing with the costs, and where a judge in dealing with the costs proceeds upon a wrong principle there is always an appeal as to the costs. By sect. 15, sub-sect. 2, of the Arbitration Act 1839, the award of the official referee was equivalent to the verdict of a jury, and therefore the official referee was in the same position as a judge trying a cause with a jury, in which case, under Order LXV., r. 1, there would be no power to deprive the successful party of costs except for good cause. An order as to costs made by a judge after the verdict of a jury can always be appealed against on the ground that it was not made "for good cause." Here the plaintiffs succeeded in the action, and the official referee had no good cause for depriving them of their costs. The preliminary objection ought therefore to be overruled.

LORD ALVERSTONE, C.J.—I entertain no doubt upon this question. Where costs have been given to a person who has no right to them, then there is an appeal; but where there is no question of right, and they are in the discretion of the persons who have to award them, then there is no appeal except by leave. I am of opinion that the preliminary objection to this motion must succeed.

DARLING and CHANNELL, JJ. concurred.

Preliminary objection upheld and motion dismissed.

Solicitors for the plaintiffs, *Lewis and Newton*;
 Solicitors for the defendants, *William Sharp*;
 and *Mackrell, Maton, Godlee, and Quincey.*

March 5 and 6.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

BROWNE (app.) v. BRANDT. (resp.). (a)

Innkeeper—Common law duty to receive travellers—Night—All bedrooms occupied—Inn full.

An innkeeper is under no common law duty to provide shelter and accommodation for travellers wishing to spend the night at his inn when all the rooms ordinarily used as bedrooms for guests are occupied.

APPEAL from the decision of the County Court judge of Surrey.

The facts of the case as they appeared upon the judge's note of the evidence and from the

(a) Reported by W. W. OGB, Esq., Barrister-at-Law.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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defendant's answers to interrogatories were as follows:—

On the 9th April 1901 the appellant was travelling on a motor-car from Crawley to London. The car broke down in the neighbourhood of Horley.

The appellant and a friend who was travelling with him pushed the car to Horley, where they came to an inn called the Chequers, of which the respondent was the landlord. They arrived there about two o'clock in the morning.

Having roused the respondent, the appellant demanded a bed or beds for himself and his friend, who were both wet through.

The respondent declined to admit them to the inn, saying that the house was full.

The appellant then asked for some refreshment, when, after some demur, the respondent admitted him and his friend into the inn and provided the refreshment required.

The appellant again asked for beds or a bed, and was again refused on the ground that the house was full.

The respondent then said that as the bedrooms were all occupied he and his friend would be content to remain for the night in the coffee-room or in a sitting-room which was unoccupied.

This the respondent refused to permit, saying that he never allowed anyone to stay up all night in the coffee-room or sitting-rooms.

The appellant and his friend then left the inn, and, failing to find shelter elsewhere, they procured a brougham and drove back to Crawley.

The appellant sued the respondent for damages sustained by reason of the respondent having refused to give him shelter in his inn.

At the hearing before the learned County Court judge the latter found as facts that the Chequers was on the night of the 9th April full as regarded proper sleeping accommodation; that there was no unoccupied bedroom; that there were, however, at least two other rooms available for the shelter and accommodation of the appellant and his friend, and that the shelter and accommodation were refused.

On these facts he held that the Chequers was on that night full when the appellant demanded shelter and accommodation, and that the respondent was therefore not bound to give shelter and accommodation to the appellant on that night. He gave judgment for the respondent, but, in case his judgment might on appeal be held wrong, he assessed the appellant's damages at five guineas.

Thornton Lawes for the appellant.—The point here is whether at common law a belated traveller is entitled to shelter in an inn when all the bedrooms, but not all the other rooms in it, are occupied. It is admitted that all the bedrooms in the Chequers were occupied on the night of the 9th April. I submit, however, that is not sufficient. The innkeeper is bound to give a traveller who claims it any shelter and accommodation he can give him. He can only refuse to give him such shelter and accommodation on one of two grounds—(1) that the traveller is an improper person, or (2) that the inn is full. Here no question arises on the first of these grounds, and I submit on the second that an inn is not full on a night when all its bedrooms are occupied, but other rooms are unoccupied. From the earliest

times the common law gave an action against an innkeeper who refused shelter when his house was not full, but it cannot be said that the literature or decisions on the subject very clearly define what is meant by the house being full. But it is to be noted that the words always are that the "house" must be full, not that the "bedrooms" must be full: (*Roll. Abr. F. 3, pl. 1*). I submit that a house is not full when several of its rooms are empty, and that a traveller, if he chooses to put up with the inconvenience, is entitled to claim shelter for the night in a sitting-room just as much as in a bedroom. The extent of the innkeeper's liability is laid down in *Hawkins' Pleas of the Crown* (at p. 714) in these words: "It seems also to be clear that if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at the suit of the party aggrieved, but may also be indicted and fined at the suit of the King. Also it is said that he may be compelled by the constable of the town to receive and entertain such a person as his guest, and that it is no way material whether he have any sign before his door or not, if he make it his common business to entertain travellers." This passage is chiefly useful as showing the serious way in which the common law regarded and the strenuous way in which it enforced the obligation. No doubt since railways were introduced the obligation has not been of the same importance as previously, but now with the cycle and the motor-car road travelling has become common again, and the courts should protect the ancient rights of the traveller. Here the appellant found himself denied shelter at two o'clock on a rainy night. If the law gave him a right to such shelter as the inn could afford, it was a grave wrong on the part of the innkeeper to refuse it. The traveller is entitled at least as much to shelter at night as to shelter during the day, and it does not matter how late it is when he demands it:

Ree v. Ivens, 7 C. & P. 213;

Fell v. Knight, 8 M. & W. 269.

The licensing laws do not affect the point.

English Harrison, K.C. and *B. Burleigh Muir*, for the respondent, were not called upon.

LORD ALVERSTONE, C.J.—In this case the appellant, his motor-car having broken down, arrived at the respondent's inn after midnight, and was, after some discussion, let in for refreshment, but was not allowed to remain. He thereupon brought an action in the County Court contending that the respondent had broken his common law duty as an innkeeper to provide accommodation for travellers, and that the action could be maintained if the respondent had a room of any kind, or at any rate a coffee-room or sitting-room, where he could have remained for the night. The County Court judge found that the respondent's house was full as regarded proper sleeping accommodation; that there was no empty bedroom; that there were two rooms available for the accommodation of the appellant, and that the accommodation was refused. I do not think that the question whether the appellant demanded to take the one sitting-room which was empty was

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submitted to the County Court judge, but I do not wish to decide this case upon any narrow ground, and I will therefore assume in favour of the appellant that there was some place in the house where possibly the respondent might have permitted the appellant to stay for the night. I think it would be straining the common law liability of an innkeeper if we were to hold that the appellant has a good cause of action. The true view of the common law rule, in my opinion, is that an innkeeper may not pick and choose his guests; he must give accommodation to people who come as travellers to his inn and are in a position to pay. I cannot think that the authorities to which we have been referred mean that, where an innkeeper provides a certain number of bedrooms and sitting-rooms for the accommodation of guests, he is under a legal obligation to receive and shelter as many people as the rooms will hold without overcrowding. I do not think that a person who comes to an inn at night has a legal right to demand to be allowed to pass the night in a sitting-room; if the bedrooms are all full, I think the landlord is under no legal obligation to receive and shelter him. He must act reasonably and not captiously or unreasonably refuse to receive guests when he has proper accommodation for them. Here the County Court judge has found in effect that the landlord did not act unreasonably. For these reasons I am of opinion that his judgment must be affirmed.

DARLING, J.—I am of the same opinion. No doubt an innkeeper is bound to provide accommodation for travellers, but it is not his absolute duty to do so at all risks and at all costs. He is bound to provide accommodation only so long as his house is not full; when it is full he has no duty in that respect. The question, then, is, When is an inn to be said to be full? I do not think the old cases can help one very much on this point, because one knew that in olden times people were in the habit of sleeping very many in one room and several in one bed. People who were quite unknown to one another would sleep in the same room, as is done in common lodging-houses at the present time. Therefore, if we got a definition of "full" in one of the old cases of the fourteenth or fifteenth centuries, I should not be surprised to find that what was called "full" then we should now call "indecent overcrowding." It is the habit now of people to occupy separate bedrooms, and it seems to me that, having regard to modern habits, "full" must at present mean "full" in the sense in which a decently conducted inn would be considered full—that is, the house must be considered full when all the bedrooms were occupied, if what the person wanted was to pass the night. There might have been some difficulty here if the appellant had said: "I will take your sitting-room; I do not want to go to bed; I wish to sit up all night." But that difficulty does not arise on the facts of the case. The County Court judge has come to the conclusion that the house was full, having regard to modern habits. He referred to the *Canterbury Tales* of Chaucer and the state of inns in this country when the pilgrims to Canterbury left the Tabard (Prologue to *Canterbury Tales*, vv. 19-20). And counsel for the respondent might have cited an incident in Laurence Sterne's *Sentimental Journey* to show that a room was not considered

then as full which certainly would be considered too full at the present day.

CHANNELL, J.—I agree. *Appeal dismissed.*

Solicitors for the appellant, *George Terrell, Terrell, and Varley.*

Solicitors for the respondent, *Cooper, Turner, and Evans, for Morrison and Nightingale, Reigate.*

Friday, April 18.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

EDWARDS v. CORPORATION OF LIVERPOOL. (a)

Writ of certiorari—Removal of action from inferior court—Common law right—Liverpool Court of Passage—5 Vict. c. lii., ss. 2, 3—56 & 57 Vict. c. 37, s. 5.

At common law a writ of certiorari issues as of right to remove an action from an inferior court to the High Court. The Act 5 Vict. c. lii., s. 2, and the Liverpool Court of Passage Act 1893, s. 5, do not take away this right, but the former Act merely imposes on its exercise the condition that recognisances shall be given unless the judge dispenses with them. The application for the writ is in time, within sect. 3 of the former Act, if it be made within one month of the delivery of the statement of claim.

THIS was an appeal by the plaintiff from an order made by Bucknill, J. in chambers granting to the defendants a writ of *certiorari* to remove the action from the Liverpool Court of Passage to the King's Bench Division.

The action was brought to recover 50*l.* damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendants' servants in causing part of the footway by the George's Dock, Liverpool, to be in a dangerous condition, and permitting the defendants' tramway system to constitute a public danger, and in driving a certain tramcar in a negligent manner.

The writ was issued on the 18th Nov. 1901, and the statement of claim was delivered on the 10th Feb. 1902.

On the 8th March 1902 the defendants applied to Master Lord Dunboyncy for a writ of *certiorari* to remove the action into the King's Bench Division.

The master refused the writ, and, on an appeal by the defendants to Bucknill, J. at chambers on the 14th March, the judge, on the ground that he had no discretion in the matter, ordered the writ to issue, the plaintiff agreeing that recognisances on the part of the defendants should be dispensed with.

The writ was issued on the 17th March, and on the 19th March the writ and return were lodged in the central office.

The plaintiff appealed from the order of Bucknill, J. to the Divisional Court.

The Act 5 Vict. c. lii., a local Act declared public, and entitled "An Act to restrict the vexatious removal of certain actions from the Borough Court of Liverpool," enacted by sect. 2, as follows:

And be it enacted, that no causes depending in the said borough court, in which the debt or damages

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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sought to be recovered shall not exceed fifty pounds, shall be removed by any defendant, before judgment therein, into any Superior Court except in pursuance of a judge's order as hereinafter mentioned, unless the defendant, with two sufficient sureties, such as the said borough court shall allow, shall first be bound to the plaintiff in the cause by recognisance, to be acknowledged in the said borough court, in a sufficient sum, for the payment of the debt or damages and costs in case judgment shall pass against the defendant in the Superior Court, or in case the cause shall be brought back by *procedendo* in the borough court: Provided always that any judge of any of the Superior Courts of common law at Westminster may, in the exercise of his discretion, order a writ of *certiorari* to issue to remove any such cause depending in the said borough court into any Superior Court of common law, without such recognisance as aforesaid, and that such cause may be removed into such Superior Court accordingly.

Sect. 3 of the same Act is as follows:

And be it enacted, that no cause depending in the said borough court shall be removed before judgment therein into any Superior Court, unless the writ for removing such cause shall have been lodged with the proper officer of the said borough court within one calendar month next after the delivery of the declaration or the filing and giving notice thereof, nor unless such writ shall have been lodged with such officer before such action shall have been entered for trial, according to the practice of the said borough court.

The Liverpool Court of Passage Act 1893 (56 & 57 Vict. c. 37) enacts by sect. 5:

It shall be lawful for the High Court or a judge thereof to order the removal into the High Court by writ of *certiorari* or otherwise of any action or matter commenced in the Court of Passage if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose.

H. Solomon Simmons for the appellant.—The order of Bucknill, J. was wrong. The common law right to a writ of *certiorari* to remove an action from the Court of Passage has been progressively curtailed by a series of statutes. It has been taken away in actions in which the claim does not exceed 50*l.* by 5 Vict. c. lii., s. 2, and in all actions by 56 & 57 Vict. c. 37, s. 5, except in cases where the judge deems it desirable that the action shall be tried in the High Court. If the latter section is merely an enabling section, it has no utility. Moreover, the respondents are out of time, as sect. 3 of the former Act says that the writ must be lodged with the officer of the borough court within one month of the delivery of the declaration. That is now impossible. If the grant of the writ is a matter of discretion, I submit that this is not a case in which the discretion should be exercised.

A. J. Ashton for the respondents.—At common law *certiorari* lies as of right to remove the action from any inferior court in England, and that right can only be taken away by express words in a statute:

Cherry v. Endean, 54 L. T. Rep. 763.

To take away the right, a section is required such as the Borough and Local Court of Record Act (35 & 36 Vict. c. 86), s. 12 of the schedule, or the County Courts Act 1888 (51 & 52 Vict. c. 43), ss. 124 and 126. There are no such words in the Court of Passage Acts. The writ issues as of

right with sureties, or with the leave of the judge without sureties. Sureties have been waived in this case.

Simmons in reply.

Lord ALVERSTONE, C.J.—We do not see our way to interfere with the decision of Bucknill, J. I think myself he was right. I think it is clear from Tidd's Practice, and from the series of Acts of Parliament, that there was a common law right to remove these actions from inferior courts, and no doubt the limitations which have been settled one at a time have led to some of the amending statutes. They proceeded by steps. I have looked at two or three of them, and there does not seem to have been any discretion given, in those I have seen, for the court to deal with the cases below the limits which were put. They also impose restrictions as to the application being made before the first step of the trial, and before the plea. I think that all those progressive interferences or limitations point to the existence of a right which was being cut down. That being so, I think we must take it that before the Act 5 Vict. c. lii. there was a right to remove, except in the cases where the earlier statutes limited it. Then the reason for the Act (5 Vict. c. lii.) seems to me to be reasonably plain. It deals with actions of a much larger class than the previous Act, which had only gone up to 15*l.* It deals with cases of 50*l.* It says that, as a condition to the exercise of the right in those cases, there shall be recognisances given, with power in the judge to dispense with the recognisances. Then came the Act of 1893, and, without saying it did not affect certain other matters which are possibly covered by the previous Act, it seems to me to be going too far to say that the language is sufficient to take away the right that previously existed. I must say that the argument as to legislation in regard to County Courts and the borough and local courts of record point to the recognition, in various circumstances, of the existence of this right. I therefore think that the order of Bucknill, J. is right. As regards the month, I think that that is not a sufficient ground to interfere, having regard to the fact that the application before the master was within the time, and the order made by Bucknill, J. was the order that the master ought to have made. It is, after all, a technical matter in this particular action, and I do not think we ought in any event to give effect to that contention, in order to reverse the order of Bucknill, J. I think therefore the appeal should be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

Appeal dismissed. Leave to appeal refused.

Solicitors for the appellant, *Milner and Bickford*, for *Edward Lloyd*, Liverpool.

Solicitors for the respondents, *F. Venn and Co.*, for *Pickmere*, Liverpool.

PRIV. CO.] COMMISSIONERS OF TAXATION v. TRUSTEES OF ST. MARK'S GLEBE. [PRIV. CO.]

Judicial Committee of the Privy Council.

April 15 and May 14.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY, and Sir FORD NORTH.)

COMMISSIONERS OF TAXATION v. TRUSTEES OF ST. MARK'S GLEBE. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Land and Income Tax Assessment Act 1895, s. 11, sub-s. (v.)—Lands used in connection with charitable purposes—Exemption.

Glebe lands were in part let on building leases, and the remainder were waste lands, not physically occupied or used for any purposes. The rents received for the portions let were applied by the respondents, as trustees, for charitable purposes connected with a church.

Held (reversing the judgment of the court below), that the lands were not "occupied or used exclusively for or in connection with public charitable purposes," or a church, within the meaning of sect. 11, sub-sect. (v.) of the Land and Income Tax Assessment Act of 1895 so as to be exempt from land tax.

THIS was an appeal from the decision of the Supreme Court of New South Wales (Darley, C.J., Owen and Cohen, JJ.), upon a special case stated by the Court of Review, under sect. 45 of the Land and Income Tax Assessment Act of 1895. The question raised by the special case was whether certain glebe lands by Crown grant vested in the respondents for parochial church purposes in connection with the Church of England, were in the circumstances stated exempted from assessment for land tax. The Supreme Court decided that the glebe lands were exempted.

The decision of the question involved the construction of part of sect. 11 of the Land and Income Tax Assessment Act of 1895, which so far as is material, is as follows (Part II. Land Tax):—

Sect. 11. The lands and classes of lands hereinafter specified are exempted from assessment for taxation under this Act—viz.: (v.) Lands occupied or used exclusively for or in connection with public pounds, public hospitals whether supported wholly or partly by grants from the Consolidated Revenue Fund or not, which are not a source of profit or gain to the users or owners thereof, benevolent institutions, public charitable purposes, churches, chapels for public worship, universities, affiliated colleges, the Sydney Grammar School, mechanics' institutes and schools of arts, and lands on which are erected public markets, townhalls, or municipal council chambers or any lands the property of or vested in any council or municipality, public hospital, university or affiliated college.

The facts were as follows:—

By Crown grant dated the 3rd June 1857, the object of which as stated therein, was to promote religion and education in New South Wales, certain lands were vested in trustees nominated and appointed under and by virtue of the Act 8 Will. 4, No. 5, and at the date of the assessment hereinafter mentioned the said lands were vested in the respondents as the successors of the

original trustees. The said lands were so vested both in the original trustees and in the respondents, their successors "upon the trusts for the appropriation thereof as the glebe annexed to the church of the United Church of England," at Greenoaks, Darling Point, and known as St. Mark's, for the purposes set out in the said Crown grant, in conformity with the provisions of the said Act and of the Act 7 Will. 4, No. 3, as far as the same might apply to the trusts of the said grant, and for no other purposes whatsoever.

At the date of the assessment hereinafter mentioned, a portion of the lands had been demised by the respondents on building leases, at a rent payable to the respondents, and the lessees thereunder had erected private dwellings on such demised premises; another portion had been also demised by the respondents on building leases, at a rent payable to the respondents, but the building lessees had not built thereon and did not otherwise occupy the same; the residue of the lands were waste lands which were not physically occupied or used for any purpose. The demises referred to had been made under statutory powers hereinafter set out, and the rents payable thereunder had been paid to the respondents, and applied by them to the purposes of the trusts contained in the Crown grant.

The lands were assessed for land tax by the appellants; the respondents appealed to the Court of Review, and contended upon the facts above stated that the whole of the lands were lands occupied or used exclusively for or in connection with public charitable purposes, and as such were exempt from assessment under sect. 11, sub-sect. (v.) of the Land and Income Tax Assessment Act of 1895. The judge of the Court of Review (Murray, J.), after hearing the parties, dismissed the appeal, but stated a special case hereinbefore referred to.

The following were the questions proposed in the special case: (1) Was I right in holding that only such lands as were directly or physically occupied or used for or in connection with a public charitable purpose were exempt from assessment under the said sub-section? or (2) were the demise of the said lands and the receipt and application of the rents thereof by the appellants (the present respondents) as aforesaid, an occupation or exclusive user of the said lands, or any of them, for a public charitable purpose within the meaning of the said sub-section? (3) Was the possession of the said waste lands as aforesaid an occupation or exclusive user of the said waste lands for or in connection with public charitable purposes, within the meaning of the said sub-section?

The demises hereinbefore referred to were granted pursuant to the powers contained in the Act 8 Will. 4, No. 5, s. 21.

The Acts of 7 Will. 4, No. 3, and 8 Will. 4, No. 5, were repealed by the Act 61 Vict., No. 16. By sect. 2 of the last-mentioned Act it was, however, provided in effect that all lands held by trustees upon trust for any parochial church purpose in connection with the Church of England in any diocese should be held subject to the provisions of any ordinance in force for the time being in the diocese freed and discharged from the provisions of the trust deed and of the said Acts, but not diverted from the purposes to which the said lands were respectively devoted.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.
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At the time of the assessment in question there was in force in the diocese an ordinance, known as the Sydney Church Ordinance 1891, containing provisions not materially differing from those contained in sect. 21 of the Act 8 Will. 4, No. 5.

The special case came on for hearing on the 24th Oct. 1900. The Supreme Court decided all the questions in favour of the present respondents. All the learned judges concurred in holding that the said glebe lands were exempt from assessment for land tax, because they were used exclusively for or in connection with the church.

The Commissioners of Taxation appealed from the decision.

Asquith, K.C. and *Vaughan Hawkins* appeared for the appellants.

Cohen, K.C. and *T. T. Paine* for the respondents.

In the course of the argument the case of *Moran v. Commissioners of Taxation* (19 N. S. W. L. Rep. 189) was referred to.

Asquith, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 14. — Their Lordships' judgment was delivered by

LORD DAVEY.—This is an appeal from the decision of the Supreme Court of New South Wales, upon a special case stated by the Court of Review, under sect. 45 of the Land and Income Tax Assessment Act of 1895. The question in substance raised by the special case was whether certain glebe lands by Crown grant vested in the respondents for parochial church purposes in connection with the Church of England, were in the circumstances stated in the special case exempted from assessment for land tax. The Supreme Court decided that the glebe lands were exempted and the commissioners have appealed. The decision of the question depends on the construction of sect. 11, sub-sect. (v.), of the Land and Income Tax Assessment Act 1895, which is as follows: [His Lordship read the section set out above.] Are the lands in question "occupied or used exclusively for or in connection" with public charitable purposes or a church? The lands (in area about forty acres) were vested in trustees appointed under an Act of 8 Will. 4, No. 5, by Crown grant of the 3rd June 1857. The object of the grant was therein stated to be to promote religion and education in New South Wales, and the trusts were declared to be "for the appropriation thereof as the glebe annexed to the Church of England" at Green-oaks, Darling Point, and known as St. Mark's, in conformity with the provisions of the said Act and of another Act of 7 Will. 4, No. 3, so far as applicable. By sect. 21 of the Act 8 Will. 4, No. 5, trustees were empowered with certain consents to demise glebe lands for terms of years and apply the rents and profits (1) in paying an annual sum of 150*l.* a year to the officiating minister of the church as an allowance for the glebe; (2) in building or enlarging the church to which the glebe is annexed, or a residence for the clergyman; (3) in or towards building or enlarging a church in another place in the same township or district, and paying a stipend to the officiating minister; (4) with the consent of the bishop in or towards the building of other churches and

residences for clergymen and endowing the officiating minister thereof. Pursuant to this power the glebe lands of St. Mark's have been subdivided into blocks for sale or to let on building leases. Some of the blocks have been demised by the respondents on building leases and the lessees have erected private dwellings thereon. Others of the blocks have been demised on building leases but have not yet been built on, and the balance of the lands are waste lands, and are not (to use the language of the special case) "physically occupied or used for any purpose." On these facts the Supreme Court has held that the lands are "used in connection with" the charitable purposes of the Crown grant. It cannot be denied that the words in themselves and without a context are capable of that construction. But on reading the whole of the sect. 11, sub-sect. (v.) of the taxing Act their Lordships think that the words point rather to the use and occupation of the land itself, and do not *prima facie* apply to the use or purpose to which the rents and profits derived from the land may be applied. A private dwelling-house is used and occupied by the owner or lessee of it as a residence for himself and his family, and it would in the opinion of their Lordships be a forced construction to say that it was used by the lessors for their own purposes, because they apply the rent which they receive in a particular way. If it be said that the land is used by the trustees though not by the lessees for the charitable purpose the answer would seem to be that the land is, strictly speaking, not used by the trustees at all. They have parted with the use and occupation of it during the term of the lease. It is the money derived from the rents and profits which they use, and not the land. Looking at the context, it is to be observed that lands used "for or in connection with" public hospitals, universities, and affiliated colleges are in the first instance exempted, and later in the section as a separate exemption "lands the property of or vested in" any public hospital, university, or affiliated college are also exempted. According to any admissible use of language the latter exemption must be intended to cover something not included in and different from that comprised in the first exemption. But there is no similar exemption of land the property of or vested in churches or charitable trustees generally. The words "for or in connection with" (say) a hospital or a church are probably intended to include not only the actual site of the hospital or church, but also other buildings or land occupied in connection with the principal building, as, for example, land used for a residence for the head or minister, or a room for church meetings or other similar purposes. In short, their Lordships, while admitting that the words are not free from ambiguity, think that they should be construed strictly. If it had been intended to include all lands which are vested in or held as an endowment only of churches, grammar schools, and the like they cannot think that the Legislature would not have found apt words to express its meaning. As to the lands which are not let the special case finds that they are not occupied or used for any purpose. They are not therefore, on the construction which their Lordships have given to the words of the section, within the exemption. Their Lordships will therefore humbly advise His Majesty that the order of the

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Supreme Court should be reversed, and question 1 in the special case should be answered in the affirmative and questions 2 and 3 in the negative, and that the present respondents should pay the costs of the hearing in the Supreme Court. The appellants will pay the costs of this appeal, regard being had to the terms on which special leave to appeal was given.

Solicitors: for the appellants, *Light and Galbraith*; for the respondents, *Paines, Blyth, and Huxtable*.

April 16, 17, and May 14.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY, and Sir FORD NORTH.)

SPURRIER AND ANOTHER v. LA CLOCHE. (a)

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Fire insurance—Arbitration clause—English contract—Law of Jersey.

A policy of insurance against fire upon property in Jersey, issued by an English office, in the English language, but executed in Jersey, was made subject to a condition that no action should be brought for any money payable under the policy until the liability and the amount had been settled by arbitration; and it was further provided that the submission to arbitrators should be subject to the provisions of the Arbitration Act 1889, and might be made a rule of the High Court of Justice.

Held (reversing the judgment of the court below), that the contract was governed by the law of England, and not by the law of Jersey.

THIS was an appeal against two judgments of the Superior Number of the Royal Court of Jersey, delivered respectively on the 3rd Dec. 1900 and the 5th Dec. 1900, affirming two interlocutory judgments of the Inferior Number of the Royal Court given on the 6th and 16th Nov. 1899 respectively, and a final judgment of the Inferior Number given on the 6th Nov. 1900.

The appellants were agents in Jersey of the Sun Fire Office, which was a corporation carrying on the business of fire insurance.

On the 4th Jan. 1897 the respondent effected in the island of Jersey with the appellants as such agents a policy of assurance against fire on certain postage stamps for the sum of 1000*l.* at the annual premium of 2*l.* 5*s.* The policy was signed by both appellants.

The respondent duly paid the premium and the policy was, on the date of the fire hereinafter mentioned, a valid and subsisting policy.

On the 17th Dec. 1898 the stamps were destroyed by fire at the house of the respondent in Jersey, and the respondent without delay gave notice of his loss to the appellants and claimed the sum of 1000*l.* The Sun Fire Office delayed to satisfy the respondent's claim from Dec. 1898 until May 1899. On the 17th May 1899 the respondent, acting under clause 12 of the policy, appointed one Peter Philip Guiton, of Jersey, to be arbitrator, and notified the Sun Fire Office of such appointment. The Sun Fire Office thereupon appointed one Arthur Thwaites, of London, to be the second arbitrator under the said clause,

and required the arbitrators to appoint an umpire. Arthur Thwaites submitted to Peter Philip Guiton the names of three English barristers, all practising in London, to which names Peter Philip Guiton objected, and required Arthur Thwaites to agree to the appointment as umpire of some local man, but Arthur Thwaites refused to agree to such an appointment. No umpire was ever appointed by the arbitrators.

On the 30th Sept. 1899 the respondent instituted proceedings against the appellants in the Royal Court of the Island of Jersey to recover (*inter alia*) the sum of 1000*l.* upon the policy. The appellants appeared and (reserving all other defences of law and of fact) admitted that the Royal Court had jurisdiction over the whole matter but objected that the respondent had no right to proceed with his suit until a preliminary condition had been fulfilled that is to say until the amount (if any) due under the policy had been fixed by arbitrators or umpire pursuant to clause 12 of the policy.

On the 9th Oct. 1899 the Royal Court upon hearing the objection of the appellants ordered that the arbitrators should be summoned to appear before the Royal Court.

On the 6th Nov. 1899 the arbitrators appeared before the Royal Court and Arthur Thwaites denied the jurisdiction of the Royal Court, and refused to acknowledge its competence to interfere with him as arbitrator appointed by the appellants. The Royal Court thereupon ordered the appellants to appoint in place of Arthur Thwaites another arbitrator who should in his capacity of arbitrator recognise the jurisdiction of the Royal Court and that in default of so doing the appellants should plead to the action. Leave was given to the appellants to appeal to the Superior Number of the Royal Court *en fin de cause*. The appellants declined to appoint another arbitrator in place of Arthur Thwaites, and on the 16th Nov. 1899 Peter Philip Guiton and Arthur Thwaites were dismissed from the suit and the parties were sent before the Greffier, before whom evidence by both parties was received.

On the 6th Nov. 1900 the Inferior Number of the Royal Court by a final judgment condemned the appellants to pay to the respondent the sum of 1000*l.*, and on the 4th Dec. 1900 the Appeal Court of the Royal Court confirmed the two interlocutory judgments aforesaid and also the final judgment.

Cohen, K.C. and Wood Hill appeared for the appellants, and argued that there was no right of action upon the policy unless and until the liability of the company in respect of the claim had been determined by arbitration in accordance with the twelfth condition of the policy; and that the company were always ready and willing to comply with the condition, and the respondent was not. They referred to

Oaledonian Insurance Company v. Gilmour, (1893) A. C. 85;

Hamlyn and Co. v. Talisker Distillery Company, 71 L. T. Rep. 1; (1894) A. C. 202;

Scott v. Avery, 5 H. L. C. 811;

Mackay v. Dick, 6 App. Cas. 251.

R. Storry Deans, for the respondent, contended that the condition was illegal by the law of Jersey as tending to oust the jurisdiction of the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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court, and went beyond the decision in *Scott v. Avery*. The appellants were not ready and willing to do all that was necessary for the proper conduct of the arbitration. By the law of Jersey the appellants are personally liable, and the action is against them. The conduct of Thwaites amounted to misconduct, and justified the court in removing him. He referred to

Elliott v. Royal Exchange Assurance Company, 16

L. T. Rep. 399; L. Rep. 2 Exch. 237;

Trainer v. Phoenix Fire Assurance Company, 65

L. T. Rep. 825;

East and West India Dock Company v. Kirk and

Randall, 58 L. T. Rep. 158; 12 App. Cas. 738.

No reply was called for.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 14. — Their Lordships' judgment was delivered by

LORD LINDLEY.—The question raised by this appeal is whether the Royal Court of Jersey has given due effect to an arbitration clause contained in a policy of assurance against loss by fire. The policy in question is dated the 4th Jan. 1897. It is a fire policy for 1000*l.* issued by the Sun Fire Office in favour of a Jersey gentleman named La Cloche on a collection of foreign stamps. The policy is in the English language, but it was executed in Jersey by the agents of the company. By the terms of the policy the company agrees with the assured subject to the conditions indorsed to pay what may become due in case of loss out of its capital stock and funds. The witnessing part runs thus:

In witness whereof I for and on behalf of the said company have hereto set my hand and seal this 4th day of January 1897. Signed SPURRIER and LE CHONIER, agent to the Sun Fire Office. Signed and sealed at Jersey, where no stamps are in use, in the presence of Spurrier, Jersey, and then there was a seal.

The conditions indorsed are fourteen in number. They are in the English language. The twelfth condition, which is the only material one, is as follows:

12. If any difference shall at any time arise between the company or the insured or any claimant under this policy as to the liability or the amount or extent of the liability of the company in respect of any claim for loss or damage by fire or as to any question, matter, or thing, concerning or arising out of any claim for loss or damage under this policy, every such difference as and when the same arises, shall be referred to the arbitration of some person to be appointed in writing by both parties, or two indifferent persons, one to be appointed in writing by the party claiming and the other by the company, within one calendar month after either party has been required so to do by the other party, and in case of disagreement between the arbitrators then to the decision of an umpire, who shall have been appointed in writing by the arbitrators before entering on the reference, and shall sit with the arbitrators, and preside at their meetings during the reference, unless the arbitrators shall otherwise agree in writing, and the death of any of the parties shall not revoke or affect the authority or powers of any arbitrator or umpire, and each party shall bear or pay his own costs of the reference and a moiety of the costs of the award, and in all other respects the submission to arbitrators shall be subject to the provisions of the Arbitration Act 1889, or any statutory modification thereof, and may be made a rule of Her Majesty's High Court of Justice

in any division, upon the application of either of the parties. And it is hereby expressly declared to be a condition precedent to the liability of the company in respect of any claim under this policy that the claim shall if not admitted, be referred to and determined by such arbitrator, arbitrators, or umpire as aforesaid, and the claimant shall have no right of action against the company except for the amount of the claim if admitted, or the amount, if any, awarded by the award of such arbitrator, arbitrators, or umpire.

The first question which arises is whether this is to be regarded as an English contract or as a Jersey contract. Their Lordships are of opinion that although this policy was made in Jersey and any money payable under it would have to be paid to the assured in Jersey the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions all show that the contract between the parties is an English contract, and that wherever sued upon its interpretation and effect ought as a matter of law to be governed by English and not by Jersey law. The intention of the parties is too plain to be mistaken; the contract to pay out of the funds of the company is of itself very significant; and the reference to the English Arbitration Acts shows that the arbitration proceedings were to be conducted according to English law and no other. That the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy: (see *Hamlyn and Co. v. Talisker Distillery Company*, 71 L. T. Rep. 1; (1894) A. C. 202), and the intention here is unmistakable. It does not follow that the agents who signed the policy in Jersey were not liable to be sued in Jersey upon it; as their principals were in this country. But whatever would be a defence by the law of England for the company on the merits to an action against the company on the policy would be a defence for the agents if sued in Jersey for the nonpayment of money payable under the policy by the company. It follows from these observations that no action could be sustained in Jersey any more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: (see *Scott v. Avery*, 5 H. L. C. 811; and *Caledonian Insurance Company v. Gilmour* (1893) A. C. 85). The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract. Mr. Deane contended that the arbitration clause was invalid by the law of Jersey because not only the amount payable, but also the liability to pay was to be decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the court, and went further than *Scott v. Avery*. But if a contract is so framed as to give no cause of action unless a certain condition is performed no question arises as to ousting the jurisdiction of any court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incompetence of a particular court to enforce it that the Court of Exchequer went wrong in *Scott v. Avery*. The oversight was pointed out and corrected in the Exchequer Chamber (8 Ex. 487), and, again in the House of Lords. Maule, J. put

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the matter in the true light in the Exchequer chamber; he there said: "There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency; but they cannot legally agree that when it is payable no action shall be maintained for it": (8 Ex. 499). Mr. Deans cited no authority to show that by the law of Jersey such a condition as that which has to be considered in this case is invalid, and could be rejected even in a contract governed by the law of Jersey. Judging from the decision in the case of *Southern v. Voisin* (July 5, 1892), it would seem that the law as laid down in *Scott v. Avery* prevails in Jersey. But in those cases the question of liability was not left to the arbitrator. However, even if the law of Jersey had been shown to be what Mr. Deans contended it was, the answer to his argument would still be that this policy is governed by the law of this country, and not by the law of Jersey; and that the distinction he drew between arbitrations in which liability is left to arbitrators, and those in which the amount payable only is so left is immaterial where an award settling the amount is a condition precedent to the right to payment of anything. The foregoing observations really dispose of this appeal. What happened was as follows: In Dec. 1898 a fire occurred in the house of the assured, and his collection of stamps was damaged or destroyed. He gave notice of his loss and claimed 1000*l*. He appointed a Jersey gentleman (Guiton) his arbitrator. The Sun Fire Office appointed an English gentleman (Thwaites) their arbitrator. The arbitrators could not agree upon an umpire. Thwaites wanted an English barrister, Guiton wanted some gentleman resident in Jersey which would save expense. Neither can be blamed for not giving way to the other. No application was made under the English Acts to the courts of this country to appoint an umpire. The Company could not proceed adversely to the assured, who was beyond the jurisdiction of the English courts, and the assured preferred to apply to the court in Jersey. Failure to agree upon an umpire brought the arbitration proceedings to a deadlock. On the 30th Sept. 1899 the assured brought an action in the Royal Court in Jersey on the policy against the agents, who signed it, and he claimed 1000*l*. The defendants relied on the 12th condition and the absence of any award as a defence to the action. On the 9th Oct. 1899 the Royal Court ordered that the arbitrators should be summoned to appear. On the 6th Nov. they did appear. Thwaites appeared by counsel and objected to the jurisdiction of the court over him. The court then ordered the defendants to appoint another arbitrator in his place. The defendants declined to do this, and the arbitrators were then dismissed from the action, which was remitted to the Greffier to assess the amount payable to the plaintiff. On the 6th Nov. 1900 the plaintiff recovered judgment for 1000*l*, and on the 4th Dec. 1900 the Appeal Court confirmed the preceding orders and judgment. The present appeal is from this judgment of the Appeal Court and from the orders and judgment thereby confirmed. On the merits of the case their Lordships do not think it necessary to add to what has already been said. No reasons are given for the judgment appealed from, and their Lordships cannot make any observations upon them. The judgment appears to them erroneous in principle.

The order of the 6th Nov. 1899 requiring the defendants to appoint another arbitrator in the place of Mr. Thwaites appears to their Lordships to be erroneous for two reasons, viz., (1) because Mr. Thwaites had done nothing to justify his removal, and (2) because, if he had, the court in Jersey was not the proper tribunal to remove him. The English Arbitration Act conferred no such power on any foreign court. Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, and that the judgment of the Royal Court of Jersey of the 14th Dec. 1900, and the orders and judgment thereby affirmed, ought to be reversed, and that judgment ought to be given for the defendants with costs. The respondent having obtained leave to defend this appeal *in forma pauperis*, no order can be made as to the costs of the appeal.

Solicitors for the appellants, *Dawes and Sons*.

Solicitors for the respondent, *Hargreaves and Joblin*.

April 17, 18, and May 14.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY, and Sir FORD NORTH.)

DOUGLAS v. SANDER AND CO. (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

Law of Natal—Fraud—Actio doli—Roman-Dutch law—Prescription.

Where a contract is induced by fraud, and the same fraud operates to deprive the plaintiff of other remedies, an action for deceit will lie by the Roman law, and by the Roman-Dutch law of Natal such action need not be brought within two years.

Judgment of the court below reversed.

Semble, that by the Roman-Dutch law of Natal an actio doli will lie in any case of fraud, even though other remedies are open to the plaintiff.

THIS was an appeal from a judgment of the Supreme Court of Natal (Finnemore and Beaumont, JJ.), who had reversed a judgment of the Circuit Court of Durban (Mason, J.) in favour of the defendant (the present appellant) upon a counter-claim.

The facts and arguments appear fully from the judgment of their Lordships.

Hume-Williams, K.C. and *Arnold Statham* appeared for the appellant.

Loehnis for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 14.—Their Lordships' judgment was delivered by

LORD ROBERTSON.—On the 4th May 1897, the respondents, who were carriers at Durban, in the colony of Natal, sold to the appellant the whole of their business and plant for 4400*l*. The appellant took possession and carried on the business in the buildings which had been occupied by the respondents for that purpose. Those buildings were held by the respondents under a lease from one Acutt, and it had been contemplated that the appellant should take over the lease. Owing to the disputes out of

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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which the appeal has arisen, this was never done; and Acutt compelled payment from the respondents of the rent due for the period of the appellant's occupation. On the 2nd April 1900 the respondents sued the appellant to recover the sum thus paid by them; and in answer to this suit the appellant made, in reconvention, a claim for 750*l.* as damages. The present appeal relates solely to this claim in reconvention; and no question is raised as to the merits of the principal suit. On the 3rd Aug. 1900 the judge of the Durban Circuit Court gave judgment in the appellant's favour for 600*l.* On the 2nd Nov. 1900 the Supreme Court of the colony reversed this judgment and disallowed the claim. The present appeal is to have the Circuit Court's judgment restored. The appellant's demand is clearly set out in his claim in reconvention, and is expressly made for damages for fraud. The fraud alleged consisted in a false statement by Franz Sander, one of the partners of the respondent's firm, which statement induced the appellant to enter into the contract of sale of the 14th May 1897, whereby he suffered damage. The statement made by Sander was that no *post-mortem* examination had been held of any horse belonging to the respondents, whereas the fact was that such a *post-mortem* examination had, to the knowledge of Sander, been held and had proved the horses of the respondents' establishment to be infected with glanders, at the time of the negotiations for the sale. This disease, having, by that time, got hold of the stables, again broke out in the time of the appellant's occupation and caused a loss in horses amounting to the sum of damages claimed. The answer made by the respondents to this claim was that at the time of the sale of the business and plant, the appellant was well aware that sickness had occurred among the horses, that several animals had been shot and that a *post-mortem* had been held which clearly "established the existence of the disease called glanders." On all the questions raised by the pleadings the evidence was highly conflicting, but at their Lordships' Bar the conflict was greatly narrowed by the admission of the respondents that Sander did make to the appellant the false statement that no *post-mortem* examination had been held, although he had, in fact, been present at a *post-mortem* examination, and knew that it revealed glanders. The sole question therefore came to be whether in fact the appellant knew before the bargain that there had been glanders in the stable in 1897. If he did, then plainly the false statement did not induce the contract. The appellant had for some time prior to the bargain in question acted as manager for Benningfield and Co., who were carriers at Durban, and had, besides, business concerns at Johannesburg. The respondents' firm consisted of Franz Sander, whose fraud is the central fact in the case, and R. H. Tatham. [His Lordship discussed the evidence, and continued as follows:] Their Lordships consider that the evidence justifies the conclusion of the judge who heard the witnesses, and they hold that the appellant had no independent knowledge preventing his accepting the statement made by Tatham, his vendor, according to Tatham's own testimony. This conclusion is supported by the admission of Sander that the price paid was a high price, and one

which he for his part would not have given if he had known there were glanders in the stable. On a specific point made by the respondents about a notice of the outbreak appearing in a local newspaper, their Lordships have no reason to reject the explanation given by the appellant and accepted by the Circuit Court that he was at Johannesburg at the time and did not see it. The incredulity expressed by the Supreme Court does not rest on any positive basis, and has no affirmative evidence to support it, having regard to the desperate position of both Tatham and Sander as witnesses of credit. The respondents, however, have maintained an argument against the present claim which is independent of testimony. They say that the appellant has lost his remedy, and that the present claim is untenable in Roman-Dutch law. Shortly stated, the argument is as follows: In Roman law a person induced by fraud to enter a contract may elect to set aside the contract by the *actio redhibitoria*, in which case he must sue within six months, or he may sue in an action *quantum minoris* to recover the difference between what he ought to have had and what he has had, in which case he must sue within twelve months. The appellant, say the respondents, was in this case; according to his own showing, he might have had either action, and he has sued in neither. What he has done is to sue in an *actio doli* (or action of deceit), but this remedy is only given to those to whom no other action was ever available; and that, as already pointed out, is not the case of the appellant. Now, assuming that the question is to be determined exactly as if it had occurred in Rome and before the praetor, one important qualification must be made of the doctrine thus stated. In the chapter in the Digest *De Dolo Malo*, it is indeed laid down that if another action had been open to the plaintiff the *actio doli* must be refused. But the text goes on to give the reason—*sibi imputet* that he has not a remedy—"qui agere supersedit," and then it is added, "*nisi in amittenda actione dolum malum passus est.*" It thus appears that if the same fraud which has induced the contract also operates to deprive the plaintiff of his other remedies, the praetor will give the *actio doli*. This is the same thing as saying that if the plaintiff only discovers the fraud more than a year after the bargain, the *actio doli* is open to him. Now, their Lordships are satisfied that this is the case of the appellant. He says, and their Lordships believe, that he only learned in Aug. 1898 of the *post-mortem* examination and of the fact of glanders, and that was more than a year after the date of the sale. The *actio doli* would thus be open to the appellant even on pure Roman law as administered by the praetor. To the objection that the *actio doli* was itself limited to two years, the Supreme Court give the answer that in Roman-Dutch law the Roman rule has been departed from in favour of the general prescription of thirty-years; and their Lordships see no reason to question this conclusion. On these grounds the action is defensible and the decree given by the Circuit Court was right. Their Lordships think it right, however, to add that they do not desire to assert as on their own authority that an action of deceit in Natal will only lie under the conditions stated in the texts of the Roman law. The argument at their Lordships' Bar on this matter was, to say

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the least, not copious; and no reference was made to authorities more modern than Van Leeuwen. On such an argument they would be reluctant to stereotype according to ancient procedure what is a matter of practice affecting mercantile transactions, the more especially as the reluctance of the praetor to grant the *actio doli* was expressly rested on the ground that it was *actio famosa*, involving infamy to the person against whom fraud was proved. This consequence would not follow a successful action of deceit in Natal; and it is impossible to avoid asking whether this chapter of the Roman texts is part of the living Roman-Dutch law, and whether the action of deceit is hampered for those obsolete reasons, the more especially seeing that in the comparatively modern work of Van Linden an action of damages is spoken of as the normal remedy for fraud inducing a contract. In the meantime it is not necessary to enter on these questions, for the present case admits of decision on grounds consistent with the archaic procedure invoked. Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court ought to be reversed with costs, and the judgment of the Circuit Court of Durban restored. The respondents will pay the costs of the appeal.

Solicitors for the appellant, *Blyth, Dutton, Hartley, and Blyth*.

Solicitors for the respondents, *Harrison and Powell*.

Supreme Court of Judicature.

COURT OF APPEAL.

May 5, 6, and 15.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

CRICKITT v. CRICKITT (Eliza Crickitt intervening, (a))

APPEALS FROM THE PROBATE DIVISION.

Practice—Married woman—Intervener in probate action—Costs of "proceeding"—Property subject to restraint on anticipation—Married Women's Property Act 1893 (56 & 57 Vict. c. 63), s. 2—Order XII., r. 23.

The words "any action or proceeding instituted by a woman," in sect. 2 of the *Married Women's Property Act 1893*, include an intervention by a married woman in a probate action; and the court has, therefore, jurisdiction, in the case of such action being dismissed with costs, to order payment, as and from the date of the intervention, of the costs of the opposite party out of property of the married woman which is subject to a restraint on anticipation.

Decision of the President (Sir Francis Jeune) affirmed.

ANNIE BLANCHE CRICKITT died on the 6th Feb. 1901, and the plaintiff in this probate action, Tom Shelton Crickitt, a solicitor, claimed to be one of the three universal legatees of an undated will, made by her in the month of May or June 1891, which he propounded.

The defendant, Henry Blackburn Crickitt, was the father of the deceased, and he opposed the claim to probate as her next of kin, and prayed the court to grant letters of administration on the ground that she had died intestate.

He pleaded (1) that the alleged will was not duly executed according to the Wills Act 1837, and was not executed in May or June 1891; (2) that the deceased was not of sound disposing mind, memory, and understanding; (3) that the deceased did not know and approve of the contents of the alleged will; and (4) by way of counter-claim he claimed as the father of the deceased to be her next of kin and that she died intestate.

The testatrix's mother, the wife of the defendant, from whom she was living apart, was one of the other legatees, and took an equal share with the plaintiff under the will. She was entitled to the income of property for her separate use without power of anticipation.

After the pleadings in the action had been delivered she applied for and obtained an order, under Order XII., r. 23, of the Rules of Court 1883, giving her liberty to intervene in the action "as a plaintiff."

The intervener subsequently delivered to the defendant a pleading "adopting the pleadings of the plaintiff."

The action came on for trial before the President (Sir Francis Jeune) and a jury.

The jury, after hearing the evidence of the plaintiff and other witnesses, stated that they had heard enough; and they found that the alleged will had not been duly executed. The President thereupon gave judgment for the defendant, with costs.

Counsel for the defendant asked for an order for costs against the intervener under sect. 2 of the *Married Women's Property Act 1893*, which gives the court jurisdiction to order payment of the costs of the opposite party out of property of a married woman which is subject to a restraint on anticipation.

The President made the order against the intervener as asked.

The intervener and the plaintiff appealed separately, the intervener's appeal being heard first.

Lord Coleridge, K.C. (with him Barnard Lailey) for the appellant.—In the face of the authorities, it is, I submit, impossible to contend that this intervention by Mrs. Eliza Crickitt under Order XII., r. 23, is an action or proceeding instituted by a married woman within the meaning of sect. 2 of the *Married Women's Property Act 1893*:

Hood-Barrs v. Cathcart, 71 L. T. Rep. 11; (1894) 3 Ch. 376;

Hood-Barrs v. Cathcart, 72 L. T. Rep. 427; (1895) 1 Q. B. 873;

Moran v. Place, 74 L. T. Rep. 223, 667; (1896) P. 214;

Hood-Barrs v. Heriot, 71 L. T. Rep. 299; (1897) A.C. 177;

Nunn and Co. v. Tyson (*Tyson, claimant*), 85 L. T. Rep. 123; (1901) 2 K. B. 487.

Then I say that, even if there is jurisdiction in a case of intervention in a probate action to give against the intervener the costs of the opposite party, such costs should be limited to the costs incurred after the date of the intervention.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Sir Edward Clarke, K.C. and J. C. Priestley (with them Gill, K.C.) for the respondent the defendant.—If the court accedes to the appellant's contention, it will cut down sect. 2 of the Married Woman's Property Act 1893 in a very serious manner. The object of the section is that a married woman who has been an effective plaintiff shall be liable for costs. The intervener has adopted the pleadings of the plaintiff, and to all intents and purposes she is the person who instituted the proceeding. She is practically the original party to the litigation. She is the substantial person, and the only substantial person, so far as costs are concerned. [COLLINS, M.R.—Let us see when the right of intervention was first given.] On this point they referred to

Rules and Orders of the Court of Probate 1862, r. 6;

Tennant v. Cross (Thorold intervening), 12 P. Div. 4.

Lord Coleridge, K.C. replied. *Cur. adv. vult.*

May 6.—The following judgments were delivered:—

COLLINS, M.R.—This is an appeal from a decision of the learned President upon a matter of practice. One Eliza Crickitt intervened in a probate suit, and she did so under an order made at her own instance, and which empowered her to intervene as plaintiff. By another order she adopted the pleadings up to that point of the plaintiff. The case proceeded to judgment. The plaintiff and the intervener failed, and the court pronounced against the will. The learned President then, at the instance of counsel for the defendant, made an order under sect. 2 of the Married Woman's Property Act 1893 whereby he imposed upon the intervener the burden of paying the costs of the defendant out of her separate estate. The words of that section are these:

In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

On the footing that this was an "action or proceeding instituted" by her, the order made was for the payment of the costs of the opposite party out of her property subject to restraint on anticipation. But on appeal it was said by Lord Coleridge, who appeared for the appellant, and who called our attention, I think, to all the authorities upon the subject, that this is not a case to which the section of the Act of 1893 applies, because this is not an action in the true sense of the section, as interpreted by the cases, which can be said to be instituted by a woman. He says that, in order to give the right conferred by the section against a married woman, you must find out whether she is a real actor in the matter, the veritable plaintiff who has initiated or instituted the proceedings; and that that does not apply to an intervener who has intervened into a ready-made situation and simply taken a part—active or neutral, it does not matter which—in assisting at the *dénouement* of the matter into which she has intervened. Therefore he says that the lady in

this case, although she was in a sense an actor, was in some sense a spectator looking on at an action started by another person—assisting and abetting in carrying it out, but not in any sense the actor within the meaning of the section as interpreted by the cases. He has referred us to cases which I do not think it is necessary to go through in detail; but I may remark that in the case of *Hood-Barrs v. Cathcart* (71 L. T. Rep. 11; (1894) 3 Ch. 376) it was held that those words "action or proceeding instituted" in sect. 2 of the Married Women's Property Act 1893 mean "some action or proceeding in the nature of an action, initiated by a married woman as plaintiff, and do not include any motion or step made or taken by a married woman in an action in which she is defendant." That was the case chiefly relied on by Lord Coleridge, and he pointed our attention to other cases. In one of them it was held that a counter-claim by a married woman is a proceeding instituted by a married woman. In another case a claim put in by way of interpleader was held to be a proceeding instituted by a married woman within the meaning of the Act. In another case as to a *caveat*—viz., *Moran v. Place* (74 L. T. Rep. 223, 667; (1896) P. 214)—the facts were these: An executor's probate action, brought in consequence of a *caveat* entered by a married woman who was made defendant to the action, resulted in a verdict for the plaintiff with costs against the defendant. Upon an action by the plaintiff under the Married Women's Property Act 1893, s. 2, for an order for payment of the costs out of property to which the defendant was entitled subject to a restraint on anticipation, it was held by the Court of Appeal, affirming the decision of Barnes, J., that the proceedings in the probate action were "instituted" within the meaning of the Act of 1893 by the issue of the writ by the plaintiff, and not by the entry of the *caveat* or appearance of the "caveator"—that is a very curious word—in answer to the warning, and accordingly that the order applied for could not be made. In substance it amounts to this, that the mere step taken in the course of a case by a defendant cannot be treated as an institution of an action or proceeding within the meaning of the section. But the question is whether that section, by the words "action or proceeding instituted," covers the case of an intervention, and an intervention such as took place in the present case. Now, that makes it necessary to consider what the meaning of "intervention" is. The rule under the Judicature Acts on the subject is Order XII., r. 23, which provides as follows:

In probate actions any persons not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased.

That, of course, refers us back to the old practice, and it seems quite clear that, where a probate suit has been started, any person interested has the right to come and demand to be heard and take part—to intervene in the discussion. And that intervention may, and does, I think, in this case, mean that an independent right to assert a right in the person who is the intervener is recognised as existing; and that intervener has a right to come in and he or she has a right to insist upon his or her interest being pressed home to judgment. It may be, and in this case it was, the fact

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that the interest of the intervener coincided with that of the plaintiff to this extent, that she was satisfied to take, and did take, an order that she should intervene as plaintiff. But it would be perfectly possible and very probable that their respective interests might not be merged in some parts of the case, and that the court might have felt justified in an alteration of the attitude in certain contingencies on the part of the intervener. For all practical purposes she was another independent person there for the purpose of insisting on or asserting her own right which might or might not be consistent with that of the plaintiff who first started the action. In this case it happened to be consistent; the two rights were conducted on parallel lines. But she was just as much an actor in the matter as the original plaintiff. She had an independent right which might or might not have coincided with that of the original plaintiff. Is it to be said that she has not intervened? It seems to me that she was an actor who had intervened within the meaning of the section of the Act of Parliament, and that therefore the learned judge had the right or had the jurisdiction—that is the only point we have to deal with, we have no question of discretion to consider here—to order her to pay the costs of the opposite party. Now, technically and strictly I think that the true order would be that the costs should be payable from the date of the intervention; that is to say, she should pay, within the words of the Act, the costs of the opposite party from and after her intervention. My learned brother Cozens-Hardy will suggest the exact form the order should take. But I think that it is proper to declare that the learned President had jurisdiction to order her to pay the costs of the opposite party at all events from and after the time she intervened.

STIRLING, L.J.—I am of the same opinion. The case arises in this way: A will is brought forward for probate under which three persons become entitled to the residuary estate of the testatrix in equal shares. The person who brings forward the will is one of those persons, and the will is opposed by the next of kin. An action is brought, therefore, by one of the three residuary legatees against the next of kin for the purpose of establishing the will. Now, one other of the three persons who is entitled under the same will to an equal share of the residue is a married woman. She was under no obligation to appear or take any part in this action, but she had a right given her by the rule of court, which has already been referred to, if she thought fit to intervene and take part in the action. She did so intervene, and under an order, dated the 21st May 1901, it was ordered that she should be at liberty to intervene as a plaintiff. Subsequently she delivered a pleading by which she said that she adopted the pleadings of the plaintiff herein. Now, what was the effect of that? The effect was, as I conceive, not that she became co-plaintiff with the original plaintiff in the action. In fact she treats by her pleading the plaintiff as a different person; she calls herself the intervener, and says she adopts the pleadings of the plaintiff. So that the plaintiff in the action comprises the same person, but she intervenes as a plaintiff, meaning thereby that she takes the side of the plaintiff and supports his view. She was not bound to adopt all the proceedings which he took; she

pursued an independent course which, by her choice, was a parallel course with that of the plaintiff. She was not bound by the proceedings of the plaintiff. If the plaintiff chose to discontinue the action, she might continue it. If she was dissatisfied with the result she might go on further, and she might even have brought the action herself. It seems to me that, under these circumstances, from the proceeding on her part from the time at which she obtained leave to intervene, it constituted a "proceeding instituted by a married woman," and was a proceeding in which she was the first and prime mover within the meaning of that expression as used in the case of *Hood-Barra v. Cathcart* (*ubi sup.*). I think, therefore, that, with the exception already alluded to, the order ought to be sustained.

COZENS-HARDY, L.J.—I am of the same opinion. Some difficulty has been occasioned by reason of the peculiar position of interveners. Interveners were not known to the common law courts, and I think that there is a little fallacy in attempting to treat an intervener as though by the order here made she became for all purposes a co-plaintiff. That cannot be so, because co-plaintiffs have no right to appear by separate solicitor or separate counsel; one co-plaintiff cannot discontinue and leave the other to go on. Co-plaintiffs are joined together, and must appear by the same solicitor and same counsel throughout. We are dealing, in fact, with a peculiar mode of proceeding. Under the 6th of the Contentious Business Rules 1862, where parties who previously to the passing of the Court of Probate Act 1857 had a right to intervene in a cause and did so, it was done by leave on summons, subject to the same limitations and the same rules with respect to costs as theretofore. Now, it seems to me that the system of intervention is really part of the canon law administered by the Ecclesiastical Courts. In Burn's Ecclesiastical Law (9th edit.), vol. 3, p. 186, this is quoted: "*Tertius intervenire potest pro interesse suo in omni causa quæ tangit bona aut personam suam*"; and, although interveners were not known to the common law in the Court of Chancery, there were well-known proceedings *pro interesse suo* which I apprehend were simply adopted from the civil law in a peculiar class of cases. For instance, if a receiver in an action between A. and B. was in possession, and C. claimed to be interested in the property, he applied *pro interesse suo* to be examined, and he came into the action and asserted with the leave of the court his right to the property. I apprehend that when a person comes under that proceeding *pro interesse suo* he initiates litigation none the less that he intervenes in form in an action. Now, applying that analogy and those principles to the present case, it seems to me impossible to say that this lady, when she intervened and appeared by her own solicitor and by her own counsel, and by her own pleading, did not initiate proceedings against the opposite party. It follows, therefore, that the case comes precisely within the language of that section of the Act of 1893 which has been referred to. But I think that it will be more correct to limit her liability, or, rather, to exclude from her liability the costs prior to the date of the summons for intervention whatever it was.

The plaintiff's appeal was then proceeded with, being, in effect, a motion for a new trial on the

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grounds that the learned President had misdirected the jury, and that the verdict was against the weight of evidence.

Their Lordships dismissed the appeal.

Appeals dismissed.

May 15.—Upon an application to the court for an order removing the restraint on anticipation on the property of the intervener, their Lordships made an order to the extent of the costs payable by her.

Solicitor for the first appellant, *G. B. Crook*.

Solicitors for the respondent, *Milles, Jennings-White, and Foster*.

Tuesday, May 6.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

KAYE v. KAYE. (a)

APPEAL FROM THE DIVORCE DIVISION.

Husband and wife—Divorce—Wife's petition—Variation of marriage settlement—Property settled by husband—Life interest of husband therein—Extinguishment—Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61), s. 5.

Dissolution of a marriage having been decreed on the wife's petition, an order was made by Barnes, J., under sect. 5 of the Matrimonial Causes Act 1859, extinguishing the life interest of the husband in settled property, the whole of which was brought into settlement by him and the income of which amounted to 45l. a year, there being one child of the marriage who had not attained a vested interest.

Held, that the order made by Barnes, J. was not only a legitimate order, but the best one possible that could be made in the interests of the wife and child.

UNDER a marriage settlement executed in 1887 the husband took the first life interest in the settled fund, the whole of which was brought into settlement by him.

The wife took a life interest after his death, and on the death of the survivor the fund was settled upon the children and remoter issue of the marriage, as the husband and wife jointly, or the survivor, should appoint, and, in default of appointment, upon the children attaining the age of twenty-one years or marrying.

In default of any children attaining a vested interest, there was an ultimate trust in favour of the husband.

The income of the fund amounted to about 45l. per annum.

There was one child of the marriage, a girl, born in 1891.

In 1900 the wife petitioned for a dissolution of the marriage on the ground of the husband's adultery and cruelty.

In April 1900 a decree *nisi* was granted by the President (Sir Francis Jeune), which decree was made absolute in Nov. 1900.

A few days later the wife petitioned for maintenance, and in Dec. 1900 she petitioned for variation of the marriage settlement by the extinguishment of all the powers and interest of the husband in the settled fund as if he were already dead, save and except the ultimate trust in his favour.

The husband being in India, he was allowed by the registrar four months in which to put in his answer to the petition, and from this order the wife appealed to the President in chambers.

His Lordship gave her leave to accept unsworn answers, or, in the alternative, confirmed the allowance of four months.

The wife elected to accept unsworn answers, which were accordingly filed.

It appeared that the husband owed debts, and was in arrears with his contribution to the Indian army pension fund, which he had been allowed to make by monthly payments.

After hearing the petition the registrar reported that the wife ought to receive 100l. per annum for the maintenance of herself and the child of the marriage, made up as to 45l. by the income of the settled fund and as to the remaining 55l. by a contribution by the husband.

In Aug. 1901 Barnes, J. confirmed the registrar's report and ordered that the life interest of the husband in the settled fund should be extinguished.

From that decision the husband now appealed.

Mickleth, K.C. and Gordon Dill for the appellant.—Although the court has, no doubt, jurisdiction to do so, there is no reported case in which in the exercise of its discretion it has extinguished a husband's life interest in a fund wholly brought into settlement by himself. In the various cases where his life interest has been extinguished it has been in a fund settled by the wife. In the present case justice would be done by giving the husband a life interest on the death of the wife, which would satisfy all that is necessary for her, the child to have the right to demand maintenance from her father if she is under age at the wife's death. As the order stands, when the child attains twenty-one years of age she and her mother can dispose of the settled fund although it was entirely the husband's. This cannot be right. They referred to

March v. March, 16 L. T. Rep. 366; L. Rep. 1 P. & D. 440;

Wigney v. Wigney, 47 L. T. Rep. 129; 7 P. Div. 228.

Barnard Deane, K.C. and Barnard for the respondent.—This is a matter of discretion, and in the exercise of his discretion Barnes, J. has done what is right. In view of the husband's circumstances, the child, if her mother dies while she is under age, may have to compete for her maintenance with creditors of the husband. Barnes, J. has exercised his discretion for the benefit of both wife and child in the only way possible in the circumstances of the case. It is suggested that there is no authority for the order which the learned judge has made. But the reason why no similar reported case can be found is that this class of case very rarely comes before the court. In the ordinary case of variation of a marriage settlement property has been brought into settlement on both sides, and it is not necessary to distinguish the husband's property. In any event an order for maintenance would end when the child attained twenty-one years of age, as in

Thomasset v. Thomasset, 71 L. T. Rep. 148; (1894) P. 295.

We submit that the court ought not to interfere

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

with the discretion of the learned judge in making the present order.

Micklem, K.C. replied.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. I think that the order made by Barnes, J. was not only a legitimate order, but the best one possible that could be made in the interests of the wife and child. The husband was the guilty party, and the court had to consider the interests of the child as well as of the wife. There is a settled fund producing an income of 45*l.* a year, the husband having an income derived from his pay in the army. The court had a duty to perform for the wife and the child, and accordingly extinguished the husband's interest under the settlement, pursuant to sect. 5 of the Matrimonial Causes Act 1859. It was suggested by Mr. Micklem that the order should have been that the husband's life interest should be postponed to that of the wife, and that after the wife's death he should have been given a life interest before the child's interest took effect. But I think that that was a course which the court was bound to guard against. The child would then have had to seek her maintenance from the Chancery Division, in competition possibly with creditors of the husband, while the present order gives it to her direct, without the intervention of the Chancery Division. It seems to me that the order was a perfectly wise exercise of discretion, and within the jurisdiction of the court to make it.

STIRLING, L.J.—I am of the same opinion. I think that this was a case in which Barnes, J. ought to exercise his discretion. He has exercised it in a particular way, and I think that it is impossible for us to interfere with the order which he has made.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Thornycroft and Willis*, agents for *Alfred Fossick*, Maidenhead.
Solicitor for the respondent, *W. H. Blaber*.

April 23, 24, and May 7.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.J.J.)

Re KINGDON AND WISON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Costs—Taxation—Estate duty—“Disbursement”—Finance Act 1894 (57 & 58 Vict. c. 30), s. 6, sub-s. 2—Solicitors Act 1843 (6 & 7 Vict. c. 73), ss. 37, 38, 39.

A payment in respect of estate duty, under sect. 6, sub-sect. 2, of the Finance Act 1894, made by a solicitor on behalf of his client, is not a “disbursement” within the meaning of sect. 37 of the Solicitors Act 1843; and therefore is not properly included in his bill of costs.

Re Lamb (23 Q. B. Div. 5) overruled.

Decision of Byrne, J. reversed.

By her will Mrs. Ross, who died in 1899, bequeathed the residue of her estate to her executors and trustees in trust for T. K. Ross.

A firm of solicitors were employed to obtain probate of the will and realise the estate, and

their bill of costs, amounting to 218*l.* 5*s.* 9*d.*, was delivered to and paid by the executors.

T. K. Ross having died, his representatives obtained an order for taxation of the bill under sects. 38 and 39 of the Solicitors Act 1843.

The sum of 117*l.* 4*s.* 4*d.* was charged in the bill for “probate duty.” This item was disallowed by the taxing master, leaving a balance of 101*l.* 1*s.* 5*d.*

The taxing master then taxed off 24*l.* 17*s.* 10*d.*, being more than one-sixth of the reduced bill.

That sum was repaid to the executors by the solicitors; but disallowance of the “probate duty” was objected to by them on the ground that it was a “disbursement,” and had been properly paid.

This objection was overruled by the taxing master, who stated in his answers to objections that estate duty, not probate duty, was payable on the testatrix's estate, and ought not to have been inserted in the bill. The taxing master considered that *Re Lamb* (23 Q. B. Div. 5), where it was decided that probate duty should be included in the bill, was not applicable to estate duty.

A summons was thereupon taken out by the solicitors to review the taxation.

The summons was adjourned into court, and came on to be heard before Byrne, J. on the 15th March 1902, when the following judgment was delivered:—

BYRNE, J.—This is a summons to review taxation. The point raised on it is a very short one, and is as follows: Whether or not a solicitor is entitled to introduce into his bill of costs the sum of 117*l.* paid by him on behalf of his clients in respect of estate duty. In the present case the solicitors were at the time of such payment in funds from the clients. According to the authorities, that makes no difference. I have had the advantage of reading the very careful answers to objections given by the taxing master, in which he mentions the cases that are in the books. Finally he suggests that, probate duty being no longer payable, the decision in *Re Lamb* (23 Q. B. Div. 5), to which I will refer presently, should not be applied to the payment of estate duty which is levied and paid on all property, real or personal, settled or not settled, and is a far heavier duty than probate duty as originally assessed on personalty only. He adds that if in dealing with estate duty *Re Lamb* (*ubi sup.*) be followed, then in the result the solicitor, whatever may be the amount, will be entitled to enter as a payment in his bill of costs the amount paid for estate duty, whether the same be paid out of the client's pocket or out of the solicitor's, and in a considerable number of cases may render the solicitor's bill of costs untaxable except at the expense of the client. It appears to me that I am bound by authority in this matter. The case of *Re Lamb* (*ubi sup.*) came before Mathew, L.J.—then Mathew, J.—and afterwards before the Divisional Court composed of Pollock, B. and Manisty, J. In that case there was a payment made for probate duty by a solicitor on behalf of his client. That was held to be a “disbursement” within the meaning of sect. 37 of the Solicitors Act 1843, and was properly included in the bill of costs. Pollock, B. says in the course of his judgment: “There is, too, a well-known practice of the Profession as to solicitors' disbursements which is laid down by the taxing masters in the case of

[CT. OF APP.]

Re KINGDON AND WISON.

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Re Remnant (11 Beav. 603). In the case of *Re Haigh* (12 Beav. 307) it was held that a payment of legacy duty by a solicitor was not a disbursement by him in his character of a solicitor, and could not properly be included in his bill of costs, but it is to be noted that in his judgment the then Master of the Rolls expressly used the word 'agent,' and based his judgment upon the payment having been made by him in that character, and not as a solicitor. Then there is a question of the distinction between probate and legacy duty, and as to this we are satisfied that the payment of probate duty is analogous to the payment of any other tax upon the subject which must be paid by the solicitor before the client can be in a position to exercise the rights to the exercise of which such payment is a condition precedent. We think that the decision of the learned judge was right; he has drawn the line where it has been drawn for many years by the Profession and by judicial decisions." Manisty, J. in the course of his judgment says: "I agree in thinking that this was a disbursement made by the solicitor in the ordinary course of his duty. The case of legacy duty is different; there is no reason why he should pay it, and he would not pay it unless he had a special authorisation to pay legacies. But he is employed to obtain probate as he is employed to obtain a conveyance of property, and he must pay the probate duty in the one case just as he must pay the stamp duty in the other. And our decision is fortified by the report of the Probate registrar, who says that it is the invariable practice to include sums paid for probate duty in bills of costs as disbursements." I need not again refer to the cases of *Re Remnant* (*ubi sup.*) and *Re Haigh* (*ubi sup.*) as the decision of *Re Lamb* (*ubi sup.*) appears to me to cover the present case and to be a decision which I ought to follow, unless the suggestion of the taxing master to the effect that estate duty stands on a different footing from probate duty makes a distinction, and therefore involves that a solicitor should bring it into his cash account instead of into his bill of costs. Now, is there any fair difference between the estate duty payable in order to obtain probate and the old probate duty? By sect. 6, sub-sect. 2, of the Finance Act 1894 (57 & 58 Vict. c. 30) it is provided that "The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death on delivering the Inland Revenue affidavit." Then it goes on to say what he may pay: "And may pay in like manner the estate duty in respect of any other property passing on such death which by virtue of any testamentary disposition of the deceased is under the control of the executor or in the case of property not under his control if the persons accountable for the duty in respect thereof request him to make such payment." The payment which the executor of the deceased must make is, it appears to me, a stamp duty—that is, under sect. 6, sub-sect. 1—collected in respect of that property on which duty must be paid before probate is granted. Following the reasoning of Manisty, J. in the case of *Re Lamb*, to which I have already referred, it appears to me that the payment which is necessary to obtain probate falls exactly within the analogy of the old probate duty. And if there is to be any altera-

tion in the practice which has, according to Manisty, J., been the practice of the Profession and the subject of decision for many years, it must be by a higher court than this, or by a change in the rules respecting taxation by the proper authority.

From that decision the representatives of T. K. Ross, by leave, now appealed.

Levett, K.C. and the Hon. T. H. Watson for the appellants.

Norton, K.C. and A. P. Poley for the respondents.

Levett, K.C. replied.

The following authorities were cited or referred to in the course of the arguments:

- Re Remnant*, 11 B. & V. 603;
- Re Haigh*, 12 Beav. 307;
- Re Metcalfe*, 30 Beav. 406;
- Re Lamb*, 23 Q. B. Div. 5;
- Re Taylor, Stileman, and Underwood*; *Ex parte Payne Collier*, 64 L. T. Rep. 605; (1891) 1 Ch. 590;
- Seton's Forms of Judgments and Orders, 6th edit., p. 280;
- Hanson's Estate, Probate, Legacy, and Succession Duties Acts, 4th edit., p. 273;
- Pridmore's Guide to the Preparation of Bills of Costs, 1st edit., p. 558; 10th edit., p. 732;
- Finance Act 1894, s. 6, sub-s. 2; s. 8, sub-s. 6; s. 9, sub-s. 1; s. 16;
- Probate Act 1857, s. 96;
- Supreme Court of Judicature Probate Rules 1897.

Cur. adv. vult.

May 7.—The following written judgment of the court (Collins, M.R., Stirling and Cozens-Hardy, L.J.J.) was delivered by

STIRLING, L.J.—The question on this appeal is whether the costs of taxation of a bill of costs under the common statutory order are to be paid by the clients or by the solicitors. That depends on whether one-sixth of the amount of the bill has or has not been taxed off. The bill is for the costs of obtaining the probate of a will on behalf of the executors, who were the clients. In the course of obtaining the probate the solicitors paid the estate duty, amounting to 117*l.*, out of a sum of 130*l.* paid by the clients to the solicitors on general account. In the bill as delivered the professional charges, amounting to 101*l.*, are first entered; to this is added the estate duty, making a total sum of 218*l.*; then there is deducted the 130*l.* paid on account, leaving a balance due to the solicitors of 88*l.* From this bill there has been taxed off an amount of 24*l.* 1*s.* 10*d.* If the estate duty is properly included in the bill less than one-sixth has been taxed off; but, if the estate duty ought (as is contended on behalf of the clients) to have been entered in the solicitors' cash account, and not in the bill, more than one-sixth has been taxed off. Byrne, J. has decided, on the authority of *Re Lamb* (23 Q. B. Div. 5), that the estate duty was properly included in the bill of costs. We think that the learned judge was bound by *Re Lamb* (*ubi sup.*), which was decided by a divisional court, consisting of Pollock, B. and Manisty, J., who affirmed Mathew, J. at chambers. The real question is whether the rule established in that case ought to be upheld in the Court of Appeal, before which it is now brought for the first time. This subject was carefully inquired into by Lord

Langdale in *Re Remnant* (11 Beav. 603, 613), decided in 1849, and the following rule was laid down: "That those payments only which are made in pursuance of the professional duty undertaken by a solicitor, and which he is bound to perform, or which are sanctioned as professional payments by the general and established custom and practice of the Profession ought to be entered or allowed as professional disbursements in the bill of costs." The case of *Re Lamb* (*ubi sup.*) was intended to be decided in accordance with this rule, and it was evidently believed by both the learned judges who constituted the Divisional Court that it was the settled practice to include sums paid for probate duty in bills of costs. It was strongly pressed upon us in argument that, if *Re Lamb* (*ubi sup.*) be upheld, it will be practically impossible in a large number of cases for a client to obtain the costs of the taxation to which a bill may have been justly subjected, and we think that such is the case. We have consulted one of the taxing masters of the Chancery Division, and are informed by him that, from the time of the decision in *Re Remnant* (*ubi sup.*) down to that in *Re Lamb* (*ubi sup.*), it was the settled practice not to include sums paid for probate duty in bills of costs; that the taxing masters of the Chancery Division consider that the decision in *Re Lamb* (*ubi sup.*) was based on imperfect or inaccurate information; that the effect of it is to discourage the taxation of bills which ought to be taxed; and that the adherence to it has, in their opinion, operated unfairly to clients in the past, and (regard being had to the increased duty now payable) is likely still more so to operate in the future. We are informed that, although the taxing masters have followed the decision in *Re Lamb* (*ubi sup.*) when the point has been taken before them, yet that many eminent solicitors still adhere to the practice as it existed before the decision in *Re Lamb* (*ubi sup.*), and do not include payments for probate duty in their bills. We have also consulted one of the registrars of the Probate Division, who is conversant with the taxation of costs in that division, and are informed by him that, although the practice there, so long as he has known it, has been regulated by *Re Lamb* (*ubi sup.*), he is also of opinion that in many cases it leads to injustice being done. In these circumstances we think that *Re Lamb* (*ubi sup.*) ought to be overruled, and that payments for estate duty ought not to be included in bills of costs. In what precedes it has been assumed that estate duty stands on the same footing as probate duty. It is, however, to be observed that estate duty is not, like the original probate duty, merely a stamp duty, but is one for which the executor is personally accountable: (see the Finance Act 1894, ss. 6 (2), 23 (1) (d)). Although we do not base our decision on this distinction, we consider it favourable to the adoption of the course which we regard as the proper one. The appeal will therefore be allowed, with costs here and below, and an order made substantially in accordance with the notice of appeal.

Appeal allowed.

Solicitors for the appellants, *Collyer-Bristow, Hill, Curtis, and Dods*.

Solicitors for the respondents, *Kingdon, Wilson, and Webb*, agents for *Frankish, Kingdon, and Wilson, Hull*.

May 6 and 7.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

BLOOD v. BLOOD. (a)

APPEAL FROM THE DIVORCE DIVISION.

Husband and wife—Divorce—Wife's petition—Variation of marriage settlement—"Property settled" by wife—Extinguishment of all the life and derivative interests of the husband—Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61), s. 5.

A wife upon her marriage settled property to which she was entitled in her own right upon herself for life, and after her death upon her husband for life, if he survived her, with remainder to the children of the marriage. There was only one child of the marriage, a son. He attained the age of twenty-one years, and thus acquired a vested interest in the property comprised in the settlement. Subsequently the wife petitioned for the dissolution of her marriage with the husband, and a decree nisi was pronounced in her favour. Before the decree was made absolute the son died, a bachelor and intestate. After the decree was made absolute the wife applied, under sect. 5 of the Matrimonial Causes Act 1859, for an order extinguishing all the husband's interest in the property, as he had become entitled to his son's interest, the latter having died intestate.

Held, that there was "property settled" within the meaning of the section; and that the court had jurisdiction to extinguish the life interest of the husband in the trust funds, and such beneficial interest as he took as the next of kin of his son in the son's interest in the trust funds.

Decision of Barnes, J. (ante, p. 121) affirmed.

By a settlement executed in contemplation of the marriage between Neptune William Blood and Constance Rebecca Blood, and dated the 25th July 1877, the wife settled the sum of 4000*l.* Great Western Railway stock, being property to which she was entitled in her own right, upon trusts in favour of herself for life, and after her death of her husband for his life if he should survive her, with remainder to the children of the marriage in the usual form, with a proviso that, if the wife should survive the husband and marry again after his death and there should be only one child of the first marriage, the wife should be at liberty to appoint a moiety of the income of the trust fund to her second husband for his life, and a moiety of the trust fund to the children of the second marriage.

There was only one child of the marriage, a son, who attained his majority on the 13th July 1899, and thus acquired a vested interest in the property comprised in the settlement.

The wife petitioned in 1900 for a dissolution of her marriage with her husband on the ground of his adultery and desertion, and a decree nisi was pronounced in her favour on the 14th July 1901.

On the 16th July 1900, after the date of the decree nisi, but before the date of the decree absolute, the son died, a bachelor and intestate, and his beneficial interest in the settled property passed therefore to his father as his sole next of kin.

After the decree was made absolute the husband married again, and he then executed a settlement

(a) Reported by E. A. STRETCHLEY, Esq., Barrister-at-Law.

of the previously settled property which had come to him as the representative of his son, but "subject to any variation in the terms of the (original) settlement which may be made by the court."

The first wife applied, under sect. 5 of the Matrimonial Causes Act 1859, for a variation of her settlement, and she asked that the whole fund might be reassigned to her free from any interest of her late husband.

Sect. 5 provides that

The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit.

It was decided by Barnes, J. (*ante*, p. 121) that, under this section, the court had power to make an order varying the settlement, notwithstanding that the son had attained a vested interest; and his Lordship accordingly ordered that the fund should be retransferred to the wife, free from any interest of her former husband.

From that decision the husband now appealed.

Inderwick, K.C. and *Barnard* for the appellant.—It is not a question of discretion, but whether Barnes, J. had power to extinguish any more than the interest of the husband himself under the settlement. Sect. 5 of the Matrimonial Causes Act 1859 limits the power to vary settlements to "property settled." The interest which the husband acquired through his son was not "property settled." It was by a mere accident that the husband became entitled to that interest at all. It has devolved upon the husband, not by the terms of the settlement, but by operation of law, he being the next of kin of his son, who died intestate. If the son had died before he attained a vested interest, the court might have made an order affecting his interest. Barnes, J. acted upon the decision in

Meredyth v. Meredith and Leigh, 72 L. T. Rep. 898; (1895) P. 92).

[*COZENS-HARDY*, L.J. referred to *Re Radcliffe*; *Radcliffe v. Bewes* (66 L. T. Rep. 363; (1892) 1 Ch. 227).] Sect. 5 is certainly a very wide section, but there has been no case decided under it where the court has taken away the vested interest of a child under the marriage settlement of the parents. That the court had no power to vary this settlement in the way that has been done appears from

Pollard v. Pollard, 70 L. T. Rep. 815; (1894) P. 172;

Crisp v. Crisp, 27 L. T. Rep. 428; L. Rep. 2 P. & M. 426.

The Hon. *Frank Russell* (J. C. *Priestley* with him) for the respondent.—This was a proper order for the learned judge in the court below to make in the exercise of his discretion, and he had jurisdiction to make it. It was proper to extinguish the whole of the husband's interest in the trust fund. The interest acquired through the son was "property settled" within the meaning of sect. 5 of the Matrimonial Causes Act 1859. The case of *Pollard v. Pollard* (*ubi sup.*) was considered again by the learned President in *Whitton v. Whitton* (85 L. T. Rep. 646; (1901) P.

348). *Crisp v. Crisp* (*ubi sup.*) was a very peculiar case, and must be regarded as having been decided under exceptional circumstances. He referred also to

Dormer v. Ward, 82 L. T. Rep. 469; (1900) P. 130; on appeal, 83 L. T. Rep. 556; (1901) P. 20.

F. L. Wright for the trustees of the settlement. —[*COZENS-HARDY*, L.J.—Would you object to the order being in this way—vary the settlement by extinguishing the life interest of the father and any beneficial interest of the father as the sole next of kin of the son? I am striking out all the rest.] That is what I was about to suggest to the court. The second paragraph about ordering to convey does not follow as a legal consequence.

Inderwick, K.C.—I do not think that I have anything to add in reply. The case is fully before the court.

COLLINS, M.R.—This is an appeal from the decision of my brother Barnes affecting the interest of the husband, against whom a decree for divorce had gone; and the learned judge acted under sect. 5 of the Matrimonial Causes Act 1859, which is in these terms. [His Lordship read the section, and continued:] Now, the circumstances of the case were these: By the marriage settlement the only fund that we have to deal with in this case, which was that of the wife, was settled upon the wife for life, then upon the husband for life, and then upon the child or children of the marriage. Therefore, after the death of the second tenant for life, the husband, this fund would, in the absence of anything intervening, go to the child or children. There was only one child—a son—and he would take the whole of that fund, subject to a condition which empowered the wife upon second marriage to appoint half of it for the benefit of the children of a second marriage. That was the condition of affairs at the time when application was made to Barnes, J. to act under the section that I have read, the decree having then gone against the husband. What Barnes, J. has done is to extinguish the life interest of the father in the settlement, and there is an appeal against that order on these grounds: The husband says that that order ought not to extend to the share which passed to the son or would have passed to the son, who died before the date of the decree in question. The son died without a will, and the father, as next of kin, takes whatever the son's interest was. Now, the order of Barnes, J. extends not only to the father's life interest, but to the fund which he takes, whatever it may be, if he takes as next of kin of his son. It is said that that order was made without jurisdiction; and that there was no power to deal with that fund at all, inasmuch as the power of the judge is limited by the section which I have read to a settlement and to property settled. It is said also that as the father took as next of kin of his son there was no "property settled"; and that, therefore, there is no jurisdiction to deal with it at all. That is one objection, and I will deal with that at once, and give the answer to that objection. The wording of the section is: "May make such orders with reference to the application of the whole or a portion of the property settled." The question therefore is, Is this property, with respect to which you may make the order, settled or not settled?

At the time when the application for variation of the settlement was made, there were two outstanding life interests in the fund, and obviously the fund was in the custody of the trustees for the purpose of the settlement, and of giving the two successive life tenants the benefit of the life interest to which they were respectively entitled before the estate in remainder came into existence at all. One of these life estates has been extinguished under this order, and that was an order dealing with property settled. There was no mistake about that. Therefore there was clearly jurisdiction to make it. That disposes of the right of the court to deal with the share or sum coming to the father as next of kin of his son. Then it is said also that that is not an order which the court had jurisdiction to make, even dealing with the property as property settled, because it is said that it affects the interest of the child. It is said that, rightly understood, the words that I have read in this section, though they do enable the court to annihilate, or diminish, or vary, the interest of either of the parents—the delinquent parent—in the subject-matter of the settlement, do not extend to allow the court to diminish or annul the interest of the children of the marriage. It is not necessary to decide that point here. I cannot say that I have been much influenced by the argument upon which it was based, nor do I think that the authority that was most relied upon as supporting it—namely, *Crisp v. Crisp* (27 L. T. Rep. 428; L. Rep. 2 P. & M. 426)—when fairly construed, goes to that extent or anything like it. But I do not think it necessary to deal with it on the decision of this case, because I think the order here certainly ought to be to vary the settlement by extinguishing the life interest of the father and any beneficial interest of the father as next of kin of his deceased son. That order, which will give effect to all that is really necessary to carry out the intention of the learned judge in the court below, gets rid of any difficulty or any possible difficulty as to want of jurisdiction to deal with the interest of the son. There were two points relied upon—namely, that there was no jurisdiction at all, because this was not property settled; and that if there was jurisdiction to deal with it as property settled, there was nevertheless a want of jurisdiction to in any way affect or diminish the interest of a child. It seems to me that both these points fail, and that the order that I have stated, and which my brother Cozens-Hardy first suggested, is the proper order that ought to be made, and gets rid of any possible difficulty in this matter. Therefore, in my judgment, this appeal ought to be dismissed, and dismissed with costs.

STIRLING, L.J.—I am of the same opinion. The section gives the court power “to make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as the court shall think fit.” The first question which is to be considered is whether there is here “property settled” within the meaning of the section. Prior to the making of the order which is appealed from the property stood limited thus: Upon trust for the wife during her life, then for the husband during his life, and then for the only child of the marriage who had died intestate. In point of

fact, no representation has yet been taken out to the son; he has no legal personal representative. But the sole next of kin was his father, the husband, in this particular case. Now, in that state of things, it seems to me that there was “property settled.” There are two subsisting life interests before you come to the reversion which belongs to the legal personal representative of the son. And the words of the section seem to me ample to give the court power to deal with it as property settled. But then this is also said, that the court in dealing with property settled will not so deal with it as to deprive any person of a vested interest under the settlement, not being of course either the husband or wife one of whom must necessarily be a guilty party. It certainly is a very strong thing to confer a power on any court to alter vested interests in property, and there appears, from the reported cases, to have been a strong objection on the part of the judges of this court to deal with property in such a way as to disturb vested interests. But none of the cases which have been cited goes the length, as it appears to me, of saying that there is no jurisdiction to do it. The case which was most relied upon is that of *Crisp v. Crisp* (27 L. T. Rep. 428; L. Rep. 2 P. & M. 426). But what the learned judge held there as being beyond the power of the court was not to modify the interests under the settlement, but to extinguish it altogether; and, if I may respectfully say so, I entirely agree. It appears to me, that except so far as the court in the exercise of the jurisdiction conferred upon it, sees fit to alter the provisions of the settlement for the benefit either of children of the marriage or for one or other of the parents, the settlement must remain, and that the court has no power to extinguish it. The result of the cases appears to me to be correctly summed up by the President in the case to which we have been referred of *Whitton v. Whitton* (85 L. T. Rep. 646; (1901) P. 348). There the President says: “I am clear I have jurisdiction to do so”—that is to alter a vested interest—and I think no case has ever thrown doubt on that; the case of *Pollard v. Pollard* (70 L. T. Rep. 815; (1894) P. 172) certainly does not throw doubt on the jurisdiction, but one has in those cases to consider what is really for the benefit of the children, because I think the authorities show that nothing must be done that on the whole would be for the disadvantage of the children. This does not so much turn on the words of the Act of Parliament, but generally on the principle that the children being innocent parties ought not to have their interests injuriously affected by the conduct of either of their parents.” Here we are not prejudicing a child. The order which has been made does not affect the child. The child is dead. The beneficial interest has, by reason of the death of the child, become vested in the husband, and it is only that interest so derived from the child that is proposed to be affected as the order has been modified. It seems to me that that is not open to the objection which is pointed out by the President in *Whitton v. Whitton* (*ubi sup.*), but is within the powers of the court. I think that the order ought to be modified so as simply to provide that the settlement be varied by extinguishing all the rights, powers, and interests, including any beneficial derivative interest of the respondent as next of kin of his son, in, concern-

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ing, or over the whole or any part of the capital and income of the petitioner's settled funds—and stopping there; so that when the legal personal representative is appointed to the son such application may be made to the trustees as to the parties may seem right. But nothing ought to prejudice the rights of any persons deriving title from the son, whether they be mortgagees or assigns, or creditors, or any other person except the father.

COZENS-HARDY, L.J.—I entirely agree. It was argued here, although it was not argued in the court below, that this was not "property settled." It seems to me that a property is none the less settled because all the persons beneficially interested may be *sui juris* and capable together of dealing with it. Then, assuming it to be "property settled," I desire to express my entire agreement with the view of Barnes, J. and the Master of the Rolls and Stirling, L.J. as to the jurisdiction of the court to extinguish, in a proper case, an interest, although vested, of a child. In the present case I do not think that it is really necessary for us to consider that because the order as proposed to be altered merely affects the interest of the husband, the father—the guilty party. It affects his own original life interest as it affects such interest as he has beneficially as sole next of kin of the deceased son. Administration of course will have to be taken out. Then one other possible difficulty may very easily be got over. If the wife should marry again, she has according to the settlement a certain power of appointing a life interest in favour of a second husband and appointing half of the fund in favour of the children of the second marriage. But that is a power which she can release, and when that is done and administration is taken out, there will be no difficulty.

Appeal dismissed.

Solicitors for the appellant, Valpy, Peckham, and Chaplin.

Solicitors for the respondents, C. Russell and Co.; Hugh Wharton.

May 1 and 12.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

Re MADDOCK; LLEWELYN v. WASHINGTON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Administration—Insufficiency of personalty—Residuary bequest—Secret trust—Will exercising power of appointment.

By her will, dated in Jan. 1897, a testatrix appointed trustees and executors, and she appointed and bequeathed to them the one-third share of the sum of 18,000*l.*, over which she had a testamentary power of appointment under the will of her father, upon trust to pay the income to S. W. for life, and after her death to divide the principal of the share among certain charities; and she devised and bequeathed all her real and the residue of her personal estate to S. W. absolutely.

By a subsequent memorandum, attested by S. W., the testatrix requested that all the money she had saved should go to other persons therein named. The testatrix died in Dec. 1898.

S. W. did not dispute that the memorandum gave rise to a valid trust in favour of the persons therein named. The testatrix's residuary personal estate, apart from the portion comprised in the memorandum, was insufficient for the payment of her debts, &c.

Held, that S. W. must be taken to be subject to a personal obligation to give effect to the memorandum precisely as if it had been duly executed as a codicil and admitted to probate; that in dealing with the residuary real and personal estate given to her by the will she must treat the property comprised in the memorandum as though it had been specifically bequeathed; and that therefore the residuary personal estate not comprised in the memorandum must first be exhausted to pay debts, &c., and that any deficiency must be borne rateably by the property comprised in the memorandum, and by the real estate devised to S. W.

Decision of Kekewich, J. (85 L. T. Rep. 12) reversed.

By her will, dated the 11th Jan. 1897, Sarah Brundrett Maddock appointed Susan Annette Washington and two other persons to be the trustees and executors thereof, and she gave, appointed, and bequeathed to them the one-third share of the principal sum of 18,000*l.*, over which she had a testamentary power of appointment under the will and codicil of her late father John Maddock, and directed that the trustees should hold the money to be received in respect of such share upon trust for investment as therein mentioned, and to pay the annual income arising from such investment to Susan Annette Washington for her own use during her life, and upon her death the testatrix directed the trustees to divide the principal of her share of the sum of 18,000*l.* in equal shares among certain charities mentioned in the will. The testatrix devised all her real estate and bequeathed all the residue of her personal estate to Susan Annette Washington absolutely.

Six days subsequent to the date of her will the testatrix signed a memorandum, which was as follows:

17th Jan. 1897.—It is my request that Miss Hannah Barker, daughter of the late George Barker . . . should receive the interest arising from all the money I have saved after being invested by my trustees and paid half yearly to her. This I leave with my will.—SARAH BRUNDRETT MADDOCK.

And at her death to go to my nephew John Francis and his children.—(Witness) SUSAN ANNETTE WASHINGTON.

The testatrix died on the 14th Dec. 1898 without having revoked or altered her will, which was duly proved on the 7th April 1899 by all the executors therein named.

Susan Annette Washington did not dispute that the memorandum gave rise to a valid trust in favour of the persons therein named.

By an order made in March 1900 upon a summons to determine the scope and effect of the memorandum, it was declared that all the testatrix's property belonging to her at her death was bound thereby except a freehold house therein specified, a sum of 385*l.*, being the apportioned income to the date of the testatrix's death arising from certain trust funds to the income of which the testatrix was entitled for life, and her furni-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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ture, farming stock, and household goods and effects.

The testatrix's residuary personal estate, apart from the portion comprised in the memorandum, was insufficient for payment of her debts, the estate duty on her general personal estate, and the costs of administration.

An originating summons was accordingly taken out by the executors and trustees of the will to determine the questions (1) whether the deficiency was payable out of the property passing under the memorandum and the real estate rateably, or how otherwise; (2) whether the estate duty payable in respect of the fund appointed in favour of the charities was payable out of the fund or out of the residue.

The summons was adjourned into court and came on to be heard before Kekewich, J. on the 5th June 1901, when his Lordship decided (85 L. T. Rep. 12) first, that although the trust was specific, it was not a specific bequest, inasmuch as the title of the *cestuis que trust* was *dehors* the will, and that they were not entitled to have the trust property exonerated from payment of the debts; and, secondly, that the estate duty on the fund appointed in favour of the charities must be paid out of that fund.

From the decision upon the first question the *cestuis que trust* under the memorandum now appeared.

Renshaw, K.C. and *Vaughan Hawkins* for the appellants.—The effect of the implied promise by the residuary legatee to carry out the wishes of the testatrix, as expressed in the memorandum, was to prevent the testatrix from making a testamentary disposition in the same terms. Effect must therefore be given to that which, operating on the conscience of the residuary legatee, was substituted for a testamentary disposition in the same way as if it were a testamentary disposition. The memorandum bound the residuary legatee to deal with the testatrix's estate in a particular way. Instead of drawing a codicil, the testatrix has adopted this mode of binding her. The conjoint effect of the will and memorandum is that only that which is not given away by the memorandum is left as residue. The testatrix has in substance directed the residuary legatee to treat the property comprised in the memorandum as if she had disposed of it by codicil as a specific legacy. The leading case as to precatory trusts, showing the origin of the jurisdiction of the court in regard to them, is

McCormick v. Grogan, L. Rep. 4 E. & I. App. 82.

[STIRLING, L.J.—That case was discussed by this court in *Re Pitt-Rivers*; *Scott v. Pitt-Rivers* (86 L. T. Rep. 6; (1902) 1 Ch. 403.] Other cases on the same subject are:

Drakeford v. Wilkes, 3 Atk. 539;

Barrow v. Greenough, 3 Ves. 152;

Chamberlain v. Agar, 2 Ves. & B. 259;

Irvine v. Sullivan, L. Rep. 8 Eq. 673;

Jones v. Badley, 19 L. T. Rep. 106; L. Rep. 3 Ch. App. 862;

Wallgrave v. Tebbs, 2 K. & J. 313, at p. 321.

[STIRLING, L.J. referred to *Lady Langdale v. Briggs* (8 De G. M. & G. 391, at pp. 434, 435.) The case of *Cullen v. Attorney-General for Ireland* (14 L. T. Rep. 644; L. Rep. 1 E. & I. App. 190) has relied upon by the other side in the court below; but that case is distinguishable as it was

decided upon the construction of the Irish Stamp Acts, which are set out in the report, and which have no application to the present case. Cases of this nature are really cases of contract giving rise to a trust, as defined by Cotton, L.J.:

Gandy v. Gandy, 52 L. T. Rep. 306; 30 Ch. Div. 57, at p. 66.

There is a consideration because the legatee gets the residue of the testatrix's estate; and there is an implied promise by the silence of the legatee. The testatrix would have altered her will if there had been no understanding that the obligation cast upon the legatee would be duly performed. It is a contract which creates a trust in favour of the persons who are to benefit under the contract, and the question is, What is the true meaning of that contract as regards the exoneration of debts, &c.? Although there is no case actually deciding the point as to specific legacies coupled with a trust imposed upon the legatee, yet the question as regards pecuniary legacies has been well settled. The two classes of gifts are, however, so closely connected that the court can scarcely help deciding a case as to a specific legacy on the same footing as has been decided in regard to pecuniary legacies. Indeed a specific legacy must *a fortiori* be free from the charge of debts, &c. The case of *Barrow v. Greenough* (*ubi sup.*) decides the position as to pecuniary legacies as regards exoneration. Specific legacies are defined in

Bothamley v. Sherson, 83 L. T. Rep. 150; L. Rep. 20 Eq. 304, at pp. 308, 309.

The case of *Lady Langdale v. Briggs* (*ubi sup.*) seems to meet the point that alone the learned judge in the court below proceeded upon as to the memorandum being *dehors* the will. The trust being outside the will really does not affect the question; but the matter is to be dealt with as if the memorandum were part of the will although *dehors* the will—a trust engrafted upon the bequest has been the expression used in some of the cases. The court then gets before it a consistent scheme of the dispositions of the testatrix. We ask the court to apply the rule laid down by Knight Bruce, V.C. in

Tombs v. Roch, 2 Coll. C. C. 490, at pp. 500, 505.

The result will then be that the residuary estate unaffected by the memorandum will be primarily liable for the payment of debts, &c., and the deficiency must be borne rateably by the property passing under the memorandum and the real estate of the testatrix.

Warrington, K.C. (with him *T. H. Carson, K.C.*) for the respondent Susan Annette Washington.—If the appellants are right on their main contention—that the memorandum is to be treated in the same way as a specific bequest—then the declaration asked for by their notice of appeal is no doubt correct. I do not dispute also that if the words of the memorandum had been comprised in the will they would have constituted a sufficient specific bequest. That makes the question in one respect reduced to this: What is the exact obligation which is imposed by the doctrine of this court upon the person to whom the testatrix has communicated this trust. That is the true principle upon which cases of this class must be dealt with. The obligation was to be performed by the residuary legatee, not so much because of a contract between her and the testatrix, but because it would be fraudulent for

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the legatee not to carry out the trust imposed upon her by the testatrix, which trust she has accepted. It is an obligation affecting the conscience of the legatee. The whole matter of course depends upon the acceptance of the gift. According to the authorities it really amounts to this: The acceptance of the gift with a knowledge of the conditions which the testatrix intends to engraft upon it amounts to a representation by the legatee that she intends to fulfil those conditions. [STIRLING, L.J.—That is tantamount to a contract.] I do not think it much matters whether it arises out of contract or out of a state of circumstances which the court considers it would be fraudulent on the part of the legatee not to perform. There is no authority directly supporting the appellants' contention, because in all the cases that have been cited there was no question as to the true construction of the testator's wishes, whether written or parol. This is a case, therefore, unfettered by authority. The point appears never to have been actually decided. The appellants' contention is so against the residuary legatee that if adopted not only would she derive no personal benefit from that part of the estate which is comprised in the memorandum, but the residue of the estate would be diminished in favour of the persons who are to take under the memorandum. As regards the authorities, there is none with regard to a specific legacy of this sort. In all the cases which have been cited the true construction of the trust imposed by the testatrix upon the legatee was not in question. In *Drakeford v. Wilkes* (*ubi sup.*) the trust was a trust imposed upon a specific legatee, and therefore the question did not arise which occurs here. In *McCormick v. Grogan* (*ubi sup.*) the court came to the conclusion that there was no trust. The obligation was to pay a sum of money. In *Barrow v. Greenough* (*ubi sup.*) there was no question as to the obligation which was accepted by the legatee. Exactly the same remark applies to *Irving v. Sullivan* (*ubi sup.*), which is the only other case that has any bearing on this point. There was an obligation there to pay a sum of money, and the only point there that could affect the residuary legatee in the present case is that the Vice-Chancellor ordered interest to be paid on the money retained by the legatee. The point with regard to interest was not, however, actually discussed in that case, and no reason was given by the Vice-Chancellor for his decision on it. But as to *Cullen v. Attorney-General for Ireland* (*ubi sup.*), that has a considerable bearing on the question of specific legacies. It throws much light on what is the position of persons under circumstances similar to those occurring in the present case. The question there was whether a legacy subject to a secret trust in favour of a charity was liable to legacy duty under the Irish Stamp Acts, or fell within an exemption in favour of charities. Lord Westbury lays down the principles governing secret trusts and trusts affecting the conscience of the legatee, and shows that the title of the *cestuis que trust* thereunder is not testamentary. The fair construction of what the testatrix meant by the terms of the memorandum here is that the residuary legatee should not take the property comprised therein for her own benefit, but should dispose of the same according to the directions contained in the

memorandum. But it does not impose a further obligation upon her to discharge debts, &c., out of the property which she takes as residuary legatee. If she had refused to accept the obligation the testatrix might have placed her and the *cestuis que trust* under the memorandum upon the same footing. I submit, therefore, that the debts ought to be discharged according to the decision of Kekewich, J.

Edward Ford for the respondents, the plaintiffs, took no part in the argument.

Vaughan Hawkins replied.

Cur. adv. vult.

May 12.—The following written judgments were delivered:—

COLLINS, M.R.—The question in this case is how far the order in which the property comprised in a will is available for the payment of debts is affected by a trust imposed upon a residuary legatee in respect of a specific part of the residue in favour of a particular person by virtue of a collateral non-testamentary document signed by the testatrix. The facts are shortly stated in the first three paragraphs of the affidavit filed by the plaintiff on the originating summons herein. [His Lordship read the paragraphs as above set forth, and continued:] The affidavit then sets out a statement of the real and personal property comprised in the will, which includes a freehold house known as "Brooklyn," which was the only real estate belonging to the testatrix. It then states that by a previous order the court had ascertained and declared what part of the personal estate of the testatrix was bound by the memorandum, and also sets out the approximate amount of the debts, duty, costs, and expenses payable out of the estate, by which it appears that the greater part of the whole residuary personal estate, including the part covered by the memorandum, would be exhausted in discharging these liabilities. The originating summons was taken out to determine the question in what order the property comprised in the will should be made liable for these payments, the defendant Susan Washington contending that the debts, &c., should be apportioned between the personal estate bound by the memorandum and the remaining personal estate *pro rata*, and that the freehold house was not bound to contribute till the whole of the above funds was exhausted. The remaining defendants, on the other hand, claimed that the residuary estate unaffected by the memorandum was primarily liable for the payment of debts, and that the deficiency must be borne rateably by the property passing under the memorandum and the real estate of the testatrix. The learned judge in the court below has held that the debts of the testatrix, the estate duty on her general personal estate, and the costs of administration are payable rateably out of the portion of her residuary personal estate bound by the memorandum and the portion not so bound. The learned judge has arrived at this conclusion on the ground that, as stated by Lord Westbury in *Cullen v. Attorney-General for Ireland* (14 L. T. Rep. 644; L. Rep. 1 E. & I. App. 190, at p. 198), the obligation imposed by the memorandum is entirely *dehors* the will, and that it can therefore have no operation except upon such part of the residuary personal estate as comes to the hands of the legatee after the estate has been administered

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and all liabilities discharged in ordinary course without any regard whatever being had to the existence of the obligation created by the memorandum. It is obvious that if this view be right, the obligation imposed on the conscience of the legatee by the memorandum might not come into operation at all until the greater part or even the whole of the fund made specifically subject to it had been exhausted, and that the person bound thereby would nevertheless be entitled to insist upon a mode of administration which for his own advantage might defeat the purpose of the testator in imposing the obligation. This would be a somewhat startling conclusion for that court to accept which had long ago found means, notwithstanding statutory difficulties, to reach the conscience of legatees and compel performance of trusts. Having taken so bold a step to compel justice to be done, it would be strange if it were compelled to admit its impotence to interfere until after its intervention had become futile, as it well might if the legatee were insolvent and dishonest. It seems that the precise point involved in this case has never been raised before, and the question is whether the principle on which the court has intervened in similar cases to give effect to the intention of the testator is not large enough to cover it. The principle is well established, and is expounded in numerous cases which were cited in argument from *Drakeford v. Wilkes* (3 Atk. 539), decided by Lord Hardwicke in 1747, onwards; but it seems to be nowhere more clearly stated in recent times than by Lord Cairns in *Jones v. Badley* (19 L. T. Rep. 106; L. Rep. 3 Ch. App. 362) adopting and enlarging the explanation given by Wood, V.C. in *Wallgrave v. Tebbs* (2 K. & J. 313). He there says at p. 363 of L. Rep. 3 Ch. App.: "Upon the case applicable to such a case there is no controversy. Both appellants and respondents were content to take it, as the Master of the Rolls took it, from the clear and felicitous exposition of it by Wood, L.J., when Vice-Chancellor, in the case of *Wallgrave v. Tebbs* (*ubi sup.*). Where a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than for his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such case the court will not allow the devisee to set up the Statute of Frauds, or, rather, the Statute of Wills, by which the Statute of Frauds is now in this respect superseded, and for this reason: The devisee, by his conduct, has induced the testator to leave him the property, and, as Turner, L.J. says in *Russell v. Jackson* (10 Hare, 204), no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favour would not have been found in the will. But in this the court does not violate the spirit of the statutes; but for the same end—viz., prevention of fraud—it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it. Another test, which is founded on the same principles, and which has sometimes been applied, is to consider the case as unaffected by the

Statute of Mortmain or Wills, and then to inquire whether a trust has been imposed by the testator, and accepted by the devisee in such a way that a court of equity would enforce it as binding on the conscience of the devisee." The obligation therefore has, it would seem, as between the legatees who under such circumstances accept the legacy, and the persons designated by the testator as beneficiaries, the character of a trust. But the right of the latter is wholly dependant on whether the legatee accepts the legacy with knowledge of the mandate, and no right for them arises at all unless and until the legatee has with notice accepted the legacy. A personal relation is then established between these two parties without reference to others, and as between them would seem to have the incidents of a trust. It is not denied that had the memorandum been actually added in the form of a codicil to the will its effect would have been that contended for by the appellants. The unappropriated residue of the personality would have been applied first; and then the specific legatee under the codicil and Miss Washington as the specific devisee of the house would have contributed *pro rata* to the balance. The present case is free from the complication of any other legatee being concerned in the distribution. On what ground, then, must the court hold its hand and refrain from insisting on equity being done. The fact that the memorandum creates an obligation *dehors* the will, and cannot be enforced as part of the will, does not seem to me to be at all inconsistent with the right asserted by the court on the principle above stated to intervene to prevent an unrighteous insistence upon a *prima facie* legal right. The court does not wait to give effect to an equity which displaces the Statute of Frauds until after the rights of the parties have been disposed of on the footing of the statute. So it seems to me to be wholly consistent with the admission that nothing *dehors* the will can be treated as part of the will that the court should intervene to prevent a legatee from committing a fraud by insisting on his rights under the will to the prejudice of his *cestui que trust*. Why should the court renounce its jurisdiction over the legatee to compel him to perform his trust because he is engaged in assisting at the distribution of assets under the will? He is not emancipated from its jurisdiction because he is engaged in that process, and the court will not, I should hope be deterred from exercising this collateral jurisdiction by the fear that in so doing it may indirectly give effect to the well ascertained intention of a testator not expressed on the face of the will, but not inconsistent with it. I think this appeal must be allowed, and that the contention of the appellants must prevail.

STIRLING, L.J.—There can be no question that upon the principles stated by Lord Hatherley (then Wood, V.C.) in *Wallgrave v. Tebbs* (2 K. & J. 313, at p. 321), in a passage quoted with approval by Lord Cairns, L.C. in *Jones v. Bradley* (19 L. T. Rep. 106; L. Rep. 3 Ch. App. 362, at p. 363), Miss Washington is in equity subject to a personal obligation to dispose of the property mentioned in the memorandum of the 17th June 1897 in accordance with the directions therein contained. The precise nature and extent of the obligation must depend on the true meaning and effect of that document. It was properly admitted

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at the Bar that if the memorandum had been duly executed and admitted to probate as a codicil to the will of the testatrix, such property (which I shall hereafter call the savings) would have been specifically bequeathed by the testatrix and consequently been exempted from payment of funeral and testamentary expenses, debts, and legacies, if the personal estate not specifically bequeathed was sufficient to pay these charges. The principle of the exemption is (as is pointed out by Lord Selborne, L.O. in *Robertson v. Broadbent*, 50 L. T. Rep. 243; 8 App. Cas. 812, at p. 815) "that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing to pass unconditionally and in *statu quo* to the legatee, which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and legacies. As against creditors, the testator cannot wholly release it from liability for his debts; but as against all persons taking benefits under his will he may. The same principle applies to everything which a testator identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate, the fund out of which pecuniary legacies are in the ordinary course payable." Inasmuch as the memorandum was not executed as a codicil, this reasoning cannot be applied without some qualification. If, for example, the testatrix had by her will made specific or pecuniary bequests, the legatees would have been entitled to say that their rights could not be affected by a document which did not satisfy the requirements of the Wills Act, and to insist that the estate should be administered (so far as they were concerned) without regard to it; and consequently the savings as well as the other property devised and bequeathed to Miss Washington would remain subject to those rights, as in any case all such property would be to the rights of creditors. But as between Miss Washington and the beneficiaries under the memorandum, the savings have been separated in favour of those beneficiaries from the general mass of the testator's estate and made subject to the disposition expressed in the memorandum. *Prima facie*, therefore, it seems to me that as between Miss Washington and those beneficiaries the principle laid down by Lord Selborne applies, and that the savings ought as between that property and the other property given to Miss Washington to be held exempted from the charges which fall primarily on the personal estate not specifically bequeathed. The memorandum itself, when carefully examined, seems to me to contain much which serves to indicate that this was the meaning of the testatrix. She states that she leaves the document "with her will"; she desires the fund to be invested by her trustees. In my opinion, this indicates her meaning to be that the memorandum should (as between the beneficiaries thereunder and Miss Washington) be taken as forming part of her testamentary disposition, and that (as between the same parties) the memorandum should take effect as if it had been a duly executed codicil; and the like consequences as regards the administration of the estate must

follow. Kekewich, J. has based his decision on the ground that the title of the beneficiaries under the memorandum was *dehors* the will. This is undoubtedly true, yet it does not seem to me to conclude the case. If Miss Washington had died before the estate of the testatrix was fully administered and had made a will bequeathing the savings in the terms of the memorandum her legatees would have derived title *dehors* the will of the testatrix; but the case of *Lady Langdale v. Briggs* (8 De G. M. & G. 391) would have been, as I think, a direct authority in favour of the exemption of the saving from the funeral and testamentary expenses and debts of the testatrix. In that case a testator specifically bequeathed certain leaseholds which formed part of the general personal estate of a prior testatrix whose estate was not completely administered at the death of the testator; and it was contended that the leaseholds were subject to the payment of the funeral and testamentary expenses, debts, and legacies of the testatrix. Turner, L.J. says (8 De G. M. & G. pp. 434, 435): "It was . . . insisted that the whole or some part of the funeral and testamentary expenses, debts, and legacies . . . ought to be made good out of these leasehold estates. But as to the funeral and testamentary expenses, debts, and legacies, there were other assets . . . out of which they could be and were ultimately paid. And surely if these leaseholds were well bequeathed by the will of the testator, it was the duty of his executors to take care that they were not unnecessarily sold for the purpose of making these payments." So here, it seems to me, that Miss Washington came under an obligation to take care that (as between herself and the beneficiaries under the memorandum) the savings were not unnecessarily resorted to for the purpose of answering the funeral and testamentary expenses and debts of the testatrix. Finally, I may observe that the view which I have taken does not conflict with any decision, and is in accordance with what was done by Lord Alvanley, M.R. in *Barrow v. Greenough* (3 Ves. 152) and by James, V.C. in *Irvine v. Sullivan* (L. Rep. 8 Eq. 673). For these reasons I think that the appeal ought to be allowed.

COZENS-HARDY, L.J.—[His Lordship referred to the provisions of the will of the 11th Jan. 1897 and read the memorandum of the 17th Jan. 1897, and continued:] It will be observed that the witness to this memorandum was the residuary devisee and legatee, Miss Washington. The memorandum was not properly attested as a codicil and could not be proved. The testatrix died in Dec. 1898, and her will was proved on the 7th April, 1899. By an order made by Kekewich, J. on the 14th March 1900, on an originating summons, Miss Washington submitting to give effect to the memorandum as the court might direct, the court declared that all the testatrix's property belonging to her at her death, except the freehold messuage known as Brooklyn House and the 3851, the apportioned part of the testatrix's life interest to the date of her death, and her furniture or any farming stock, implements, or household goods and effects, was bound by the said memorandum. It now appears that the residuary personal estate, exclusive of that portion which is subject to the memorandum, is not sufficient to provide for the payment of funeral and testamentary expenses and debts and the

costs of administration, and the question arises how the deficiency ought to be borne. Kekewich, J. held that the debts, &c., are payable rateably out of the portion of the residuary personal estate bound by the memorandum and the portion not so bound, and this is an appeal by persons interested under the memorandum against that declaration. It is necessary to consider upon what principle the undoubted rule of the court that effect is to be given under certain circumstances to declarations in writing not properly attested is based. It is clear that no unattested document can be admitted to probate or treated as part of the will. It is established that a devisee or legatee who is entitled absolutely upon the terms of the will is in no way affected by the existence of a document showing that he was not intended to enjoy beneficially if he had no knowledge of the document until after the death of the testator. Such a memorandum may or may not influence him as a man of honour, but no legal effect can be given to it. If, however, the devisee or legatee is informed of the testator's intention, either before the will in his favour is made or at any time afterwards before the testator's death, different considerations arise. It is sometimes said that under such circumstances a trust is created in favour of the beneficiaries under the memorandum. At other times it has been said that the devisee or legatee under the will is bound by contract, express or implied, to give effect to the testator's wishes. Now, the so-called trust does not affect the property except by reason of a personal obligation binding the individual devisee or legatee. If he renounces and disclaims or dies in the lifetime of the testator the persons claiming under the memorandum can take nothing against the heir-at-law, or next of kin, or residuary devisee, or legatee. The case of *Tee v. Ferris* (2 K. & J. 357) is instructive on this point. There a testator by his will gave his residue to Ferris and three other persons as tenants in common. By a memorandum of even date, not attested as a codicil, he expressed his confidence that the four persons would appropriate the residue to charitable objects. Ferris alone was informed of this in the testator's lifetime, and Wood, V.C. held Ferris' one-fourth was affected by the memorandum, but that the other three-fourths were not so affected. At p. 363 the Vice-Chancellor says this: "It is well settled law that if the testator had read over to Ferris his will, and also the letter of the 18th Aug. 1846, and said: 'Mr. Ferris, I have made that will and written that letter expressing my intentions in making it,' and Ferris had said nothing in reply, he would in this court have been taken to have contracted to carry those intentions into effect." He then held that although Ferris did not know of the memorandum for sixteen months and shortly before the testator's death, he could be in no better position. "That being so, it is impossible to contend that a beneficiary placed in such a position is at liberty to stand by and say nothing, and having so stood by and said nothing is then to be at liberty, after the testator's death, to turn round and claim the benefit given him on the face of the will as if it had been given to him absolutely." In other words, a person to whom the testator's wishes are thus indicated is held to, in effect, contract that in consideration of the testator giving him the property absolutely, or, if already

given to him absolutely, not revoking it, he (the legatee) will give effect to the testator's wishes to the same extent and in the same manner as if those wishes had been formally expressed in a testamentary document admitted to probate. In *Tee v. Ferris* (*ubi sup.*) the declaration in the decree was that the one-fourth share given to Ferris was "affected by the trusts thereof declared by the letter so far as such trusts are valid." And the decree went on to declare that, so far as the real estate and impure personality were concerned, the trusts were invalid, and that the heir-at-law and next of kin were respectively entitled. The obligation imposed upon Ferris was to treat his one-fourth exactly as if it had been in terms given by will or codicil for the charitable purposes mentioned in the letter, the result being that the heir-at-law and next of kin, who certainly were not intended to benefit, did in fact benefit. There is thus created what Lord Cairns, in *Jones v. Badley* (19 L. T. Rep. 106; L. Rep. 3 Ch. App. 362), adopting the language of Woods, V.C., calls "in effect a case of trust," and the court will not allow the devisee or legatee to set up the Wills Act. Another way of arriving at the same conclusion is to say that the devisee or legatee is estopped by his conduct from denying that the memorandum is a part of the will. But whether the true principle be trust or contract or estoppel, it seems to me that, as between the devisee or legatee and the persons interested under the memorandum, all the same consequences must follow as would follow if the memorandum had in fact formed part of the will. Applying these principles to the present case, Miss Washington, who attested the memorandum, must be taken to be subject to a personal obligation to give effect to the memorandum precisely as if it had been duly executed as a codicil and admitted to probate. It was faintly argued that the memorandum if admitted to probate would not have amounted to a specific bequest, but upon the language of the memorandum I can feel no doubt on this point. The result is that Miss Washington in dealing with the residuary real and personal estate given to her by the will, must treat the property comprised in the memorandum as though it had been specifically bequeathed, and it follows from this that the residuary personal estate not comprised in the memorandum must first be exhausted to pay debts, &c., and that any deficiency must be borne rateably by the property comprised in the memorandum, and by the real estate devised to Miss Washington. Kekewich, J. seems to consider that the memorandum only operated as a gift of a portion of the residuary estate after the entire residue had been properly administered. But for the reasons I have stated, I think this view is not correct. As against creditors of course this property is available. If there were any specific legatees or devisees other than Miss Washington, this property must be exhausted before the properties bequeathed or devised to them could be touched. But as against Miss Washington this property must be regarded as specifically bequeathed. The result is that the appeal must be allowed.

Appeal allowed.

Solicitors: *Ridsdale and Son*, agents for *Heaton and Son*, Burslem; *Hicklin, Washington, and Pasmore*.

[CHAN. DIV.]

Re CREDIT ASSURANCE AND GUARANTEE CORPORATION.

[CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, May 13.

(Before FARWELL, J.)

Re CREDIT ASSURANCE AND GUARANTEE CORPORATION. (a)

Company—Reduction of capital—Cancellation of lost capital—Losses to be borne in proportion to capital paid up—Different amounts paid up on same class of shares—Other shares not proposed to be affected.

The capital of a company was 1,000,000*l.*, consisting of 2000 deferred shares of 1*l.* each issued to the subscribers to the memorandum as fully paid, and 99,800 ordinary shares of 10*l.* each, of which 37,712 had been issued, 1123 to the vendors as paid up to the amount of 5*l.* and 36,589 to other persons as paid up to the amount of 2*l.*

The articles provided that if the company be wound up and the assets be insufficient to repay the paid-up capital, the assets should be distributed so that the losses should be borne in proportion to the capital paid up or which ought to have been paid up at the commencement of the winding-up.

The company now petitioned to reduce the ordinary shares to 8*l.* 10*s.* each, credited with 3*l.* 10*s.* where 5*l.* had been paid, and 10*s.* where 2*l.* had been paid, the deferred shares to be unaffected. This was opposed by certain shareholders.

Held, that the duty of the court was to see that the losses were divided between the different classes of shares in the same manner as in a winding-up; that the articles provided that in such winding-up losses must be borne in proportion to the amount of capital paid up; that the proposed reduction was not in accordance with this principle, and must therefore be refused.

This was a petition for the reduction of capital.

The Credit Assurance and Guarantee Corporation Limited, the company in question, was incorporated in 1897 with a capital of 1,000,000*l.*, divided into 2000 deferred shares of 1*l.* each and 99,800 ordinary shares of 10*l.* each.

The memorandum of association of the company provided that the profits should be applied, after carrying to reserve such sums as might be thought expedient by the directors in paying a dividend upon the ordinary shares, at the rate of 10 per cent. per annum on the amount paid up for the time being; and that one-half the surplus should be paid to the holders of deferred shares, and the other half, subject to payment thereof of such extra remuneration to the directors as the company in general meeting should direct, should belong to the ordinary shareholders.

The articles of association gave the company power to reduce capital, and contained the following article:

152. If the corporation shall be wound-up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commence-

ment of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions.

The 2000 *l.* shares had been issued, as fully paid, to the subscribers of the memorandum of association in consideration of their underwriting a part of the capital; 1123 of the ordinary 10*l.* shares had been issued to the vendors as paid up to the extent of 5*l.* On the other ordinary shares issued 2*l.* only had been called up or paid.

The company had incurred losses, and on the 12th Dec. 1901 passed a special resolution, which was afterwards duly confirmed:

That the capital of the company be reduced to 850,300*l.*, divided into 99,800 ordinary shares of 10*l.* each, and 2000 deferred shares of 1*l.* each, and that such reduction be effected by cancelling capital to the extent of 1*l.* 10*s.* in respect of each of the ordinary shares in the company's capital . . . which have been issued and are now outstanding, and by reducing the nominal amount of all the ordinary shares in the company's capital from 10*l.* to 8*l.* 10*s.*

The minute proposed to be registered stated:

The capital of the company is 850,000*l.*, divided into 99,800 ordinary shares of 8*l.* 10*s.* each, and 2000 deferred shares of 1*l.* each, reduced from 1,000,000*l.* divided into 2000 deferred shares of 1*l.* each, and 99,800 ordinary shares of 10*l.* each. At the time of registration of this minute 1123 of the said ordinary shares have been issued, and are paid up or considered as paid up to the extent of 3*l.* 10*s.* per share, and 2621 of the said ordinary shares have been forfeited for nonpayment of calls, and the remaining 33,968 have been issued and are paid up to the extent of 10*s.* per share.

This petition was for confirmation of the proposed reduction.

Upjohn, K.C. and W. A. G. Woods for the petition.—It is proposed to reduce one class of shares and not the other. No doubt the reduction on a loss of capital ought to be borne between all classes rateably. But the company has power to apply a return of capital if gained or a loss if lost to any particular class of shareholders subject to a special report sanctioning or refusing such sanction. The great conflict on this question is now settled by

Birch v. Cropper, 61 L. T. Rep. 621; 14 App. Cas. 525.

Jenkins, K.C. and Martelli for opposing shareholders.—The form of article which is used here is that which is to be found on p. 659 of *Palmer's Company Precedents*, 7th edit., and which was drawn for the purpose of getting out of the decision in that case. Accordingly, in a winding-up it is important whether our shares are of the nominal value of 8*l.* 10*s.* or 10*l.* The proposed reduction is therefore inequitable, and ought not to be sanctioned.

Upjohn, K.C., in reply, referred to the judgment of Chitty, J. in

Re Floating Dock Company of St. Thomas, (1895) 1 Ch. 697;

Bannatyne v. Direct Spanish Telegraph Company, 55 L. T. Rep. 716; 34 Ch. Div. 287;

Re Barrow Hematite Steel Company, 83 L. T. Rep. 397; (1900) 2 Ch. 846.

FARWELL, J.—It may be very inconvenient, but the objection seems to be well founded. I allow it, however, with some reluctance. This company consists of shares some of which were issued under a registered contract at the price of

(a) Reported by A. W. CHARTER, Esq., Barrister-at-Law.

5l. and 10l. respectively. There are other shares on which 2l. is called up, and the ordinary rule in the absence of special provision is that the assets are available for distribution in a winding-up among the members in proportion to the nominal capital held by them. To avoid that condition of things a special article was framed which I need not read, because it is to be found in Palmer's Company Precedents at p. 659. Now, as I understand it, in cases of reduction of capital the court is treating the reduction as a sort of anticipation to a limited extent of what would take place if there were a winding-up. Thus, Cotton, L.J. in *Bannatynes v. Direct Spanish Telegraph Company* (*ubi sup.*), at p. 299 of the L. R. says: "If there was a winding-up, the capital being partly lost, the preference shareholders and the ordinary shareholders must bear the loss rateably between them, because these shares were constituted without any preference as regards capital, though they had a preference as regards dividend. Then, if that is so, and there is a loss of capital, in consequence of which there is a reduction made in the capital of the company by reducing the nominal amount of the shares, that must be borne not only by the ordinary shareholders, but also by the preference shareholders." As I understand it, that means this, that when you come to consider a reduction of capital under the Act of 1877 you have also to consider what would take place if there were a liquidation. Looking at the articles to see what the bargain is, and applying that so far as one can to the limited liquidation which is supposed to be taking place, there is the bargain, and I do not see how to avoid it. It leads to inconvenience, no doubt, but I am not at liberty to disregard it. The result is that I make no order except to dismiss the petition with costs.

Solicitors: Greenwood and Greenwood; R. Chapman.

Thursday, May 29.
(Before FARWELL, J.)

AERATORS LIMITED v. TOLLIT. (a)

Company—Name—New company proposed to be registered under similar name—Injunction—Companies Act 1862 (25 & 26 Vict. c. 89), s. 20.

Aerators Limited was a company established for the purpose of working a certain patent for the instantaneous automatic aeration of liquids. The defendants were the signatories to the memorandum and articles of association of a proposed new company to be known as *Automatic Aerator Patents Limited*. The plaintiff company moved for an injunction to restrain the defendants from registering that title as being calculated to deceive, and rested their case largely on the fact that "*Aerators*" was generally known as a company that possessed the principle of instantaneous automatic aeration—that was the plaintiff company—and that the adoption of that word by the defendants was, therefore, calculated to deceive. The defendants contended that the system they proposed to adopt was entirely different from that of the plaintiffs, and could not be confused with their patent.

Held, that there was no evidence of probability of deception, and that the action was, therefore, an attempt to monopolise a word in ordinary use, and must be dismissed with costs.

THE plaintiffs in this case were a company established for the purpose of working a certain patent for the instantaneous automatic aeration of liquids, and the defendants were the signatories to the memorandum and articles of association of a proposed new company to be known as "*Automatic Aerator Patents Limited*."

About the 1st May 1902 it came to the knowledge of the directors of the plaintiff company that a new company was being formed under that title, and they accordingly prepared a memorandum and articles of association of a new company under the title of *Automatic Aerators Limited*, which was tendered to the Registrar of Joint Stock Companies on the 8th May.

Some delay took place owing to a technical informality, and ultimately the registrar refused to register the name, as the defendants' papers had then been lodged with him.

The plaintiff company then commenced this action, in which they claimed an injunction to restrain the defendants from registering a company under the title of "*Automatic Aerator Patents Limited*" or in any other name so nearly resembling the name of the plaintiff company as to be calculated to deceive.

Notice of motion having been given for an injunction in the action, the motion was ordered to be heard as an action with witnesses and without pleadings.

The plaintiffs' case was that they had been carrying on business since Feb. 1900, and had spent large sums in advertising the company in England and the colonies, particularly in Australia and South Africa, and the word "*Aerators*" was thoroughly well known over the greater part of the world as a company possessing the principle of instantaneous, automatic aeration by the name of "*sparklets*."

For the defendant it was urged that the system of aeration they proposed to adopt was entirely different from that of the plaintiffs.

The plaintiff company's system was essentially a portable one, whilst that of the defendants was more adapted to public-houses and places of business where a large amount of aeration was required.

The plaintiff company's objection to the defendants' title was practically confined to the word "*Aerator*" on the ground that that word had been identified over the greater part of the world with the business carried on by them.

Jenkins, K.C. and J. G. Wood for the motion.—The object of the motion is to restrain the registration by the defendants of the name "*Aerator Patents Limited*." We are entitled to this under sect. 20 of the Companies Act 1862. The use of that name is calculated to deceive. The defendants have taken the whole of our name with the exception of an "s." They have adopted the actual word. [Upjohn, K.C. and George Lawrence, for the defendants, referred to the word "*Aerator*" in Knight's Dictionary of Mechanics, 1876. "An apparatus for making aerated waters." FARWELL, J.—If you take a common word in the English language can you restrain

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AERATORS LIMITED v. TOLLIT.

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the use of that?] Certainly. That is the case of the *North Cheshire and Manchester Brewery Company v. Manchester Brewery Company Limited* (79 L. T. Rep. 645; (1899) A. C. 83). [FAREWELL, J.—That was the name of a particular place.]

Upjohn, K.C. and *George Lawrence* for the defendants.—This case goes to the high-water mark of the cases on the subject. They depend largely on a question of fact. The evidence here is insufficient. [FAREWELL, J.—You cannot have evidence of actual deception here; you can only have evidence of common sense men that they believe the name is calculated to deceive.] There is no ground for an injunction here. The *Manchester Brewery* case (*ubi sup.*) was altogether different.

FAREWELL, J. — The plaintiffs "Aerators Limited" claim an injunction to restrain the defendants from registering a company under the name of "Automatic Aerator Patents Limited" on the ground that such name so nearly resembles the plaintiffs' name as to be calculated to deceive within the meaning of the 20th section of the Companies Act 1862. The plaintiffs were incorporated in the year 1900, and took over the business of a similar company of the same name incorporated in 1896. Their business consists in the sale of sparklets; this word is their trade mark, they have largely advertised "sparklets." I understand them to be a small apparatus containing carbonic acid gas by means of which contents of bottles are aerated. One of the merits claimed for them is their portability and their applicability to a small quantity of liquid. The defendants propose that the new company to be formed by them shall acquire patents for the aeration of liquids contained in tanks or cisterns of large size, and shall either work such patents themselves, or shall form subsidiary companies for the development of such patents. The 20th section of the Companies Act enacts that no company shall be registered under a name identical with that by which a subsisting company is already registered or so nearly resembling the same to be calculated to deceive, except in certain cases which are not material to the present case. It will be observed that a company has therefore a greater right than an individual in respect of names that are identical. For John Smith cannot prevent other persons of the same name from using their own name; but John Smith Limited can prevent the registration of any other company as John Smith Limited. I do not, however, consider that it follows that the Legislature has intended to give companies any greater rights than individuals possess in respect of names which are not identical, but only similar, and it has been held that "calculated to deceive" does not point to intentional fraud, but it is a question of fact in each case whether the name of the new company is so similar to that of the old company as to induce the belief that the two companies are identical. In considering this question it is material to ascertain (1) what business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new one; (2) what sort of name has been adopted by the old company. As to the first point, I do not think that it is sufficient for an

existing company to point to clauses in its memorandum which will enable it to extend its operations to numerous classes of trade unless it can satisfy the court that it either has carried on or really proposes within a limited time to carry on such particular business. It cannot, I think, be enough in these days when the objects of a company are usually limited only by the number of letters in the alphabet and extend to every form of business whether connected or not with the principal object to show that the intended new company includes some similar objects. It is necessary to see whether the real objects of the second company are similar. As to the second point, I think that it is necessary to consider the nature of the title registered by the old company. The plaintiffs have argued that the House of Lords in the *Manchester Brewery* case (*ubi sup.*) decided that in no case can a new company take the whole title of an existing company whatever additional words they may add to it, and they accordingly claim a monopoly in the word "Aerators." In my opinion this is not correct. The House found as a fact in the case before them that the adoption by the defendant company of the whole of the plaintiffs' title, although added to other words, was "calculated to deceive," but it appears to me impossible to say as a general proposition that a company can by registering a single word, whatever its nature, remove that word from the English language so far as regards its use in the title of subsequent companies. In the present case the plaintiffs have taken a word which, and which only, aptly and rightly describes a machine for producing a particular result. The word has been in common use in the English language for at least thirty years; it is to be found in dictionaries such as the *Century* (1889), *Murray's Dictionary* (1891), and in the *Dictionary of Mechanics* (1876), to which one of the witnesses referred. It would obviously lead to the greatest inconvenience if any company could prevent all other companies from using as part of their title the one word in the English language which aptly describes the articles they manufacture and deal in, or the name of the individual associated for years with a particular firm; for example, suppose a company had registered the name of *Motors Limited*, and another the name of *Automobiles Limited*, it appears to me impossible to say that they thereby prevent all other companies from using as part of their title these two words, which, so far as I know, are the only words which represent the fashionable locomotives of the day, although their sole trade was the manufacture and sale of motors and automobiles. Or again to take an instance of names, it would be absurd to suppose that *Barclay and Co. Limited*, the well-known bankers, could restrain *Barclay, Perkins, and Co. Limited*, the well-known brewers, from registering as such on the ground that they take the whole of the title of the banking firm. In considering whether a name is calculated to deceive it is, as I have said, material to see what that name is, and, if the name is simply a word in ordinary use representing a machine or an article of commerce, the probability of deception is out of all proportion less than it would be in the case of an invented or fancy word, or even the name of a place; the latter may well point to a particular company, the former certainly points *prima facie*

to the machine or article, and can only under very exceptional circumstances, and by a long course of usage point to the company, and rather than the thing itself. English-speaking people know "aerators," "motors," and the like as machines, not as companies, and the presence of such a word in the title of a company suggests that. A company deals in these machines, not that it has anything to do with a company of that name; if the plaintiffs assert the contrary it is for them to prove it, and the principles applied by the House of Lords in *Reddaway v. Banham* (74 L. T. Rep. 289; (1896) A. C. 199), explained as they were in *Cellular Clothing Company v. Maxim* (80 L. T. Rep. 809; (1899) A. C. 326), to which I had occasion to refer in *Chivers v. Chivers* (17 Pat. R. 420), apply as much to the name of a company under sect. 20 as to the camel's hair belting, the cellular clothing, and the name of Chivers in these cases. I will read the passages from Lord Shand's speech that I read in *Chivers' case*, "I shall only say that it no doubt shows it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning, and so to confer on the person who has so used it a right to its exclusive use, or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language, and which is descriptive only, and, indeed, were it not for the decision in *Reddaway's case* (*ubi sup.*), I should say this should be made altogether impossible." The plaintiffs further argued that the Act of Parliament was intended for the protection of the public, and that there must necessarily be some confusion in the minds of the public if the whole of their title is taken, but I would point out that the plaintiffs cannot assert in their own names the right of the public—that is for the Attorney-General; they can only assert their own right as members of the public if and so far as they can show special damage to themselves; but the choice of their own name rests with themselves; the registrar has no discretion to refuse to register any name put forward on behalf of a company; and if by reason of their adoption of one single word in common use they run the risk of suffering injury, they have only themselves to thank, and they can no more acquire a monopoly in the use of the word "aerators," by adopting that as their title than an individual can acquire a monopoly in his own name or the name of the article he manufactures. As in the latter case it is necessary for the individual to show not merely that the defendant is trading under his name or making the article the name of which he has adopted, but must also show that the name or article is exclusively identified with his own manufacture so as to have acquired a secondary meaning. So a company must also show that the name which *prima facie* refers to a number of persons or articles is in fact identified solely with the plaintiff before they can satisfy the court that its use as part of another company's name is calculated to deceive. A name is not necessarily calculated to deceive because it is similar; it must depend in great measure upon

what the nature of the name is, and if it merely represents the name of the article supplied by the company it would require very strong evidence to show that such name had lost its primary meaning, and had become identified with the plaintiff company. In the case before me, as indeed in all cases under sect. 20, the action is a *quia timet* action, and evidence of actual mistake is therefore impossible, but there is in fact no evidence to my mind of any probability of deception. The plaintiffs' trade mark is sparklets, and the name is put prominently forward on their shop fronts, invoices, bill-heads, and letter paper. The articles in which they deal are very different from those to be manufactured under the defendants' patents. When the plaintiffs ascertained that the defendants intended to register the Automatic Aerator Patents Limited they themselves applied to register another company under the same or all but the same title, and were only prevented from so doing because the defendants' application was first lodged. The plaintiffs' managing director, who gave his evidence in a very fair and candid manner, stated, that although their chief object was to be beforehand with the defendants, and prevent the registration of the name, yet that they had intended that the new company should carry on business under this title, and that if proper care was taken they did not anticipate that any confusion would arise. Yet this new company of the plaintiffs was intended to deal in articles similar to those sold by the plaintiffs, and if due care can prevent confusion in such a case, *a fortiori* can it do so when the articles dealt in are so different as those of plaintiff and defendant. In my opinion the plaintiffs' action is an attempt to monopolise for the purposes of nomenclature one word in ordinary use in the English language, and fails, and must be dismissed with costs.

Solicitors: Wainwright and Co.; Hind and Robinson.

Wednesday, May 14.

(Before BUCKLEY, J.)

Re CLARKE'S SETTLED ESTATES. (a)

Settled land—Capital moneys—Improvements—Electric light installation—Additions to or alterations in buildings—Settled Land Act 1890 (53 & 54 Vict. c. 69), s. 13, sub-sect. (ii).

The improvements contemplated by sub-sect. (ii.) of sect. 13 of the Settled Land Act 1890 are structural additions to or alterations in the building; and the installation of a system of electric lighting and the necessary fittings are not structural additions or alterations, and their cost cannot therefore be defrayed out of capital moneys.

Re Freake; Lord Kinnaird v. Freake (85 L. T. Rep. 454; (1902) 1 Ch. 97) not followed.

THIS summons involved the construction of sect. 13, sub-sect. (ii.), of the Settled Land Act 1890.

A country house, with garden and pleasure grounds, situated near Uxbridge, was comprised in a settlement.

In Aug. 1901, the tenant for life, who was non-resident, was desirous of letting it, and entered

(a) Reported by A. L. MORRIS, Esq., Barrister-at-Law.

into negotiations for the purpose. The proposed tenant was willing to take a lease, but only upon the terms that the electric light was supplied and fitted throughout the house, and possession given before the 1st Sept. There being no time in which to submit a scheme to the trustees, the tenant for life himself carried out the improvements at his own expense, and in October granted a lease for eleven years.

He now applied that the costs of the improvements might be repaid to him out of capital moneys subject to the settlement.

By sect. 13 of the Settled Land Act 1890 it is provided that

Improvements authorised by the Act of 1882 shall include the following—namely, (i.) Bridges; (ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.

W. A. Peck (Birrell, K.C. with him) for the applicant.—There can be no doubt but that the improvements were “reasonably necessary or proper to enable” the house “to be let,” and the only question is whether they were “additions” or “alterations” within the section. I admit that an “alteration” in a building is necessarily an alteration in the structure, but the word “addition” is not so limited, and it includes anything added. The wires, &c., really become fixtures, and could not be taken away by a tenant as against his landlord. A similar application was recently sanctioned by *Joyce, J. in Re Freake; Lord Kinnaird v. Freake* (85 L. T. Rep. 454; (1902) 1 Ch. 92. He also referred to

Re Gaskell's Settled Estates, 70 L. T. Rep. 554; (1894) 1 Ch. 485.

T. H. Robertson, for the trustees, was not called upon.

BUCKLEY, J.—The question I have to determine on this summons is as to the true construction under sect. 13 (ii.) of the Settled Land Act 1890, of the words “additions to” or “alterations in” buildings. Mr. Peck, for the tenant for life, has addressed an argument to the court in which he was bound to allow that “additions” under that section meant additions of any kind. He read passages from some of the dictionaries to show, what I should have thought—without the aid of a dictionary—was obvious, that an addition means something added to something else, and it is none the less an addition, in the largest sense of the word, where the particular thing is not of the same quality as that to which it is added. If the word in this sentence were understood in that sense it would follow, as it seems to me, that there would fall within these words all such things as I am going to mention—for instance, Venetian blinds, outside sun blinds, furniture put into an unfurnished house, a park added to a mansion-house which enjoyed no park—all those are additions to the buildings in a sense; but are they additions within the meaning of this sub-section? I think not. One can conceive a case in which a house could not be let unless it enjoyed, say, a certain amount of ground with it, or unless, in some inaccessible part of the country, it were offered as a furnished house, and not as an unfurnished house, but an “addition” within the section would not include the addition of land to a house or furniture to a house, because I think that addition here means structural addition in some sense of the word. The frame of

the sentence is “additions to” or “alterations in buildings.” Now, an alteration in a building must be a structural alteration; to alter a thing you must alter it structurally. You cannot alter it otherwise, and the argument addressed to me on the part of the tenant for life amounts to this, that whereas of these two noun substantives one (namely, “alteration”) always must mean “structural alterations,” the other (namely, “additions”) does not mean “structural” additions, but means the addition of anything, whatever it may be, to the building. I do not think that this is a true principle of construction. I understand this sentence to mean “the addition to the building of some fresh building,” or the alteration of the building by removing and replacing in some other form some part of a building, that is to say, that both one and the other are to be structural. Now this matter is not without authority. The question was considered by the late Chitty, L.J., when a judge of first instance, in *Re Gaskell's Settled Estates* (70 L. T. Rep. 554; (1894) 1 Ch. 485). The question there was, whether the addition, so to call it, of a fixed boiler with hot water pipes running all over the house, for the purpose of warming the house, was an addition within this section. An addition in a sense, of course it was; the building had more in it after the hot water pipes were put there than it had before, but the learned judge held that it was not within the section. As I read the judgment, he construed these words as meaning “structural additions” and “structural alterations.” Now, in order to show that, I will just read one or two words. The learned judge says: “Sect. 13, sub-sect. (ii.), is very precise in its terms, and is confined to additions to or alterations in buildings, and any improvements authorised under this sub-sect. (ii.) must therefore be an addition to or alteration in the buildings.” His Lordship then goes on to point out that although the boiler and hot water pipes will make the house much more comfortable and convenient, that does not bring it within the scope. At the top of the next page he says: “I am of opinion that this warming apparatus, however convenient it may be to the occupier, is neither an addition to nor alteration in the building within the section.” It is true the learned judge has not used the word “structure,” but his language, to my mind, clearly shows his meaning. The reason why he excluded the boiler and hot water pipes from the Act was that, although they were an addition, they were not a structural addition; that is made very plain from what follows, I think. He goes on to discuss next a different sort of alteration altogether—viz., taking off the roof and putting on a new roof, of course structurally. As to that, he commences the discussion by using these words: “As regards the change in the main entrance and the other minor alterations consequent thereon, they appear to have been alterations in the structure of the building itself.” Here he is contrasting, to my mind, what he is passing to, which is structural, with that which he is leaving, which was non-structural, and which he has excluded because it was non-structural. Then he says: “A question of a metaphysical nature arises as to the identity of the house. Is a house with a rotten roof identical with the house which becomes, when the roof has been replaced, a new and sound one.” Now,

it would have been unnecessary altogether to discuss that, unless he meant that the non-structural alteration was outside the section. I read *Re Gaskell's Settled Estates* therefore as a decision that this sub-section refers to structural alterations. But then it is said that recently in *Re Freake's Settled Estates* (35 L. T. Rep. 454; (1902) 1 Ch. 97), Joyce, J. has decided that an electrical lighting installation is within this section as being an addition. Now, I have taken the opportunity of speaking to the learned judge about that case, and he tells me he did not intend there to decide any general question; he preferred simply to decide that case. However that may be, if there be the two decisions, *Re Gaskell's Settled Estates* by Chitty, J. and *Re Freake's Settled Estates* by Joyce, J., and they are in conflict, it is open to me to follow my own judgment in the matter, and my own judgment is that alterations and additions in order to fall within the section must be structural. Now, in saying that, I do not intend in any way to preclude an investigation in each particular case as to whether the thing is structural or not. I say, the section must be construed as meaning structural additions of some kind, and every case when it arises must depend upon its own circumstances and its own merits. The particular case here is, there was a house somewhere near Uxbridge, and some one was minded to take it if he had electric light. He would not take it unless he had electric light. The installation of electric light therefore was no doubt, within the words of the Act, "reasonably necessary or proper to enable the same to be let," but, in my opinion, it was not an addition to put the wires into the house. When I say it was not an addition, I mean it was not an addition within the section; it was an alteration of course, but not a structural addition or alteration. I cannot discriminate it in principle from the boiler and hot water pipes, the subject of the discussion in *Re Gaskell's Settled Estates*. For these reasons it seems to me that I must disallow the first item in the summons, for the installation of the electric light. I am told that a subsidiary question may arise, or might arise hereafter, as to the existence of the engine, dynamo, and accumulator for this light, but taking the view which I do it seems to me that that also must fall within my decision upon the question of the electric light, except so far as a question might arise if any actual building were erected, of course, for the purpose of containing the engine, and so on.

Solicitors for all parties, *Frere, Cholmeley, and Co.*

May 8, 9, and 13.

(Before JOYCE, J.)

RIDD v. THORNE. (a)

Solicitor—Lien—Partnership action—Receiver—Judgment creditors—Charging orders—Property recovered or preserved—Priority—Solicitors Act 1860 (23 & 24 Vict. c. 127), s. 28.

In an action for dissolution of partnership a receiver had been appointed who realised the assets of the partners and paid the money into court, retaining a certain sum in hand. After

the appointment of the receiver certain judgment creditors obtained charging orders in chambers whereby the assets in or to come to the hands of the receiver were charged with the payment of their judgment debts.

The solicitor who acted for the plaintiff in the partnership action, and also in defending another action brought against the partners, claimed to have a charge in respect of his costs incurred in such actions on the moneys in court and in the hands of the receiver as being property recovered or preserved, in priority to the judgment creditors.

Held, that the solicitor was entitled to have such charge in priority to the judgment creditors.

Held, also, that the judgment creditors were not purchasers for value without notice within the meaning of sect. 28 of the Solicitors Act 1860.

The effect of a so-called charging order as made in Kewney v. Attrill (55 L. T. Rep. 805; 34 Ch. Div. 345) considered and explained.

THIS was a summons by a Mr. Harry Watkins, a solicitor, asking (1) that it might be declared that the applicant as the solicitor employed by the plaintiff in the prosecution of the above action, and in defending the action of *Lydall v. Bristow and Sons*, was entitled to a charge upon the assets of R. Bristow and Sons, represented by a sum of 300*l.* cash in court and 52*l.* 5*s.* cash in the hands of the receiver appointed in the above action, for the taxed costs, charges, and expenses of the applicant in reference to the above action and the action of *Lydall v. Bristow and Sons*, and that such charge should constitute a first charge on the assets of the firm of R. Bristow and Sons, subject only to the payment of the receiver's remuneration and his solicitor's costs, but in priority to the charging orders obtained by certain judgment creditors; and (2) that the costs, including the taxed costs of this application, might be paid to the applicant out of the cash in court, and in the hands of the receiver.

The action was brought for the dissolution of a partnership between the plaintiff and the defendant, and by an order dated the 12th Feb. 1901, upon motion by the plaintiff in the action, a receiver was appointed of the business of builders carried on by the plaintiff and defendant at 35, Red Lion-street, under the style of R. Bristow and Sons.

The receiver having realised the assets of the partnership, except certain book debts, paid the sum of 300*l.* into court under an order dated the 1st Aug. 1901, retaining a balance of 52*l.* 5*s.* in hand. These sums were, however, subject to the payment of the receiver's remuneration fixed at 52*l.* 10*s.*, and payable on his passing his account and his solicitor's costs, assessed at 34*l.* 11*s.* 4*d.*

There were several creditors of the partnership firm, which was hopelessly insolvent, and among them the following judgment creditors—viz.: Henry Sandall and Sons for the total sum of 115*l.* 6*s.* 4*d.*, J. P. Ridd for the sum of 211*l.* 6*s.*, and Farquharson Brothers and Co. for the sum of 107*l.* 0*s.* 2*d.*

By an order dated the 24th June 1901 it was ordered that the assets of the firm of R. Bristow and Sons in or to come to the hands of the receiver of the business, and assets of R. Bristow and Sons, should stand charged with the payment to Henry Sandall and Sons of two sums amount-

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

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ing to 115l. 6s. 4d. with interest from the dates of the respective judgments, and with the taxed costs of the application.

Similar orders were obtained by a Mr. J. P. Ridd and Messrs. Farquharson Brothers and Co., dated respectively the 24th June 1901 and the 7th Feb. 1902.

Mr. Harry Watkins, as solicitor for the plaintiff in the action, had incurred considerable costs in prosecuting the partnership action and applying for the appointment of the receiver and also in defending another action of *Lydall v. Bristow and Sons*. He had also at the request of the receiver incurred costs in applying to the court for directions as to the realisation of the assets.

By his evidence Mr. Watkins alleged that if the action had not been promptly brought and the receiver appointed the whole of the assets would have been lost, and that the assets in court and in the hands of the receiver represented salvage or property recovered or preserved, and formed a fund which had been created by his work, and he claimed to have a common law lien thereon or charge under the Solicitors Act 1860.

The evidence also showed that the plaintiff had no means other than that in the partnership firm, and that her solicitor had no source from which to obtain payment of his costs other than out of the moneys in court or in the hands of the receiver.

Younger, K.C. and *T. Douglas* for the applicant.—The fund in court and in the hands of the receiver has been recovered by the solicitor's exertions. But for this action there would have been no assets. The solicitor must establish that the property was recovered or preserved within the meaning of sect. 28 of the Solicitors Act 1860, and this we submit he has done. There is no doubt as to the jurisdiction of the court whether in a partnership action or otherwise. The order is made subject to two conditions—viz., (1) that there is no other fund out of which the costs can be paid; and (2) that one of the partners is present on the application by the solicitor for a charging order. This was decided by *Jackson v. Smith* (51 L. T. Rep. 72). They also referred to

Kewney v. Attrill, 55 L. T. Rep. 805; 34 Ch. Div. 345;

Greer v. Young, 49 L. T. Rep. 224; 24 Ch. Div. 545.

C. Bovill for H. Sandall and Sons, judgment creditors.—We have obtained a charging order in the form settled by Kay, J. in *Kewney v. Attrill* (*ubi sup.*). If we had levied execution before the receiver was appointed we would have got priority to the solicitor's lien, and the effect of our charging order is the same as if we had levied execution. The lien of the solicitor attaches here to the moneys in court and in the hands of the receiver, less the amount of our judgment debts and costs. Since the case of *Kewney v. Attrill* (*ubi sup.*) whenever a judgment creditor finds a receiver in possession he gets a charging order in the form adopted in that case, and by it the benefit is preserved to the creditor, which he would have obtained if the sheriff had sold, and at the same time a forced sale is prevented. The "act done to defeat" mentioned in sect. 28 of the Solicitors Act 1860 must be done by the person for whom the property is ultimately recovered. The section is directed against the person for whom the pro-

perty is recovered or preserved, and not against anyone claiming adversely to that person. I am in a better position than the person for whom the property was ultimately recovered. In the case of *Jackson v. Smith* (*ubi sup.*) the creditors took no steps at all to enforce their judgments.

E. Clayton, for Farquharson Brothers and Co., adopted Mr. Bovill's argument and also submitted that the solicitor only recovered or preserved the assets as between the two partners and not as between them and an outside person. He referred to

Emden v. Carter, 45 L. T. Rep. 328; 19 Ch. Div. 311.

Younger, K.C. in reply.

JOYCE, J.—In this case there was a dispute between two partners, and an action was commenced by one of the partners against the other. While the proceedings in that action were going on certain creditors of the partnership commenced actions against the partnership, and, having got judgments, they obtained in the chambers of the judge to whom the partnership action was attached orders which have been called charging orders, although not technically charging orders, but orders following the form of order made in the case of *Kewney v. Attrill* (55 L. T. Rep. 805; 34 Ch. Div. 345) before Kay, J. By these orders the applicants undertook to deal with the charge thereafter mentioned according to the order of the court, and it was ordered that the assets of the firm of R. Bristow and Sons to come into the hands of the receiver appointed by the said order should stand charged with the payment of such judgment debts. Now, at that time, certainly at the date of the last order, various assets had been got in, and the proceeds of those assets were either in the hands of the receiver or had been paid into court. Now, my opinion is that the effect of these orders so far as the assets were concerned was not to give a charge otherwise than subject to any existing lien, or existing prior charge. Speaking for myself, I very much doubt whether Kay, J. ever intended in the case of *Kewney v. Attrill* (*ubi sup.*), or whether it has ever been intended when such orders as these have since been made, to give any charge, except as among the creditors of the partnership or as against the separate partners themselves. Then comes the question on the statute. Now, the statute gives the court power to charge property recovered or preserved with the payment of the costs, charges, and expenses of that preservation, "and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right." Now it is quite settled, and it has been said over and over again, that this section must receive a liberal construction, and I think the decision of Romer, J. in *Scholey v. Peck* (68 L. T. Rep. 118; (1893) 1 Ch. 709) is really in accordance with the general line of authorities. At p. 711 of the latter report he says: "I have considered the cases cited in the course of the arguments and others bearing on charging orders obtained under the Solicitors Act 1860. These authorities show that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered.

CHAN. DIV.]

Re A. AND A. CROMPTON AND CO.'S TRADE MARK.

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The 28th section of the Act is very general in its terms. It authorises a charge not on the mere interest of the plaintiff, but on all property recovered in the action, whether for the plaintiff only or for him in connection with the others. It is not necessary that the property charged should belong to the same person as employed the solicitor; but it must be by reason of the employment that the property is preserved. Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security. In my judgment the case is governed by the principle of *Greer v. Young*. I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the plaintiff, but also against the mortgagee, who is taking the benefit of the action, and over whose mortgage they must have priority. The charge will include their taxed costs." As I have said, and as it appears there, it is quite settled that this is a charge which may be imposed, not merely on the property of the particular client, but, if the property of other persons be preserved or recovered, on their property or their interest. That it may be made as against creditors of a partnership appears by the case of *Jackson v. Smith* (*ubi sup.*). What the statute says is distinctly that all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value, be absolutely void. Now, it reasonably may be doubted whether judgment creditors are purchasers or not. They certainly were not purchasers before they obtained their orders; if they are purchasers at all it is only by virtue of their charging orders. But they were not purchasers without notice, because the action was in existence when they obtained their orders. In the case of *Cole v. Eley* (70 L. T. Rep. 892; (1894) 2 Q. B. 180), which was affirmed on appeal (at p. 350 of (1894) 2 Q. B.), it was held that the provision of sect. 28 of the Solicitors Act 1860, avoiding conveyances to defeat a charging order, "unless made to a *bonâ fide* purchaser for value without notice," means, without notice of the solicitor's right to a lien, and not without notice of the existence of a charging order, that the assignee of a judgment debt, being aware of the existence of the action, and that the solicitor was acting in it for the plaintiff, must be taken to have had notice of the solicitor's right to a lien on the property recovered in the action, and, therefore, was not a "purchaser for value without notice." I hold most distinctly that the creditors who obtained these orders were not purchasers for value without notice. I consider, therefore, that the right to this lien takes priority over them all, and the solicitor must take the common order.

Solicitor for the applicant, *Harry Watkins*.

Solicitors for the judgment creditors, *Smith and Hudson*, and *Ward, Perks*, and *McKay*.

Feb. 21, 22, 25, and March 8.

(Before EADY, J.)

Re A. AND A. CROMPTON AND CO.'S TRADE MARK. (a)

Trade mark—Rectification of register—Combination—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 64.

A trade mark was registered in respect of cotton yarn and sewing cotton not on spools or reels, and the application stated: "The essential particular of the trade mark is the combination of devices, and we disclaim any right to the exclusive use of the added matter, except in so far as it consists of our own name and address." The trade mark consisted of three labels, which appeared on the register:

Held, that the essential particulars were sufficiently stated.

THIS was a motion by the defendants to an action for infringing the plaintiffs' trade mark asking for the removal from the register of the plaintiffs' trade mark.

The trade mark No. 107,354 in class 23 was registered on the 10th June 1894 in respect of cotton yarn and sewing cotton not on spools or reels, and consisted of the combination of devices shown on three oblong labels.

The largest sized label consisted of an oblong border with a statement in nine different languages descriptive of the quantity and weight of yarn. The medium-sized label consisted of an oblong border in which were two shields charged with devices surmounted by crests, with leaves, flowers, and a scroll, and the name of the respondents impressed by perforation. The smallest-sized label was the same as the medium size, but without the perforated name.

The second and third labels were reproductions of a mark registered in 1876.

The application for registration was dated the 10th Jan. 1894, was contained in the shape in which it was accepted by the comptroller: "The essential particular of the trade mark is the combination of devices, and we disclaim any right to the exclusive use of the added matter except in so far as it consists of our name and address."

The trade mark was used by pasting the first and third label on the outside of bundles of yarn, and by pasting the second label on the inside wrapper.

The Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 64, as amended by the Act of 1888 (51 & 52 Vict. c. 50), s. 10, provides:

Sect. 64 (1). For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars: (a) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (b) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or (c) a distinctive device, mark, brand, heading, label, or ticket; or (d) an invented word or invented words; or (e) a word or words having no reference to the character or quality of the goods, and not being a geographical name. (2) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, a combination of letters words, or figures, or of any of them, but the appli-

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

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cant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register. (3) Provided as follows: (i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or any foreign equivalent thereof. (ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade mark before 13th Aug. 1875 may be registered as a trade mark under this part of the Act.

Clare and Kerly for the defendants.—The objections to this trade mark are that the application did not state the essential particulars as required by the Act. Then the combination of devices is not a proper subject-matter for registration. The first label is non-distinctive, and the other two are simply reproductions of an existing trade mark, the registration of which is superfluous:

Re Player and Son's Trade Mark, 81 L. T. Rep. 190; (1901) 1 Ch. 382.

Again, the labels are not all visible at once, so the combination is not used as a trade mark:

Re Kinahan and Co.'s Application, 10 Rep. Pat. Cas. 395.

Further, the registration is too wide, as the plaintiffs intend to use the mark for yarn only:

John Batt and Co. v. Dunnnett, 81 L. T. Rep. 94; (1899) A. C. 428;

Edwards v. Dennis, 54 L. T. Rep. 112; 30 Ch. Div. 454.

The defendants are persons aggrieved:

Re Apollinaris Company's Trade Mark, 65 L. T. Rep. 6; (1891) 2 Ch. 186.

Sebastian for the plaintiffs.—The application follows the usual form. The comptroller ought to be represented if the validity of the registration is seriously disputed. The combination of the three labels, the device and perforation, is a good subject-matter for registration. *Re Player and Son's Trade Mark* (*ubi sup.*) was an application to register, not an application to remove. The user is sufficient, although the three labels are not all visible at once:

Re Spencer's Trade Mark, 3 Rep. Pat. Cas. 638.

The point was left undecided in *Re Kinahan and Co.'s Application* (*ubi sup.*). The objection that the mark is only intended for yarn must be disregarded. There is no evidence as to this. The defendant is sued in respect of yarn.

Clare replied.

Cur. adv. vult.

March 6.—EADY, J.—As to the first objection, it seems that the application as at first carried in to the comptroller did contain some description in writing of the essential particulars, but this was altered, and, as I gather, at the request of the comptroller, to the form in which it now appears on the register, describing it as a "combination of devices," and leaving anyone to refer to the actual combination registered to see for himself of what the trade mark consists. I am told that this is now a common form at the office of the comptroller, and have been referred to some current numbers of the *Trade Marks*

Journal, which show how general the practice is. I am of opinion that the description is sufficient. The eye frequently enables a better idea to be formed of a trade mark than any verbal description: (see *Eno v. Dunn*, 63 L. T. Rep. 6; 15 App. Cas. 252). Then it was urged that the trade mark was not a trade mark at all, but three trade marks, which could not be registered as one, and *Re Player's Trade Mark* (*ubi sup.*) was referred to. In that case *Cozens-Hardy*, J. declined to direct the comptroller to register a mark which was in all essentials the same as an earlier trade mark, on the ground that such registration was superfluous. But it does not follow that if the mark had been registered it would necessarily have been taken off the register on the application of a rival trader. How is he aggrieved by the registration? If his contention is that registration is superfluous, as it adds nothing to existing rights, he is not injured. If registration prevents him from doing anything which he could lawfully do but for the registration, it follows that registration was not superfluous. And the argument that the mark is in reality three trade marks has no validity. A combination of several marks may be treated as equivalent to a single mark. In *Re Spencer's Trade Mark* (*ubi sup.*) the words "diamond cast steel" were on one side of files and the corporate mark of the maker on the other side, the court held that the words "diamond cast steel" had not been used alone as a trade mark. The marks on both sides of the file were treated as together constituting one mark. Then it was said that the respondents have only used their registered mark for cotton yarn, and only intend so to use it, whereas they have registered it in class 23 for cotton yarn and sewing cotton not on spools or reels. It does not appear that the applicants deal in sewing cotton, or are in any way affected by the registration, except so far as the yarn is concerned, and in any event their remedy would be to rectify the register by limiting the mark to those articles in the class in connection with which it is being actually used, as was done in *Edwards v. Dennis* (*ubi sup.*), and not to strike the mark out altogether. The motion fails, and must be dismissed with costs.

Solicitors: *W. J. and E. H. Tremellen*, for *Blair and Seddon*, Manchester; *Woodcock, Rylands, and Parker*, for *Tweedale, Son, and Lees*, Oldham.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 15 and 16.

(Before Sir F. JEUNE, President).

THE BERNARD HALL. (a)

Collision—Fog—Moderate speed—Duty of vessel in vicinity of fog to stop on hearing whistle forward of the beam—Regulations for Preventing Collisions at Sea, art. 16.

There is no obligation on a vessel not herself in a fog, under art. 16 of the *Regulations for Preventing Collisions at Sea*, to go at a moderate speed on account of fog being in the vicinity. Where a fog signal is heard forward of the beam, the position of which is not ascertained, there is

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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THE BERNARD HALL.

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a duty under art. 16 upon the vessel hearing it to stop and navigate with caution until danger is over, although she herself may not be in a fog.

THIS was an action for damages by collision brought by the owners of the steamship *Holyrood* against the owners of the steamship *Bernard Hall*. The collision occurred about 4.55 p.m. on the 28th March 1902, in the Atlantic Ocean, in about lat. 49° 24' N. and long. 10° 19' W.

The plaintiffs' case was that the *Holyrood*, a steamship of 2715 tons gross register, was on a voyage from Portland Maine to London, laden with a general cargo. The weather was hazy, the wind light from the westward, and the current setting to the eastward of the force of about half a knot an hour, and the *Holyrood* was proceeding on a course E. ½ N. true, making about five knots an hour through the water.

Under these circumstances a bank of fog was seen some distance to the northward on the port side of the *Holyrood*, and shortly afterwards the whistle of a steamer, which proved to be the *Bernard Hall*, was heard apparently a considerable distance off and about four points on the port bow. The engines of the *Holyrood* were immediately put to slow and her whistle was sounded a long blast in reply; and on the *Bernard Hall's* whistle being heard again, the engines were stopped and the whistle replied to. The whistle of the *Bernard Hall* was heard once again and answered, and then, shortly afterwards, three blasts were heard from her, whereupon the engines of the *Holyrood* were put full speed astern and three blasts sounded. The *Bernard Hall* then loomed into view about three ships' lengths off and about four points on the port bow, and struck the *Holyrood* on the port side abreast of the fore-rigging, and in consequence of the collision she sank shortly afterwards.

The plaintiffs charged the defendants (*inter alia*) with failing to keep a good look-out, with navigating under the circumstances at an improper rate of speed, and with not stopping and reversing when the fog signal of the *Holyrood* was heard forward of the beam. They also charged them with neglecting to comply with arts. 16, 19, 23, and 29 of the Collision Regulations.

The defendants' case was that the *Bernard Hall*, a steamship of 2677 tons gross register, was at the time of the collision on a voyage from Liverpool to Barbados. The weather was foggy, with a moderate breeze from the W.N.W., and the *Bernard Hall* was on a course S. 70° W., and had for some time been sounding her whistle and proceeding at half speed, making only about four knots an hour, as her speed was impeded by a very heavy swell on her starboard bow.

Under these circumstances a whistle from the *Holyrood* was heard close to. The engines of the *Bernard Hall* were at once reversed full speed astern and three short blasts sounded on her whistle, to which the *Holyrood* replied. After the *Bernard Hall* had been going astern about a minute, the *Holyrood* was seen coming up out of the fog at a great speed about three points on the starboard bow, and came on very fast, and, swinging to starboard across the bows of the *Bernard Hall*, she carried the latter's stem over to port and damaged her considerably.

The defendants charged the plaintiffs (*inter alia*) with a bad look-out, with failing to keep

clear of the *Bernard Hall*, with navigating at an excessive rate of speed, with neglecting to stop her engines when the whistle of the *Bernard Hall* was heard, and with not sounding her whistle sufficiently often. They also charged the plaintiffs with neglecting to comply with arts. 15, 16, and 29 of the Collision Regulations, and counter-claimed for the damage done to their own vessel.

The material part of art. 15 of the Regulations for Preventing Collisions at Sea is as follows:

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be as follows—viz., (a) a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

Arts. 16 and 23 are as follows:

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel, hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Laing, K.C., Scrutton, K.C., and Adair Roche for the plaintiffs.

Pickford, K.C., Aspinall, K.C., and Glynn for the defendants.

The PRESIDENT (after dealing with the plaintiffs' case, and finding on the facts that the *Bernard Hall* was to blame for proceeding at an excessive speed).—Then with regard to the *Holyrood*. There is one point which appears to me to be a question of the construction of art. 16. I will accept her statement as to the fog for the purpose of this charge against the *Holyrood*—viz., that although there was on her port bow, at some distance, a fog out of which a sound came, and out of which a vessel eventually came, on the other hand, straight ahead and on the starboard hand, the weather was tolerably clear. The state of things is that a vessel not herself in a fog hears in a fog or out of a fog a whistle of a vessel that is in that fog. Under those circumstances what is the obligation imposed upon her by the second part of art. 16? [His Lordship then read art. 16.] Does the obligation under that article apply to a vessel which is not herself in a fog, but which hears the whistle of a vessel which is in a fog? I have come to the conclusion, after considering the matter, and also with the assistance of the Elder Brethren, because this is a matter upon which practical experience throws light, that that part of the article does apply, even though the vessel herself is not in a fog. It appears to me that in the reason of things it should be so, because although she might not herself be in a fog, there might be another vessel close to her in a fog. As danger arises, so comes the obligation to act with that particular kind of caution which this rule imposes. The subject matter appears to me to give rise to exactly the same necessity for caution as if the vessel is herself in a fog. The intention of the rule is clear. It is this—that where there is a vessel ahead, that is to say, forward of the beam, of which the position is

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unascertained, that is danger, and it becomes important to take precaution at the earliest possible moment. That being so, the danger is as great, and is of exactly the same kind, whether the vessel is herself in a fog or not. Under those circumstances it appears to me natural that the persons who drew the rule imposed upon her the same obligation as if she was in a fog. Therefore, even if the story of the *Holyrood* be accepted, it appears to me that she has not absolved herself from the obligation to stop her engines when she heard the first whistle from the *Bernard Hall*. It is clear she did not, and therefore I think she must necessarily be held equally to blame for that. An attempt was ingeniously made to argue that in this particular case there was sufficient ascertainment of the position of the *Bernard Hall* to free the *Holyrood* from the obligation under that rule. I have had occasion to consider what is the meaning of those words "not ascertained," and it appears to me that the real object of the words was to negative the obligation to stop in case of repeated whistles. When whistle after whistle is heard the position is ascertained, and therefore there is no obligation to stop for other whistles, but there is an obligation to stop with regard to the first whistle because at that time the position is not ascertained. It is quite true that the first whistle gives a certain indication where the vessel is, but it is obvious that if the position of the vessel is ascertained by the first whistle, the effect of the rule would be nullified. It is said in this case that there was a certain ascertainment. There was this. The vessel was not on the starboard side, and not right ahead, but was in a bank of fog on the port bow, and that fog was a certain distance. It cannot be disputed there was that amount of ascertainment. But the Elder Brethren point out that there would be extreme difficulty in knowing how far off the vessel would be in a fog, and therefore they do not think there was any such ascertainment as to justify the *Holyrood* in not complying with the clear terms of art. 16, by stopping her engines when she first heard the whistle of the *Bernard Hall*; and that it is impossible to say it would not have been a material matter if she had done so. She would not only have gained time, but also located with more precision the later whistles of the *Bernard Hall*, and although it is clear that she did stop at the second whistle, I think it is impossible to say it would have been immaterial whether or not she had stopped at the first. I think, therefore, that the *Holyrood* must be held to blame for not obeying the second part of art. 16. The other charge made against her is certainly more difficult to decide, because it involves the whole question as to the exact nature of the fog at the place where she was. It is clear according to the terms of art. 16, that the obligation to go at a moderate rate of speed applies only to a vessel which is herself in a fog, mist, falling snow, or heavy rainstorms, and not to a vessel which is near a fog. If a vessel is running into a fog ahead, I have held—and I think I may say rightly held, because I think the Court of Appeal took the same view—that there is an obligation upon her, although she is not actually in it at the moment, not only under the first part of art. 16, but under the general rules of seaman-ship, to go at a moderate speed. It seems to me

only common sense, and according to the advice which competent sailors could not fail to give to this court. But a different state of things appears to me to apply if the vessel is not herself in a fog nor running into it. In this case the fog was not directly ahead, and I do not think the evidence shows that the vessel was running into a fog, and I cannot say there was any obligation, under the general principles of navigation, to go at a moderate rate of speed on account of fog being in the vicinity. That is the advice I receive. That assumes that I substantially accept the *Holyrood's* statement with regard to the fog, and although it is not easy to see how it could be exactly as she says, at the same time there is her clear evidence, and I am not prepared to say there is anything in this case to lead me to disregard it. I do not wish to go at great length into the questions which have been rather bandied about from side to side as to the witnesses who have not been called and ought to have been, or the documents which should have been produced and have not been. Although I regret that the fullest evidence has not been given, at the same time in this case I am not prepared to say that the absence of those witnesses or of that evidence has been sufficiently clearly shown to have been material to this case. Therefore I am not prepared to say that the statement given by those on board the *Holyrood* is not substantially accurate as to the state of the fog. It has also been suggested, and no doubt is the case, that the *Holyrood* had not a man exclusively on the look-out. I do not wish to depreciate the importance of having a proper look-out, but the Elder Brethren tell me that no serious blame ought to be attached to the *Holyrood* on that account. Where you have officers on the look-out themselves, as undoubtedly there were in this case, it would be stretching the matter rather far to say that serious blame is to be attached to the vessel because she had not one man on the look-out at a particular spot on the vessel. The result is that, on the grounds I have indicated, both vessels must be held to blame.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Rowcliffes, Rawls, and Co.*, agents for *Hill, Dickinson, Dickinson, and Hill*, Liverpool.

Monday, April 23.

(Before Sir F. JEUNE, President.)

THE ASSUNTA. (a)

Practice — Action in rem — Misdescription of plaintiff — Practice of Court of Admiralty — Irregularity — Amendment — Fresh step after knowledge of irregularity — Order XLVIII.A, r. 1 — Order LXX, rr. 1, 2.

Order XLVIII.A, r. 1, allows any two or more persons claiming as co-partners to sue in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action.

A plaintiff issued a writ in an action in rem for damage to cargo in the name of a firm of which he was the sole member, and indorsed it

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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"the plaintiffs as owners of goods laden on board the steamship A." In a motion by the defendants to set aside the writ:

Held, that as by the old Admiralty practice, which is not abrogated by the Judicature Acts, owners of a ship or cargo are entitled to sue as such, it would have been sufficient if the plaintiff had described himself as "owner" on the face of the writ, and that therefore this was a mere irregularity and might be cured by leave to amend under Order LXX., r. 1.

Held, also, that as the defendants, by applying for security for costs after knowledge of the irregularity, had taken a fresh step in the action, they were precluded by Order LXX., r. 2, from taking advantage of the irregularity.

Smurthwaite v. Hannay (71 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 485; (1894) A. C. 494) distinguished.

THIS was a motion by the defendants to set aside the writ in an action *in rem* brought by the plaintiff in respect of damage to cargo.

The plaintiff had issued a writ dated the 21st March 1902 in the name of Louis Dreyfus and Co., residing at No. 3, Gracechurch-street, E.C., against the owners of the Italian steamship *Assunta*, claiming, "as owners of goods laden on board the *Assunta* on a voyage from the River Plate to England, compensation for damage done to the said goods during such voyage." The vessel was arrested on the same day, and a copy of the writ was duly served on board.

On the 26th March an appearance was entered by the solicitor for the defendants, and on the 10th April the vessel was released on bail and subsequently left this country.

It appeared that the sole member of the firm of Louis Dreyfus and Co. was Leopold Louis Dreyfus, who resided in Paris, and that the London address of the firm at the date of the writ was 194, Bishopsgate-street Without, E.C., and that the address of 3, Gracechurch-street, where the firm had carried on business for some years, and from which they had recently removed owing to the premises having been burnt down, had been inadvertently inserted in the copy of the writ by the plaintiff's solicitors.

On the 16th April the defendants applied to the registrar for an order to dismiss the action on the ground of non-compliance with the rules, or, in the alternative, that the plaintiff should give security for costs; but the application was refused.

The defendants now moved that the writ should be set aside on the grounds that it was improperly issued in the name of Louis Dreyfus and Co., and did not contain the plaintiff's address.

Order XLVIII.A is as follows:

Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firm, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and certified on oath or otherwise, as the judge may direct.

Order LXX., rr. 1 and 2, are as follows:

Rule 1. Non-compliance with any of these rules shall not render any proceedings void, unless the court or a judge shall so direct, but such proceedings may be set

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aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.

Rule 2. No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

Leck for the defendants in support of the motion.—Before the Judicature Act there was no power to sue in the name of the firm, and Order XLVIII.A, r. 1, only gives this power when the firm consists of two or more persons. The writ therefore was improperly issued in the name of the firm, and the misdescription is more than a mere irregularity which the court can give leave to amend, as the plaintiff has begun the action in a manner not authorised by the rules. The writ is irregular within the decision in *Smurthwaite v. Hannay* (71 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 485; (1894) A. C. 494), and ought to be set aside. A second objection to the writ is that it does not contain the plaintiff's address as required by Order IV., r. 1.

A. E. Nelson for the plaintiff, *contra*.—There is a long-established practice in the Admiralty Court for plaintiffs to sue as "owners of the cargo" or "owners of the ship," and it was never intended that the rules should abrogate this antecedent practice. Order LXVIII.A, r. 1, does not apply to actions *in rem*, which are different from actions *in personam*:

The Freedom, 1 Asp. Mar. Law Cas. 136; L. Rep.

3 A. & E. 495;

The Longford, 60 L. T. Rep. 373; 6 Asp. Mar. Law Cas. 371; 14 P. Div. 34;

The Maréchal Suchet, 74 L. T. Rep. 789; 8 Asp. Mar. Law Cas. 158; (1896) P. 233;

St. Gobain v. Hoyermann's Agency, 69 L. T. Rep. 329; (1893) 2 Q. B. 96.

Even if the rule does apply, the insertion of the name of the firm on the writ was a mere irregularity which the court may give leave to amend. *Smurthwaite v. Hannay* only decided that each of the plaintiffs in that case had to bring a separate action. The indorsement on the writ properly described the plaintiffs as owners of the cargo. He referred to

Petty v. Daniel, 55 L. T. Rep. 745; 34 Ch. Div. 172;

Dickson v. Law, 72 L. T. Rep. 680; (1895) 2 Ch. 62.

The defendants' steamship is an Italian vessel now out of the jurisdiction of the court, and the effect of setting aside the writ would be to deprive the plaintiff of his remedy against the defendants. Further, by Order LXX., r. 2, the defendants are not entitled to make this application, as they have taken a fresh step in the proceedings by asking for security for costs after knowledge of the irregularity. The omission of the plaintiff's proper address is an irregularity which the court has power under LXX., r. 1, to cure.

Leck in reply.

The PRESIDENT.—The plaintiff in this case is really one person, but he sues in the name of Louis Dreyfus and Co.—the firm name which he apparently uses in business—the indorsement on the writ showing that he sued as the "owners of goods laden on board" a certain steamship. Now in one sense that is not an important matter, because it was quite clear what the real facts were.

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The indorsement on the writ showed what the real plaintiff was, and anyone could ascertain at any moment who Louis Dreyfus and Co. in fact were. But in another sense it is an important matter, because this being an action *in rem*, the effect has been that the defendants' ship has gone and if this writ is held bad it will be necessary for the plaintiff to wait until he has an opportunity of arresting the vessel again. The question is whether that title of the plaintiff renders this writ null; whether it is wrong to begin with, or whether it is merely an irregularity. The rule relied on is Order XLVIII.A, r. 1. [His Lordship then read the rule.] By that rule any party to an action may apply, by summons, for a statement of the names and addresses of the actual partners. Before the date of that rule persons could not sue or be sued in the name of a mere firm. The names of all the partners had to be added; but this rule gives power to persons carrying on business under a firm name to sue in the firm name, although in point of fact there might be several partners, without stating the names of the partners, except in the limited way required by the latter part of the rule. Now, what is said is first of all that this rule does not apply to an action *in rem* at all, and there is a great deal of force in that observation. But it is not necessary for me to decide that actual question, because there is undoubtedly an old practice in the Admiralty Court of very great value to persons concerned in those matters, which enables the owners of a ship or cargo, in any Admiralty action, to sue as such—a proceeding which would have been regarded by the courts of common law with professional horror. But the courts of Admiralty allowed it for a very good reason, because, what they were really dealing with was one ship against another, and so long as you had the names of the vessels you had really all that was material, because you could ascertain the names of the owners from the register, or otherwise. Therefore you have an antecedent practice of a very peculiar kind in the Admiralty Court, and certainly I do not think it is too much to say that it is impossible to suppose that this general rule was intended to abrogate so old and valuable practice as that which obtained in the Admiralty Court. If one looks at the terms of the rule it does not apply to the case of owners of ships, because it speaks only of persons suing and being sued in the name of their respective firms, whereas the owners of a ship do not constitute a firm in that sense at all. Therefore I feel no difficulty at all in saying that this rule does not apply in any sense to abrogate the former practice of the Admiralty Court, of allowing the owners of a ship to sue as such. But that does not carry us the whole way in this case, because this is not a case of the owners of a ship suing. Mr. Dreyfus did not in this case sue as "owners." He sued as Louis Dreyfus and Co., and I am not prepared to say that in its narrower sense, and I think in its truer sense, this rule does not apply to the Admiralty Division as well as to any other division. If the question in this case was whether Order XLVIII.A, r. 1, applied to the Admiralty jurisdiction I am not prepared to hold that it does not, but a further question arises which, to my mind, is of great importance in this case. I have to decide not only whether this is a mistake

in this case, but whether it is an irregularity which can be cured. I am told that it is more than an irregularity, because previously a partnership could not sue at all—it could only sue in the names of the real partners—and therefore, it is said, the terms of this order must be strictly complied with, or else the whole thing is a nullity. The case of *Smurthwaite v. Hannay* (*ubi sup.*) is relied upon. If these were proceedings in common law, I do not wish to decide whether or no that might not be the case. But what I do think is this, that in the Admiralty Court, having regard to the previous practice, which I do not think has been abrogated, and, having regard to the fact of the indorsement on this writ, it is a mere irregularity. What are the facts? Here is a person suing in the name of the firm, and the writ states on the back how he does sue. If he had sued as "owners" I think it would have been perfectly good. Therefore all it comes to is this, that instead of putting on the face of this writ, "Louis Dreyfus and Co., as owners," or "Louis Dreyfus, as owner," of the goods, he has put Louis Dreyfus and Co. on the face of the writ, and he has stated clearly on the back that they are suing as owners. I cannot regard that as more than the merest irregularity. It is perfectly different from the case of *Smurthwaite v. Hannay* (*ubi sup.*). There persons were suing together who could not sue together. There was a very material matter involved, and there was much more than a mere irregularity; but having regard to the Admiralty practice in this court, and having regard to the indorsement on the writ, I am of opinion that in the Admiralty Court, where the only mistake a man makes is in not putting on the face of the writ what he had put on the back, and which, if put on the face of the writ, would have been good, it is a mere irregularity. Therefore, although the balance of my opinion is that the rule does not apply to the Admiralty Court, I think under the circumstances that the mistake made is a mere matter of irregularity and that Order LXX. applies, and an amendment may be allowed. It follows that not only does Order LXX. apply, but Order LXX., r. 2, too—and in this case the defendants have taken a step—namely, the asking for security for costs, after they knew the facts of the real composition of Louis Dreyfus and Co. That is quite enough for me to say that I think in this case all that has happened is mere irregularity, which can be cured by an amendment, and that I am prepared to allow. I do not think it necessary to deal with the other matter, as to the address of the plaintiff, because to call that an irregularity seems to me to be using too high a term. The original writ was correct in that respect, but the copy of the writ was wrong.

Solicitors for the plaintiff, *Lowless and Co.*

Solicitor for the defendants, *Robert Greening.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 26 and March 20.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re HASLAM AND HIER-EVANS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor and client—Commission—Taxation—Surcharge—Disclosure to client—Independent advice.

Solicitors were retained by O. to act for him in negotiating and carrying into effect the purchase of certain patent rights. The solicitors had obtained from the vendor a commission note, under which they were entitled to a certain commission in the event of their introducing a purchaser to him. This commission note was handed to O. by the solicitors, and remained in his possession for some days previously to the contract of sale being entered into. The purchase was carried into effect, and the solicitors, with the knowledge of O., recovered payment of 210l. as commission from the vendor. After this O. died, and the solicitors delivered a bill of costs to his executors, who procured an order for its taxation, and sought to charge the solicitors with the amount of the commission so received by them.

Held, that the executors were not entitled to treat the 210l. as money had and received by the solicitors to O.'s use, or in any way to surcharge them.

O'Brien v. Lewis (8 L. T. Rep. 179) distinguished.

Decision of Kekewich, J. affirmed.

THIS was a summons to review the taxation of a bill of costs, the question being whether the solicitors were entitled to retain a sum of 210l. for commission which they had received from the vendor of a patent to their client.

In Jan. 1889 Mr. Haslam, a solicitor, received from Mr. B. Elliot, the owner of a patent, a commission note, under which Mr. Elliot promised, in the event of Mr. Haslam introducing a purchaser whose terms Mr. Elliot might accept, to pay Mr. Haslam the sum of 250l. out of a purchase price of 3750l., the sum of 300l. out of a purchase price of 4000l., and an additional 100l. for every 1000l. additional purchase price beyond 4000l., and *pro rata* for every part of 1000l.

Mr. Haslam introduced the patent to Mr. Ohlson, for whom Mr. Haslam, and his partner, Mr. Evans, had been acting as solicitors in several other matters. Mr. Ohlson instructed Mr. Haslam to make an appointment for him to see the patented article, and on the 17th Jan. Mr. Haslam and his partner accompanied Mr. Ohlson to Harley-street for the inspection. On their return Mr. Haslam showed the commission note to Ohlson, who thereupon stated that he should not pay the lowest price therein mentioned, and that, if he could not get the patent at a much lower price, he should not buy it. Mr. Haslam and his partner explained to Mr. Ohlson that

they were not quite satisfied with the commission note, which was not as liberal as a note which they had submitted to Mr. Elliot, and thereupon, in consideration of a promise by Mr. Ohlson to allow them a reasonable commission in case they were unable to obtain any commission under the original note, they promised to accept the note for what it was worth, and not to insist on obtaining a more satisfactory note from Elliot. It appeared from the bill of costs that Messrs. Haslam and Evans received the instructions of Mr. Ohlson to try to negotiate with Mr. Elliot for a reduction of the price of the patent, and they did so, and eventually Mr. Ohlson purchased the patent for 3000l.

The commission note had been handed by the solicitors to Mr. Ohlson, and remained in his possession some days previously to the contract of sale being entered into.

Messrs. Haslam and Evans afterwards brought an action against Elliot for their commission, which action was, with Mr. Ohlson's knowledge, compromised by Elliot paying the sum of 210l. into court, which the solicitors accepted.

In Dec. 1900 Mr. Ohlson died, and Messrs. Haslam and Evans delivered a bill of costs to his executors, who procured an order for its taxation. In the course of that taxation the executors sought to charge the solicitors with the amount of the commission received by them, and the taxing master allowed their claim, holding they must account for it as money received on account of Ohlson, and that they were not entitled to obtain this sum at the expense of their client in the absence of an agreement in writing to that effect.

On a summons to review, Kekewich, J. held that the commission was received by the solicitors with the consent of their client, and they were not liable to account for it.

From this decision Mr. Ohlson's executors appealed.

T. L. Wilkinson for the appellants.—The solicitors were acting for Mr. Ohlson and were bound to use their best exertions to enable their principal to purchase on the most favourable terms. They were not at liberty to obtain any benefits for themselves beyond the costs to which they were legally entitled. It was a breach of duty on their part to accept this commission, and they must account for it:

Tyrrell v. Bank of London, 6 L. T. Rep. 1; 10 H. L. C. 26, 39.

It makes no difference that Ohlson was aware of the commission note as he had no independent advice on the subject, and never expressly assented to it:

Rhodes v. Bate, 13 L. T. Rep. 778; L. Rep. 1 Ch. App. 252;

Liles v. Terry, 73 L. T. Rep. 428; (1895) 2 Q. B. 679;

Barron v. Willis, 82 L. T. Rep. 729; (1900) 2 Ch. 121; since affirmed on appeal, 113 L. T. p. 60; W. N. 1902, p. 100.

J. B. Matthews for the respondents.—Here the client had full information. He had the commission note in his possession for some days. The commission was paid by the vendor, not by the client. It was therefore not necessary for the solicitors to tell him specially that they were liable to refund all they got from Elliot. The

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duty of a solicitor to his client is not higher than that of a promoter towards a company:

Re Olympia Limited, 78 L. T. Rep. 629, 633; (1898) 2 Ch. 153, 166;

Erlanger v. New Sombrero Phosphate Company, 39 L. T. Rep. 269, 282; 3 App. Cas. 1218, 1277.

In *Copp v. Lynch* (26 S. J. 348), which was relied on by the taxing master, the client was not aware that the solicitor was receiving commission. In *Tyrrell v. Bank of London (ubi sup.)* there was fraud and concealment on the part of the solicitor. *Barron v. Willis (ubi sup.)* was a case of a voluntary settlement and quite different from the present case.

Wilkinson in reply.

Cur. adv. vult.

March 20.—WILLIAMS, L.J. (after stating the facts shortly, continued):—It seems plain that Messrs. Haslam and Evans were attempting to serve two masters, and that one master, Mr. Ohlson, knew this, and the other, Mr. Elliot, did not. I think that, if the truth had been known, Mr. Elliot would never have paid the 210*l.* into court. I think that the claim on Mr. Elliot ought never to have been made. I do not see how we can order money to be paid by Messrs. Haslam and Evans to Mr. Ohlson's executors which Messrs. Haslam and Evans wrongfully obtained, to the knowledge of Mr. Ohlson, from Mr. Elliot. But, even putting aside the consideration that the money was wrongfully obtained, and that *in pari delicto potior est conditio possidentis*, I further think that the executors of Mr. Ohlson are not entitled to treat the 210*l.* paid by Mr. Elliot to Messrs. Haslam and Evans as money received to Mr. Ohlson's use, or in any way to surcharge them. There is no ground for saying that the 210*l.* was a secret profit. The only other possible view which, in my judgment, could support the contention that Mr. Ohlson's executors are entitled to have the benefit of this payment is that the 210*l.* was something put on the price by the vendor, and that Mr. Ohlson, in allowing Mr. Haslam to keep this sum, was making a gift to his solicitor, which he was not entitled to keep, having regard to his position as solicitor for the donor. I do not think on the evidence that it was a gift. It was a payment for a service. Mr. Ohlson, in effect, said to his solicitor, "Keep the sum which the vendor puts on the price to pay your commission, but you must, in consideration of this, serve me and not him." The case, therefore, does not fall within *O'Brien v. Lewis* (8 L. T. Rep. 179). The appeal must be dismissed, but, I think, without costs.

STIRLING, L.J.—All transactions between solicitor and client, which result in the solicitor obtaining a benefit for himself, are subjected by courts of law to strict scrutiny, when called in question by the client, and are treated as imposing obligations on the solicitor of greater or less stringency. In some cases the obligation goes so far as almost to bind the solicitor to abstain altogether from a transaction of the kind. Thus a solicitor may not accept from his client, while the relation of solicitor and client exists, remuneration for his professional services beyond that to which he is legally entitled. Of the application of this rule *O'Brien v. Lewis (ubi sup.)* is a striking example. In the great majority of cases, however, the law does not exact so much. A solicitor may, for example, purchase from his

client, but there is imposed on him the burden of proving that his client was fully informed, and duly and honestly advised, and that the price was just. See the judgment of Turner, L.J. in *Holman v. Loynes* (4 D. M. & G. 270, 284). In *Edwards v. Meyrick* (2 Hare, 60)—a case of purchase by a solicitor—Wigram, V.C. says (2 Hare, 69): "The rule of equity, which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand;" and this view of the law is approved by Turner, L.J. in *Holman v. Loynes*, and is in accordance with subsequent decisions. Wigram, V.C. in *Edwards v. Meyrick* went on to point out how the appropriate duty which falls on the solicitor depends on the special circumstances of each individual case. His concluding remarks are these (2 Hare, 70): "The nature of the proof, therefore, which the court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence, or ascendancy, or other advantage over his client; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing." It thus appears that, in the class of cases of which *Edwards v. Meyrick* is a type, it is necessary that the solicitor should establish that he and his client were "substantially at arm's length and on an equal footing." I do not think that the rule applied in *O'Brien v. Lewis (ubi sup.)* governs this case, for the commission was paid, not by the client, but by the vendor as remuneration for services rendered to him. On the other hand, I think that the less stringent rule discussed in *Edwards v. Meyrick (ubi sup.)* does apply. I am fortified in this opinion by what is laid down by Turner, L.J. in *Lyddon v. Moss* (4 De G. & J. 104), with reference to an agreement by a client to allow his solicitor interest upon his bills of costs. The learned judge says (pp. 130-1): "Every such agreement is a bargain between the solicitor and the client, and can be supported only under the same circumstances as would support any other bargain between them. It is the bounden duty of a solicitor, before he enters into any such bargain with his client, to inform the client that the law allows of no such charge of interest, and that, although he may decline to conduct the client's business without such an allowance, others of equal ability may be found who will conduct it upon the scale of allowances which is sanctioned by the law." The learned judge holds that interest on costs, although in a sense an addition to remuneration allowed by law, may be bargained for, but only subject to the like obligations on the part of the solicitor as any other bargain. I think, therefore, that in the present case the solicitors were under an obligation to give the client full information and to advise him, if and so far as necessary, with reference to the commission note. The solicitors have established that they did give him full information, but, if legal advice was necessary to be given by them, there is no evidence of their

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having given it. If the solicitors had not made full disclosure, it is quite clear that the client would have been entitled to recover the amount from them, but no case has been cited to show that a person can recover a profit received, with full knowledge on his part, by one standing in a fiduciary position towards him. It was unnecessary that the solicitors should inform the client that they would have been liable to him if they had not given him the information which they did, and so far as I have as yet stated the facts, more was not required of them. It appears, however, that the solicitors not only received the commission which they received from the vendor with the knowledge of their client, but bargained with him that they should be allowed what is termed a reasonable commission (of which the suggested amount was 250*l.*) from himself in the event of their not being able to recover a commission from the vendor. To that state of things the more stringent rule to which I have referred does appear to me to apply. In *O'Brien v. Lewis* (*ubi sup.*) the promise of additional remuneration appears to have been volunteered by the client, and Lord Westbury says that the solicitors ought to have said that they could accept no such thing, and that it was the bounden duty of the solicitors not to accept such a promise. Still more was it the duty of the solicitors in the present case to abstain from making such a bargain as they did. Since the date of the decision in *O'Brien v. Lewis* the Attorneys and Solicitors Act 1870 has been passed, and solicitors may make bargains with their clients as to their remuneration, which were previously inadmissible, but such agreements are fenced by safeguards imposed by the Legislature, which have not been observed by the solicitors in the present case, nor were they brought to the notice of the client. It is quite true that the bargain has not been enforced, and, in the events which happened, came to nothing; but the fact of its existence affords some evidence that the solicitors and their client were not dealing at arm's length and on an equal footing. It appears to me, however, that in such circumstances the remedy of the client is not to recover the amount of the commission paid to the solicitors by the vendor, but to set aside the transaction between himself and the solicitors. That relief cannot, however, be given in the present proceedings. I think, therefore, that the appeal ought to be dismissed. But I consider it my duty to express my great regret that solicitors should have made a bargain, which was not merely improper in the eye of the law, but which placed them in a position in which it was scarcely possible for them to fulfil the duties which they had undertaken to both vendor and purchaser of the patent. Although I have rested my judgment on the grounds which I have stated, it must not be understood that I disagree with what has been said by Williams, L.J.

COZENS-HARDY, L.J. — The judgment of Williams, L.J. so entirely expresses my own views that I do not think it necessary to add anything.

Solicitors: *Greenop and Son; Haslam and Heir-Evans.*

Feb. 28, March 1, 2, 3, and 24.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re CHESEBROUGH MANUFACTURING COMPANY'S TRADE MARK "VASELINE"; *Re* PEARSON'S APPLICATION. (a)

APPEAL FROM THE CHANCERY DIVISION.

Trade mark—Removal—Old mark—Distinctive word—Patented article—Name of article manufactured—Onus of proof—Trade Marks Registration Act 1875 (38 & 39 Vict. c. 91), s. 10.

In 1872 an inventor took out a patent in the United States for a product from petroleum "named by me 'vaseline.'"

In 1874 he took out a patent in England for a similar product which he described as "a material which I term 'vaseline.'"

In 1877 he registered the word "vaseline" in England under sect. 10 of the Trade Marks Registration Act 1875 as an old mark.

On an application to remove the mark from the register:

Held (*Cozens-Hardy, L.J. dissenting*), that the language of both patents being ambiguous, as it might mean either that the name was given to the substance manufactured by the inventor or to the substance made according to the process described, the onus of proof was on the applicant for the removal of the trade mark to show that it meant the latter; that he had not discharged that onus and the mark ought not to be removed.

Re Leonard and Ellis's Trade Mark (51 L. T. Rep. 35; 26 Ch. Div. 288) followed.

Linoleum Manufacturing Company v. Nairn (38 L. T. Rep. 448; 7 Ch. Div. 834) distinguished.

Held, by *Cozens-Hardy, L.J.*, that the word "vaseline" was an invented word to describe an invented thing; and therefore, as any one was at liberty to make the invented article, which was not protected by patent in England, and at liberty to call it by the name attributed to it by the inventor, the word ought not to have been registered as a trade mark under sect. 10 of the Trade Marks Registration Act 1875 as an old mark.

Per Cozens-Hardy, L.J.: The principle applied by *Fry, J.* in *Linoleum Manufacturing Company v. Nairn* (*ubi sup.*) to the case of a patented article after the expiration of the patent cannot be limited to that case.

THIS was an appeal from an order made by Buckley, J. that the register of trade marks should be rectified by the removal of a trade mark consisting of the word "vaseline."

The following statement of the facts is taken from the judgment of Stirling, L.J.:

The trade mark was registered under the Act of 1875 in the year 1877, as an old mark, which had been in use for six years before the 8th March 1877. In 1898 one Edward Theodore Pearson applied to register the word "vasogen," and the comptroller refused to proceed without the consent of the *Chesebrough Manufacturing Company*, the owners of the trade mark "vaseline." That consent was refused, and the comptroller declined to register the word "vasogen." From this decision there was an appeal, which was referred to the court, the *Chesebrough Manufacturing Company* being respondents on the appeal. On the 31st Jan.

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1900 the applicant Pearson gave notice of motion for an order rectifying the register by removing therefrom the word "vaseline." This motion and the appeal came on together. At the hearing the learned judge was of opinion that it was established on the evidence before him that the word "vaseline" was in 1877 used "as indicating, not the manufacture of a particular firm, but the petroleum jelly manufactured by a particular process," and that, on the authority of *Linoleum Manufacturing Company v. Nairn* (38 L. T. Rep. 448; 7 Ch. Div. 834) and cases which have followed it, the mark ought to be removed. From this decision the Cheesbrough Manufacturing Company have appealed. Upon the appeal further evidence has been admitted. The facts seem to be as follows: In 1865 Robert Alfred Cheesbrough took out patents in England and America for an improvement in refining petroleum and other hydro-carbon oils. This improvement consisted in the filtration of these oils through animal charcoal (sometimes termed bone-black) or wood charcoal or other filtering material. The specification states that the oils "filtered in this manner will be light in colour, have very little odour, and be suitable according to their density for the purposes either of lubrication or illumination." It also states that "petroleum may be subjected to such filtration either in its crude or natural state or after distillation." But, as I read the specification, distillation at some stage is necessary, and the oils refined by means of the process therein described are products of the distillation. In 1872 the same inventor took out in America a patent for "improvements in products from petroleum." He states in his specification that he has invented a "new and useful product from petroleum," which he has termed "vaseline," and that "the substance from which 'vaseline' is made is the residuum of petroleum left after the greater part has been distilled off." The process of making vaseline is described as consisting of "the filtering of the aforesaid petroleum residuum through bone-black, according to the process described" in the American patent of 1865, and the claim is for "the new article of manufacture named by me 'vaseline,' substantially as herein described." This invention was never patented in England. The process is not, in my opinion, covered by the English patent of 1865, which appears to me, as already stated, to apply only to the product of distillation of crude petroleum, while the process of 1872 applies to the residuum left in the still after the process of distillation is completed. It was, therefore, open to anyone in England, after the American patent became known there, to manufacture the new article for which that patent was granted in the United States. In 1874 R. A. Cheesbrough took out in England a patent for improvements in treating hydro-carbon oils and products. The specification begins as follows: "When petroleum is distilled, either in the ordinary stills used or by the vacuum or superheated retort processes, a quantity of residuum is left back in the still or retort which has not been distilled over. This residuum contains no paraffin, but appears to be a concentrated product of the heavier parts of petroleum, and from it a material, which I term 'vaseline,' is made by filtration through bone-black, or animal charcoal." The invention is stated to consist in

so refining the vaseline as to make it substantially free from the taste, odour, and colour of petroleum, and the specification recognises that in England the patentee has no monopoly in the manufacture of vaseline which is not so refined. There is evidence of the sale in England by the agents of R. A. Cheesbrough of vaseline manufactured by him in 1873, 1875, and 1877. Evidence has been given by R. A. Cheesbrough and his brother W. H. Cheesbrough (his agent in England) that since 1876 vaseline has been sold in England in tin cans on which is stamped an inscription beginning with the words, "Vaseline, trade mark." It is established that since 1873 the substance termed vaseline in the patent of 1872 has been manufactured in England by many persons, and sold or described under various designations, such as petroleum jelly, *unguentum petrolei*, and several fancy names, but not under the designation vaseline. There is abundant evidence that the name vaseline has always been understood in England to denote the manufacture of R. A. Cheesbrough and his successors, the Cheesbrough Manufacturing Company. In 1877 the word "vaseline" was registered in England in four classes, one being class 3. The *Trade Marks Journal* describes the application in that class as being in respect of "ointments, cold creams, and vaseline (being an essence prepared for use in medicine and pharmacy)." In 1878 R. A. Cheesbrough registered as a trade mark in America a label beginning "Petroleum vaseline jelly," and ending, "Prepared expressly for medicinal and toilet purposes by the Cheesbrough Manufacturing Company, Office, 110, Fleet-street, New York." By the statement filed in the United States Patent Office, on the occasion of registration (which was verified by affidavit), it is stated as follows: "Said trade mark consists of the word 'vaseline.' This word has been generally arranged between the words 'petroleum jelly' as shown in the accompanying facsimile (meaning the label) . . . but the words 'petroleum jelly' and the corporate name and address may be wholly omitted, and the border may be changed at pleasure, or omitted altogether, without materially changing the character of said trade mark, the essential feature of which is the arbitrarily selected word—vaseline. This trade mark has been used in the business of said company and by R. A. Cheesbrough, who was its predecessor in the same business, for more than seven years past. . . . Said company has been accustomed to print it upon labels, to be pasted or otherwise secured upon the bottles containing the product or the compound thereof, and upon the paper wrappers in which they put it for sale. It has also been accustomed to emboss it upon the bottles or packages in which the product or compound is inclosed, or, where the compound is of sufficient consistence, to form it directly upon the cakes or tablets thereof. It has also been accustomed to use it upon the billheads, letter-heads, envelopes, circulars, and other advertising devices employed in the business."

Astbury, K.C. and *A. J. Walter* for the appellants.—This case is different from *Linoleum Manufacturing Company v. Nairn* (38 L. T. Rep. 448; 7 Ch. Div. 834) on which *Buckley, J.* relied. "Vaseline" is not the name of a patented article

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which has been manufactured for fourteen years under that name alone; nor are the appellants trying to prevent other people making this substance. They only wish to prevent other people using a name for the article which now means that manufactured by the appellants. The article has been manufactured by other people, and is called by different names. In the British Pharmacopœia the substance is called petroleum jelly:

Singer Manufacturing Company v. Spence, 10 Rep. Pat. Cas. 297.

An invented name may be registered as a trade mark under the Patent Acts though it is descriptive of the goods:

Eastman Photographic Materials Company v. Comptroller General, 79 L. T. Rep. 195; (1898) A. C. 571

Moulton, K.C. and *E. F. Lever* for the respondent.—The essence of a trade mark is that it has nothing to do with the nature or description of the goods, and that it is merely a mark of origin. Many years ago the appellants gave the name "vaseline" to a certain article, and they cannot now go back from that and say it means only the article manufactured by them. In 1877 the word ought not to have been registered, as it was not an old mark within sect. 10 of the Trade Marks Registration Act 1875. It was not a distinctive word used as a trade mark before the passing of that Act.

B. J. Parker for the comptroller.—Where a trade mark has been registered for some time the onus is on those who wish to take it off to prove that it was *publici juris* at the date of registration.

Asbury in reply.

Cur. adv. vult.

March 24.—*WILLIAMS, L.J.*—I agree with the judgment which *Stirling, L.J.* is about to read.

STIRLING, L.J. (after stating the facts set out above, continued:—) The question is whether in these circumstances the court ought to come to the conclusion that the word "vaseline" was, at the date of registration, improperly placed on the register as an old trade mark under the Act of 1875. It was admitted by the learned counsel for the appellants that the evidence did not establish that the word "vaseline" was used in England as a trade mark before the 13th Aug. 1875. It was contended, however, that the burden of establishing this did not lie on the appellants, but that it was the duty of the respondents, the applicants for the removal of the trade mark from the registrar, to satisfy the court that it was in fact not so used. In my opinion this contention is well founded. The law was so laid down by the Court of Appeal in *Re Leonard and Ellis's Trade Mark* (51 L. T. Rep. 35; 26 Ch. Div. 288), and was acted on by *Kay, J.* in *Edgington v. Edgington* (61 L. T. Rep. 323). In my judgment this rule ought to be firmly adhered to. It is manifestly unreasonable to expect that the owners of a registered trade mark should preserve evidence of the way in which it was used at and prior to the time of registration for a period of twenty years and more subsequently. On the part of the respondents reliance was chiefly placed on the American patent of 1872, the English patent of 1874, and the use of the word "vaseline" in the *Trade Marks Journal* of 1877, upon the occasion of the application for the registration of the mark

in England, and it was said that these documents proved that the word "vaseline" was in use at the date of registration to indicate, not an article manufactured by the *Cheesebrough Manufacturing Company*, but one manufactured according to the processes indicated in the American and English patents. If this were the true conclusion of fact, then there would arise a question which was raised in the case of *Re Leonard and Ellis's Trade Mark* (*ubi sup.*), but remains undecided, viz., whether, when an inventor invents a new article, and at the same time invents a word to designate it, he can claim the exclusive use of that word to denote his own manufacture. In my opinion, however, it is unnecessary now to decide that question. The word "vaseline" was admittedly invented by *R. A. Cheesebrough*, and, in my opinion, was capable, previously to 1875, of being employed by him to denote an article of his manufacture. On this I may refer to what was said by *Wood, V.C.* with reference to the word "paraffin" in *Young v. Macrae* (9 Jur. N. S. 322), *Browne v. Freeman* (12 W. R. 405), *Braham v. Bustard* (9 L. T. Rep. 199; 1 H. & M. 447, 454). The language of both the American patent of 1872 ("named by me vaseline") and the English patent of 1874 ("which I term vaseline") is ambiguous; the meaning may be either that the name was given to the substance manufactured by *R. A. Cheesebrough* and his successors, the company, or that it was used to designate the substance made according to the process described. If this be so, it seems to me the onus of proof which lies on the respondents is not discharged. As regards the entries in the *Trade Marks Journal* of 1877, I think that the word "vaseline" ought there to be read in the same sense throughout, and to be regarded as denoting the goods manufactured by the *Cheesebrough Company*. Another objection to the registration was taken. It is well settled that a word could be properly registered as an old trade mark under the Act of 1875 only if it had been used alone as the trade mark before the 13th Aug. 1875, and was not properly registered if it had been merely used in combination with other words: (see *Perry Davis v. Harbord*, 63 L. T. Rep. 389; 15 App. Cas. 316; *Powell v. Birmingham Vinegar Brewery Company*, 70 L. T. Rep. 1; (1894) A. C. 8). It was contended that the documents relating to the registration in America showed that the user had been in connection with other words, and they do appear to show that such had been the general user. But the statement filed in the United States Patent Office, from which I have quoted, indicates that the actual user was not entirely limited in this way. According to the evidence, there was a user of the word "vaseline" in England as a trade mark in 1876, and here again the respondents appear to me to have failed to show that the word "vaseline" was not used by itself as a trade mark in England previously to the 13th Aug. 1875. I think that *Livineum Manufacturing Company v. Nairn* (*ubi sup.*) is distinguishable from the present case. It simply decides that "where the inventor of a new substance gives it a name, and, having taken out a patent for the invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is not entitled to the exclusive use of that name after the expiration of the patent." Here no patent was taken out in

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England for the substance which (when manufactured by himself) the inventor named "vaseline." The inventor never at any time was alone the manufacturer and vendor of that substance in England. The substance invented by him was never in England known solely by the name of "vaseline"; on the contrary, it was known under many names, and the evidence is that the name "vaseline" has in England always been confined to the inventor's manufacture. In my judgment the appeal should be allowed, and an order made refusing the application to rectify the register. But I think the order as to costs in the court below ought not to be disturbed, and that there ought to be no costs of the appeal.

COZENS-HARDY, L.J.—This is an appeal from an order of Buckley, J. by which he has removed from the register of trade marks the word "vaseline." This trade mark was registered by Mr. R. A. Chesebrough, of New York, in several classes in the year 1877, as an old mark which had been used for six years before the 8th March 1877. Under the Act of 1878 the word could not be registered unless it had been used as a trade mark before the passing of the Act. The applicant, Mr. Pearson, who is a person aggrieved, and who has admittedly a *locus standi*, applied to strike out the mark on the ground that it ought never to have been placed upon the register. Having regard to the fact that vaseline has been on the register for nearly a quarter of a century, I feel that the burden of proof rests strongly upon anyone who seeks to disturb such a long-standing position. If Mr. Chesebrough had been content to file no evidence, I think he might well have said that no case had been made out, but as evidence has been gone into on both sides, and as the most material evidence against the mark is furnished by the respondent, I think we are bound to consider the matter as a whole, and to arrive at the best conclusion we can. Before considering the evidence in detail, I think it right to point out the extremely unsatisfactory nature of the respondent's evidence. Indeed, this was so manifest that application was made to this court to admit further evidence on the appeal. Now, although in the present case such further evidence has been admitted, it is obvious that evidence directly addressed to cure blots pointed out by the learned judge at the original hearing should be carefully scrutinised, more especially when there has been no opportunity of cross-examination. In 1865 Robert A. Chesebrough took out a patent in England and a similar patent in America for improvements in refining petroleum or other hydro-carbon oils. The patent does not mention "vaseline," and, although in the evidence before Buckley, J. it was sworn by Mr. W. H. Chesebrough that the word "vaseline" was invented by Mr. R. A. Chesebrough in 1871, and applied to articles made under the patent of 1865, I think, according to the true construction of the patent, this cannot be so. The patent process stopped short of the stage at which "vaseline" is produced. In 1872 Mr. Chesebrough took out an American patent by which he claimed "the new article of manufacture named by me 'vaseline,' substantially as herein as described." In the body of the patent he calls it "a distinct substance by itself" and a "new article of manufacture." He describes it as

made in a particular mode from the residuum of petroleum left in the still after distillation. This invention was never patented in England, but in 1874 Mr. Chesebrough obtained an English patent by which he claimed (*inter alia*) the manufacture of "the material I term 'vaseline' from the residuum of petroleum by simmering in open kettles, and through filtration through bone black as hereinbefore described." In short this was a patent for providing the same article, vaseline, by a new process. In 1877 Mr. Chesebrough registered "vaseline" in four classes. He described himself as a manufacturer of vaseline, and in the column headed "description of goods," he entered "Vaseline used for stuffing and currying of leather." There is evidence of a sale of vaseline in England in 1873. This was vaseline made under the American patent, and imported by the American patentee into this country. I can find no evidence that the word "vaseline" was used in England as a trade mark before the 13th Aug. 1875. There is a large amount of trade evidence to the effect that the word "vaseline" has been regarded as denoting the goods of the Chesebrough Company, but I attach no weight to this evidence. The fact that "vaseline" has been registered since 1877 has made it *de facto* the Chesebrough trade mark. The real question for decision is whether it could be or was used as a trade mark before 1875, and not whether it has since been so used. I regret that I am not able to concur in the judgment which has just been delivered by Stirling, L.J. I have reluctantly come to the conclusion that it appears, from the respondent's own evidence, that the word "vaseline" was an invented word to describe an invented thing; and, if so, I think it follows that any one was at liberty to make the invented article, which was not protected by patent in England, and at liberty to call it by the name attributed to it by the inventor. In the case of *Linoleum Manufacturing Company v. Nairn* (*ubi sup.*) Fry, J. applied this principle to the case of a patented article after the expiration of the patent, but I think it cannot be limited to that case. I adopt the language of that learned judge (when Lord Justice) in the *Valvoline* case (*Re Leonard and Ellis's Trade Mark, ubi sup.*), where he said: "When a new material is invented, and at the same time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section. It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker. I am inclined to think that the words 'special and distinctive' import the specialising of the make and manufacture of a particular maker from all other manufacturers, and distinguishing the manufacture of one person from the manufacture of all others." Any other view seems to me inconsistent with the essential idea of a trade mark. It is no doubt true that petroleum jelly, which may or may not have been substantially the same in its chemical constituents as vaseline, has been sold in this country under various other names. But I am not satisfied that this was done before 1875, and, even if it had been done before 1875, I do not think it would have helped Mr. Chesebrough, who described

himself as carrying on the business of a manufacturer of vaseline. It follows that, in my opinion, it is established that "vaseline" was not and could not be an old mark in 1875. I may add, though I do not base my judgment upon this, that I have grave doubt whether before 1875 it was ever used alone as a trade mark, even in America, still less in this country. For these reasons I think the judgment of Buckley, J. was correct, and that the appeal ought to be dismissed.

Solicitors: J. H. and J. Y. Johnson; Burn and Berridge; Solicitor to the Board of Trade.

Wednesday, April 30.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

BLACKETT v. BLACKETT AND FRAIL. (a)

APPEAL FROM THE DIVORCE DIVISION.

Divorce—Practice—Petition of husband—Husband an undischarged bankrupt—Alleged adultery of wife—Claim for damages—Security for co-respondent's costs—Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), s. 33.

The fact that the husband, who is petitioner in a suit for dissolution of marriage, is an undischarged bankrupt is not necessarily a ground for requiring him to give security for the costs of the co-respondent, against whom there is a claim for damages. The same rules apply in the Probate, Divorce, and Admiralty Division as to security for costs, as in other divisions of the High Court, when damages are claimed under sect. 33 of the Matrimonial Causes Act 1857.

Smith v. Smith and Palk (47 L. T. Rep. 355; 7 P. Div. 227) overruled.

A SUMMONS was taken out by way of an appeal from an order made by Mr. Registrar Owen directing that the petitioner, who was an undischarged bankrupt, should give security for the costs of the co-respondent within fourteen days, or withdraw his claim for damages.

The summons was originally heard in chambers, but was adjourned into court for further argument should the co-respondent desire to take the opinion of the Court of Appeal upon the matter, and was heard by Sir F. Jeune on the 17th March.

Barnard for the petitioner.—The learned registrar was wrong in making the order. No doubt he had acted upon the authority of the case of *Smith v. Smith and Palk (sup.)*, which was decided by Lord Hannen in 1882. That case was very similar to the present, and the petitioner had there been ordered to give security for the costs of the co-respondent, or to withdraw his claim for damages, on the ground that the petitioner was an undischarged bankrupt. That case was now bad law. In several subsequent cases the Court of Appeal had held that the plaintiff ought not to be compelled to give security for costs, merely because he was an undischarged bankrupt:

Rhodes v. Dawson 16 Q. B. Div. 548;

Cowell v. Taylor, 53 L. T. Rep. 483; 31 Ch. Div. 34;

Cook v. Whellock, 62 L. T. Rep. 675; 24 Q. B. Div. 658;

It was the general rule of law that a plaintiff

should not be compelled to give security for costs merely because he was a pauper, a bankrupt, or an insolvent person. See

Chitty's Archbold, 14th edit., vol. 1, p. 398.

Claims for damages in the Probate and Divorce Division have taken the place of the old actions for *crim. con.*, and by sect. 33 of the Matrimonial Causes Act 1857, those claims are to be tried on the same principles and subject to the same rules and regulations by which actions for *crim. con.* were formerly tried at common law. The petitioner in the present case had been adjudicated a bankrupt in May 1899. It was not alleged that the adultery complained of had been committed until 1900 and 1901. From the Law Reports it did not appear that the case of *Smith v. Smith and Palk* was argued or considered. It had never been the practice for security to be ordered in such cases, except when the plaintiff was suing for the benefit of another person. The present petitioner was not so doing.

Harvey Murphy for the co-respondent.—The case turned upon the strict construction of the words of sect. 33 of the Matrimonial Causes Act 1857: "Such petition shall be heard and tried on the same principle, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in courts of common law." It was not material to consider what were the common law rules in 1886 or 1890, but what was the practice in 1857. The decision of Lord Hannen had never been questioned or challenged. It was for the petitioner to show that it was bad, and not for the co-respondent to show that it was good. He cited

Cohen v. Bell, 1 Tidd's Prac., 9th edit., p. 536;

Webb v. Ward, 7 T. R. 296.

Strictly speaking, no petitioner suing in the Divorce Division could be said to be suing entirely on his own behalf, the court reserving to itself the right of directing how damages were to be applied. In every case of this kind security ought to be ordered.

THE PRESIDENT.—I had hoped, when this summons was adjourned from chambers, that further authorities would have been forthcoming on this matter. But none have been produced by either side beyond those which were before me on the 1st March. The real question which this court has to decide is this: What was the practice at common law with respect to security for costs in 1857? There do not appear to be any decisions at that time; but there are later cases, *Malcolm v. Hodgkinson* (L. Rep. 8 Q. B. 209), as well as those to which Mr. Barnard has referred. Is the claim in the present case for the benefit of anyone but the petitioner himself? If the action had been one for personal injuries the petitioner would be entitled to keep any damages he recovered for himself, just as much as if he had earned them since the commencement of his bankruptcy. To my mind, an action for damages in the Divorce Court is clearly on the same basis. I am therefore of opinion that the decision of Lord Hannen in *Smith v. Smith and Palk* cannot be supported, and for that reason I shall reverse the order which has been made by the registrar. The costs before the registrar and in chambers will be costs in the cause. The costs of the

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argument in court must be the petitioner's in any event, as the co-respondent has chosen to appeal.

From this decision the petitioner appealed.

Inderwick, K.C. and *Harvey Murphy* for the appellant.

Bargrave Deane, K.C. and *Barnard* for the respondent.

The arguments were similar to those in the court below, and the following further case was referred to:

Bernstein v. Bernstein, 69 L. T. Rep. 513; (1893) P. 292.

COLLINS, M.R.—This is an appeal from the President, in which he overruled the decision of the registrar and allowed a petitioner, who was an undischarged bankrupt, to prosecute the suit without giving security for costs. The petitioner claims damages against the co-respondent, and the registrar at the instance of the co-respondent ordered him to find security for the costs unless he withdrew the claim for damages. On appeal to the President he came to the conclusion that there was no sufficient ground in point of law on which security could be exacted. The first point made by counsel for the appellant is that there is a well-ascertained practice of the Divorce Division, founded on the case of *Smith v. Smith and Palk* (*ubi sup.*) which was decided by Sir James Hannen in 1882, and that his decision has regulated the practice ever since. I do not think, however, that that would be sufficient to prevent us interfering with this practice if we were sure that it was not well founded. The cases in which the petitioner is a bankrupt and claims damages are rare, and, therefore, this is a class of case which is exceptional. It is not a matter occurring every day which has been dealt with according to one uniform practice. The President does not say it is a settled practice; nor does Mr. Deane, whose experience is only second to that of Mr. Inderwick, admit it to be settled practice. I do not think, therefore, that the practice has been uniform, and therefore we are at liberty to consider it and see if it is a well-founded practice. The case with which it all starts is *Smith v. Smith and Palk* (*ubi sup.*), which is very shortly reported, and the judgment is very short, and rests on the argument of Mr. Searle, which is in four lines. The headnote to the report in the Law Reports is "In a petition for dissolution of marriage, the husband, who was an uncertificated bankrupt, claimed damages. Upon application by the co-respondent; held, that unless the claim for damages was withdrawn the petitioner must give security for the costs of the action." The argument as there reported is, "Searle, for the co-respondent, applied for security for costs and a stay of proceedings until the security had been given. The proceedings, so far as damages are claimed, are in the nature of an action for *crim. con.* to which the practice at common law is applicable." That is the whole of the argument, and I may say of the judgment also, because, according to the report, the court granted the application and gave no reasons for doing so from which it may be taken to have acted on the reasons adduced in argument. Therefore I venture to criticise the argument of Mr. Searle, which introduced, with the approbation of the court, the practice at common law. What was the practice at common law? Certainly it was

not to order security for costs to be given in such a case. Mere poverty was not of itself a ground at common law for ordering security to be given. That was absolutely contrary to the practice at common law except in certain cases. Mere insolvency or bankruptcy was no ground for claiming security for costs. The foundation of the argument is, therefore, infirm, and I think this practice is not so fixed that we cannot now alter it. I now turn to the later cases which were cited to us in which the subject has been discussed. In *Cowell v. Taylor* (*ubi sup.*) it was held that the court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy, even where he is in insolvent circumstances, and Bowen, L.J. in his judgment quotes and adopts a passage from the judgment of Lord Esher, M.R. in *Sykes v. Sykes* (20 L. T. Rep. 663, 665; L. Rep. 4 C. P. 645, 650), where he said: "Insolvency alone is not a ground for compelling security. But an exception has been grafted on that rule, where the plaintiff is merely lending his name for the benefit of another person, and is therefore not the real plaintiff in the action, as where he has assigned his interest in the debt to another. There is no authority, however, for extending that exception to the case of an executor or an assignee of a bankrupt." In *Rhodes v. Dawson* (*ubi sup.*) the second paragraph of the headnote is: "A receiving order made under the Bankruptcy Act 1883 does not divest the debtor of his property; and what he recovers as plaintiff in an action is his property, both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them. Therefore a debtor, against whom a receiving order has been made, ought not merely on that ground to be ordered to give security for the costs of any action in which he may be the plaintiff." I emphasise that, because I propose to mention it later on in dealing with one of the arguments which have been addressed to us. In giving his judgment in *Rhodes v. Dawson* (16 Q. B. Div. 553) Lindley, L.J. says: "The law upon this subject is well summed up in the last edition of Chitty's Archbold, vol. 1, part 5, ch. 33, p. 398: 'The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent, and this even in a *qui tam* action. And this rule applies where the plaintiff is trustee of a bankrupt, and is suing for the benefit of the estate; or where the plaintiff is suing as executor for the benefit of the testator's estate.'" There are other passages in the other cases which have been cited to the same effect, but I do not think they add anything to what I have already read. But in the present case it has been argued by counsel for the appellant that there is a special circumstance arising out of sect. 33 of the Divorce Act 1857, which provides that after the damages to be recovered have been ascertained by the verdict of a jury "the court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife." It is contended that by virtue of this section the bankrupt is not suing for himself, but for the person who may become entitled to the damages; in other words, that he is a conduit

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pipe to conduct the damages to other persons, a *nominis umbra*, who therefore comes within one of the exceptions referred to in the authorities. I think that argument is concluded by the passage in the headnote to *Rhodes v. Dawson* (*ubi sup.*), to which I previously referred, for in that case the existence of the receiving order compelled the plaintiff to hand over what he might recover to the official receiver, and yet it was held that the plaintiff was not in a position of a person who was required to give security. If therefore we are at liberty to follow the rules of the common law, security for costs ought not to be given in the present case. In *Smith v. Smith and Palk* (*ubi sup.*) the principle laid down was that the standard to be applied was the standard of the common law, and to that extent I adopt the principle laid down in that case, and I have no doubt of what the proper standard of the common law is. The result is that in my opinion the decision of the President is right and this appeal must be dismissed.

STIRLING and COZENS-HARDY, L.JJ. concurred.

Solicitors for the petitioner, *Collyer-Bristow, Hill, Curtis, and Dods.*

Solicitors for the co-respondent, *Woodcock, Ryland, and Parker.*

April 17, 18, and May 6.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

BELLERBY v. ROWLAND AND MARWOOD'S STEAMSHIP COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company — Shares — Surrender to company — Invalidity — Release of shareholders' liability — Rectification of register — Lapse of time — Companies Act 1862 (25 & 26 Vict. c. 89), ss. 26, 35.

Since *Trevor v. Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409) a surrender of its shares to a company which has the effect of reducing its capital can only be supported under circumstances which would justify a forfeiture of the shares.

In 1893 certain directors of the defendant company surrendered shares to the company, in each of which the sum of 1l. was still unpaid, the company releasing the directors from all further liability in respect of them.

In 1900 the directors commenced an action, claiming a declaration that the surrender was *ultra vires* and inoperative; and also that the register of shareholders might be rectified by inserting the names of the plaintiffs as shareholders in respect of the shares surrendered by them.

The surrendered shares had not been reissued or in any way dealt with by the company.

Held (affirming the decision of *Kekewich, J.*, 84 L. T. Rep. 651), that the transaction was a purchase of its own shares by the company within *Trevor v. Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409), and the surrender was therefore void.

Held also (reversing the decision of *Kekewich, J.*), that sect. 35 of the Companies Act 1862 did not apply, and that the plaintiffs never having

ceased to be legal owners of the shares, their names must be restored to the register of shareholders.

Per Stirling, L. J.: *Teasdale's case* (29 L. T. Rep. 707; L. Rep. 9 Ch. App. 54) ought not to have been followed in *Eichbaum v. City of Chicago Grain Elevators Limited* (65 L. T. Rep. 704; (1891) 3 Ch. 459).

Semble, Teasdale's case (*ubi sup.*) is overruled by *Trevor v. Whitworth*.

THIS action was brought by Messrs. Bellerby, Moss, and Marwood, directors, and the executors of Messrs. Wright and Rowland, two other directors, of the Rowland and Marwood's Steamship Company Limited, asking for a declaration that the surrender of 415 shares made in 1893 in favour of the company by the above-named directors was *ultra vires* and inoperative, and for a return to them of the shares which they had surrendered.

The company was incorporated in 1890 under the Companies Acts with a capital of 275,000l., divided into 25,000 shares of 11l. each, for the purpose of carrying on the business of ship-owners.

By art. 37 of the articles of association of the company it was provided that "the directors may accept from any member, on such terms and conditions as shall be agreed, the surrender of his shares or stock or any part thereof."

In 1893 the company gave an order to contractors for a steamship called the *Golden Cross*. Owing to depression in the shipping trade they were unable to pay the contractors for the construction of the ship, and the ship was sold to pay the contractors.

By this transaction the company lost 4000l.

By a deed poll executed in July 1893 the directors surrendered to the company eighty-three shares each on which 10l. had been paid up for the purpose of making good to the company the loss sustained to the *Golden Cross* contract.

The company had since become prosperous, and at a meeting of the shareholders it was resolved that the shares which they had surrendered should be returned to the directors, and for that purpose a friendly action should be brought to set aside the surrender.

The surrendered shares had not been reissued or in any way dealt with by the company.

Kekewich, J. held (84 L. T. Rep. 651; (1901) 2 Ch. 285), that the surrender amounted to a purchase of its shares by the company, and was therefore invalid; but he treated the matter as an application under sect. 35 of the Companies Act 1862 for the rectification of the register of shareholders, and thought that, considering the length of time which had elapsed since the surrender, the plaintiffs had not established any equity to disturb the existing state of things, and he therefore dismissed the action.

From this decision the plaintiffs appealed.

Upjohn, K.C. and *Eustace Smith* for the appellants. — The decision of *Kekewich, J.*, holding that the surrender of these shares was *ultra vires* and a nullity, was correct, therefore the appellants have a legal right to have their names restored to the register of shareholders in respect of them. What took place in 1893 amounted to a purchase of the shares by the company, and not a surrender, as the directors were released

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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from all further liability in respect of the shares, on each of which the sum of 1*l.* was still uncalled.

Trevor v. Whitworth, 57 L. T. Rep. 457; 12 App. Cas. 409;

General Property Investment Company v. Matheson's Trustees, 16 Ct. Sess. 4th ser. 282.

It is the duty of the company to keep their register correctly:

Companies Act 1862, s. 25.

On the day after the surrender of the shares the appellants had a legal right to have their names restored to the register, and they do not rely on any equity to have the register rectified. Therefore, if the court had any discretion under sect. 35 of the Companies Act 1862, Kekewich, J. was wrong in refusing to order the register to be corrected. But this is not an application under that section, and it has nothing to do with it. It is an action by the plaintiffs asserting a legal right of the plaintiffs to these shares, of which they never ceased to be owners. The company had no right to remove their names from the register, and their act was a nullity. *Re Dronfield Silkestone Coal Company* (44 L. T. Rep. 361; 17 Ch. Div. 76) was considered in *Trevor v. Whitworth* (*ubi sup.*), and depends on the particular facts of the case. By this surrender the capital of the company was reduced without the provisions of the Companies Acts 1867 and 1877 being complied with. They also referred to

Chapleo v. Brunswick Permanent Benefit Building Society, 44 L. T. Rep. 449; 6 Q. B. Div. 696;

Ex parte Watson, 21 Q. B. Div. 301;

Great North-West Central Railway Company v. Charlebois, 79 L. T. Rep. 35; (1899) A. C. 114;

Sichell's case, 17 L. T. Rep. 363; L. Rep. 3 Ch. App. 119;

Shortt on Mandamus, pp. 223, *et seq.*

Warrington, K.C. and *H. E. Wright* for the defendants.—Even if the appellants were entitled to be regarded as shareholders, Kekewich, J. was right in refusing to direct their names to be restored to the register. But the surrender was valid, and the directors ceased to be shareholders in respect of those shares. The transaction of 1893 was not a purchase by the company of its own shares within *Trevor v. Whitworth* (*ubi sup.*). The question of the surrender of shares was not considered in that case. There are cases which show that a simple surrender of shares may be valid, and the validity depends on the particular facts of the case. Here no money of the company was used to purchase the shares. A surrender is not a reduction of the capital of the company within the Companies Acts 1867 and 1877. It is not a permanent reduction, because the shares can be reissued:

Re Denver Hotel Company, 68 L. T. Rep. 8; (1893) 1 Ch. 495.

A surrender of shares partly paid up may be valid, and no surrender is invalid unless it amounts to a purchase of the shares with the company's money:

Lindley on Companies, 5th edit., pp. 517 *et seq.*;

Marshall v. Glamorgan Iron and Coal Company, 19 L. T. Rep. 632; L. Rep. 7 Eq. 129;

Wright's case, 17 L. T. Rep. 635; L. Rep. 12 Eq. 331, 336;

Snell's case, 21 L. T. Rep. 445; L. Rep. 5 Ch. App. 22;

Teasdale's case, 29 L. T. Rep. 707; L. Rep. 9 Ch. App. 54;

British and American Trustees and Finance Corporation v. Couper, 70 L. T. Rep. 882; (1894) A. C. 399.

[*COLLINS, M.R.* referred to *Price v. Jenkins* (36 L. T. Rep. 237; 5 Ch. Div. 619).] The decision in *Teasdale's case* is still good law, and was not affected by *Trevor v. Whitworth*, although a dictum of James, L.J. was treated as going beyond the law, and it was followed by *Stirling, J.* in

Eichbaum v. City of Chicago Grain Elevators Limited, 65 L. T. Rep. 704; (1891) 3 Ch. 459.

[*COZENS-HARDY, L.J.*—In *Teasdale's case* the resolutions were passed before the Companies Act 1867 came into force.] A forfeited share may be disposed of as the company thinks fit, clause 20 of table A, sched. 1, to the Companies Act 1862; and clause 22 implies that it may be reissued to a purchaser; and in that case it may be dealt with as partly paid up to an extent not exceeding the amount which had been paid up at the date of forfeiture:

Morrison v. Trustees, Executors, and Securities Insurance Corporation, 79 L. T. Rep. 605.

Kekewich, J. was right in treating this action as within sect. 35 of the Companies Act 1862. That section provides a method for the rectification of the register, and any application by a shareholder for that purpose must be deemed to be taken under that section. The "justice of the case" did not require that the plaintiffs should be placed on the register. They voluntarily gave up the shares for the benefit of the company, and they cannot come now and ask that their names shall be placed on the register because it is in a prosperous condition.

Upjohn, K.C. in reply.

Cur. adv. vult.

May 6.—*COLLINS, M.R.*, after referring to the facts, continued.—Since the case of *Trevor v. Whitworth* (*ubi sup.*) it is clear law that a limited company incorporated under the Joint Stock Companies Acts cannot purchase its own shares unless it does so by way of reduction of capital with the sanction of the court under the provisions of the Companies Acts 1867 and 1877: (see *British and American Trustee and Finance Corporation v. Couper* (*ubi sup.*)). Cases dealing with the acquisition by companies of their own shares before *Trevor v. Whitworth* (*ubi sup.*) was decided are now of little assistance. Is then the transaction in this case a purchase by the company of its own shares? It was certainly intended by the parties who carried it out to involve the release by the company to the surrenderers of the right to call up the unpaid balance of 1*l.* on each share, and was, therefore, not a gratuitous surrender. There was an exchange of real consideration between the parties, and therefore it ought to be described perhaps more accurately as a sale and purchase than as a surrender. But assuming it can be properly described as a surrender, although it involves a consideration given out of the assets of the company to the party surrendering, it remains to consider whether there is any legal ground upon which it can be taken out of the principle of *Trevor v. Whitworth* (*ubi sup.*). It seems to me that there is not. An argument was addressed

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to us by Mr. Warrington based on a minute criticism of some passages in the speeches of the learned Lords in which they deal with the argument that to hold a sale bad would be to forbid forfeitures and surrenders, and point out that these differ from the case actually before them, which involved a present parting by the company with the amount actually paid up on the shares. But whether this distinction is conclusive or not, it seems to me that when closely criticised these *dicta* as to surrenders deal with them as a species of forfeiture, which, as the learned Lords point out, is recognised by the Act itself, and cannot be extended to cover a transaction having none of the elements of a forfeiture. Lord Herschell said (57 L. T. Rep. 460; 12 App. Cas. 417): "It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender, no doubt, stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment, it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *Re Dronfield Silkestone Coal Company* (44 L. T. Rep. 362; 17 Ch. Div. 85): 'It is not for me to say which the limits of the surrender are which are allowable by the Act . . . because each case as it arises must be decided on its own merits.'" Lord Watson said (57 L. T. Rep. 464; 12 App. Cas. 429): "Notwithstanding the general prohibition of alterations upon the memorandum of association which diminish the capital, whether paid-up or nominal, of a company limited by shares, the Companies Acts contemplate the possibility of diminution of unpaid capital in certain cases, although the memorandum remains unaltered. Sect. 26 of the Act of 1862 and the regulations of table A (17 to 22) show plainly that the Legislature intended companies to have the power of forfeiting shares. There is no references in the Acts to surrenders of shares; but these have been admitted by the courts upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding *in invitum*, and the other a proceeding taken with the assent of the shareholder, who is unable to retain and pay future calls on his shares." Again, Lord Macnaghten said (57 L. T. Rep. 467; 12 App. Cas. 438): "Now, the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce the capital includes a power

'to pay off any capital which may be in excess of the wants of the company,' and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or 'the payment to any shareholder of any paid-up capital.' It follows that if the operation be effected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company. One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862; it is mentioned in sect. 26; every company is to return to the Registrar of Joint Stock Companies once a year 'the total amount of shares forfeited.' There can be no question as to the power of a company in a proper case to forfeit shares. Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction." And, again, in *British and American Trustee and Finance Corporation v. Couper* Lord Macnaghten said (70 L. T. Rep. 886; (1894) A. C. 414): "Speaking for myself, I cannot see any substantial distinction between the *Denver Hotel* case (*ubi sup.*), where the reduction was confirmed, and the present case, where it is admitted that, if the view of the Court of Appeal in the *Denver Hotel* case (*ubi sup.*) be correct, confirmation must be refused. In both cases, as it seems to me, you have a purchase by a limited company of its own shares, for I cannot agree that a transaction which involves a surrender of shares as part of the consideration is anything but a purchase of shares within the meaning of the opinion of this House in *Trevor v. Whitworth* (*ubi sup.*). I can see no distinction in principle between returning to a shareholder a part of the paid-up capital in exchange for his shares and wiping out his liability for the uncalled-up sum payable thereon. Both methods involve a reduction of the capital which, as Lord Watson points out in *Trevor v. Whitworth* (57 L. T. Rep. 462; 12 App. Cas. 423), persons dealing with the company are entitled to rely upon as existing either as paid up or as still to be called up, and such a reduction, therefore, can only hold good if sanctioned under the conditions prescribed. If it be objected that the shares may, in the language of Lord Watson, be "reissued," and that though the liability of the surrenderor to pay the amount still at call is extinguished, the liability will remain good against anyone to whom the company disposes of the share, the answer in this case is the same as that suggested by Lord Watson in the case where the

money paid up on the share is returned to the shareholder. He says (57 L. T. Rep. 462; 12 App. Cas. 424): "In the event of the company continuing to hold the shares (as in the present case) the amount paid up is permanently withdrawn from its trading capital." But further and apart from the question of sale or trafficking in a company's own shares, I think the reasoning in *Ooregum Gold Mining Company of India v. Roper* (66 L. T. Rep. 427; (1892) A. C. 125) establishes that to release a shareholder from any part of his obligation to pay the uncalled-up balance on his share is an *ultra vires* act on the part of the company. "It seems to me," said Lord Halsbury, L.C. (66 L. T. Rep. 427; (1892) A. C. 133), "that the system thus created, by which the shareholder's liability is to be limited by the amount unpaid upon his shares renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing. I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security"; and the opinions of the other learned lords are to the same effect. The justification of forfeitures rests upon the statute itself, and I think that since *Trevor v. Whitworth* (*ubi sup.*) no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture. It is not necessary to refer to *Eichbaum v. City of Chicago Grain Elevators Limited* (*ubi sup.*), decided by my brother Stirling on the authority of *Teasdale's case* (*ubi sup.*), as he will deal with those cases himself. In *Re Denver Hotel Company* (*ubi sup.*) Lindley, L.J. in supporting a surrender, relied on the fact, pressed by counsel in argument, that, "the shares being fully paid up, their surrender involved no release by the company of any of its rights against the surrenderor," indicating thereby the possible importance of a release. It is not, however, necessary to consider in this case whether a surrender, even of fully paid-up shares, could be supported. I am of opinion, therefore, that Kekewich, J. was right in his decision on the principal question in the case. Upon the second point, however, Kekewich, J. has held that, notwithstanding that the surrender of the shares was void as being an act *ultra vires*, still the application to restore the plaintiffs to the register must be treated as being made under sect. 35 of the Act of 1862, and that he was not satisfied of the justice of the case within that section, and he therefore refused to make the order. The learned judge relied on the fact that so much time had elapsed since the surrender, and that it was conceivable that some persons might have altered their position on the footing that the capital of the company had been reduced, and, relying upon *Sichell's case* (*ubi sup.*) and the dicta of Lord Macnaghten in *Trevor v. Whitworth* (*ubi sup.*), he held that the plaintiffs showed no equity in their favour to disturb the existing

state of things, and therefore refused to rectify the register at their instance. The application in this case is not in fact made under sect. 35 (if anything turns upon that), but is an action, asserting the legal right in the plaintiffs to be on the register, on the ground that the act whereby they were removed from it was *ultra vires*, and, therefore, a nullity. *Sichell's case* did not relate to an act *ultra vires* of the company, and in Lord Macnaghten's observations in *Trevor v. Whitworth* on *Re Dronfield Silkestone Coal Company* (*ubi sup.*) he treated the application as made by one who had no equity to set the court in motion. Here it seems to me that in point of law the plaintiffs never ceased to be the legal owners of the shares, and therefore are not obliged to rely upon an equity to have the register rectified. Nor, on the other hand, can the company set up lapse of time or acquiescence as validating that which was in its essence incapable of being made valid, being, as Sir George Jessel, M.R. pointed out in *Re Dronfield Silkestone Coal Company* (*ubi sup.*), void and not voidable only. The Scotch case, *General Property Investment Company and Matheson's Trustees* (*ubi sup.*), is an authority directly in point on this part of the case, unless the fact of liquidation makes a difference. An action was there brought by the liquidator to place on the register a shareholder who had sold his share to the company at their instance many years before, and Lord Shand, in dealing with an argument based on sect. 35, said (16 Ct. Sess. Cas. 4th series, 291): "If the legal right of the company be clear, then it follows that the justice of the case requires that effect shall be given to that right." It seems to me, therefore, that the learned judge's decision on this part of the case cannot be supported, and that the appeal must be allowed.

STIRLING, L.J.—On the first of the two points decided by Kekewich, J. I have arrived at the same conclusion as the learned judge, though not without some doubt. I take the effect of the transaction (as contemplated by the parties) to have been that the shares surrendered were to become the property of the company who would have power to deal with the shares in any manner permitted by law, but were not to enforce payment of the 1l. per share remaining unpaid against the surrenderors. The company might, for example, sell the shares to a purchaser subject to the liability to pay 1l. per share as and when called up; but could not extinguish the shares except under the provisions of the Companies Acts with respect to reduction of capital. Now, table A in sched. 1 to the Companies Act 1862 contains the following provisions: "(20) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit. (21) Any member whose shares have been forfeited shall notwithstanding be liable to pay the company all calls owing upon such shares at the time of forfeiture." Forfeited shares, therefore, may become the property of a company, and may be disposed of by the company in any manner permitted by law. Again, as the rights of the company in respect of calls due at the time of forfeiture are expressly preserved, it follows, in my opinion, that the company could not resort to the member whose shares have been forfeited for subsequent calls. Forfeited shares, therefore,

under table A stand in a similar position to that in which the surrendered shares in the present case were intended to be; and it seemed to me that the clauses of table A to which reference has been made might possibly be regarded as showing that the Legislature did not consider the existence of such a state of things as constituting a reduction of capital contrary to the provisions of the Companies Acts or as otherwise violating any of the enactments therein contained. But upon a careful examination of what was laid down in the cases of *Trevor v. Whitworth* (*ubi sup.*), *Ooregum Gold Mining Company of India v. Roper* (*ubi sup.*), and *British and American Trustee and Finance Corporation v. Couper* (*ubi sup.*), I think the weight of authority is in favour of the view that forfeiture, which is specifically mentioned in the Act of 1862, stands on a special footing, and that surrenders can only be supported in circumstances which would justify forfeiture. I wish to add a few remarks with reference to *Eichbaum v. City of Chicago Grain Elevators Limited* (*ubi sup.*), which was cited in argument. That case was decided by me on the authority of *Teasdale's* case (*ubi sup.*), which appeared to me to be precisely in point. There was, however, a difference, which was pointed out by Cozens-Hardy, L.J. (so far as I know, for the first time) during the argument of the present case—viz., that the resolutions in *Teasdale's* case were passed in 1865, before the passing of the Companies Act 1867, while the resolutions in *Eichbaum v. City of Chicago Grain Elevators Limited* (*ubi sup.*) were brought forward in 1891, after the passing of that statute. I now think that in these circumstances I ought not to have followed *Teasdale's* case, and, further, that although there was in 1891 some ground for the view that the last-mentioned case was not overruled by *Trevor v. Whitworth* (see Lindley on Companies, 5th edit., p. 526), it seems now in face of the later decisions much more difficult to support that view. On the second point, I think that the decision of Kekewich, J. cannot be sustained. The learned judge appears to have relied mainly on what it was said by Lord Macnaghten in *Trevor v. Whitworth* with reference to *Re Dronfield Silkestone Coal Company* (*ubi sup.*). In that case the surrender was merely part of a larger transaction which, in the language of Lord Macnaghten (57 L. T. Rep. 468; 12 App. Cas. 440), "could not be undone altogether so as to restore the parties to their original position, and which could not be undone at all without committing injustice." Here there is no such difficulty. The surrender is an isolated transaction, and it is neither alleged nor proved that anyone has altered his position by reason of it. It is true that in past years dividends may have been paid to the shareholders of the company at a somewhat higher rate than would otherwise have been the case by reason of no one participating in respect of the surrendered shares; but any difficulty which might thus be caused is precluded by the withdrawal of all claim on the part of the plaintiffs to past dividends. I think therefore that the appeal should be allowed.

COZENS-HARDY, L.J.—This is an appeal from Kekewich, J. who has held that a transaction by which the plaintiff in 1893 surrendered to the defendant company 415 shares of the nominal amount of 11l., upon which only 10l. had been paid,

was *ultra vires* and void, but that the plaintiffs are nevertheless not entitled now to have their names restored to the register. The transaction seems to have been perfectly honest. A loss of 4000l. had been incurred by the company in relation to a ship, and the plaintiffs, who were directors, without admitting any obligation to make good any part of the loss, surrendered the shares upon the terms that they should not remain liable for the 1l. per share still unpaid. The transaction was not entered into with a view to escape liability, and except on the ground of its being *ultra vires* there is no reason for impeaching it. The company has since become highly prosperous, and the plaintiffs desire to get back their shares. No claim is made for past dividends. The surrender was effected by a deed poll, but I think it must be treated as if the company had been parties to a deed by which, in consideration of the surrender of the shares to the company, the company released the plaintiffs from all liability in respect of the 1l. per share. Since 1893 there has been no attempt by the company to dispose of the 415 shares. In the balance-sheets and returns the subscribed capital has since 1893 been treated as 21,595 shares with 10l. per share called up. The nominal capital is 25,000 shares of 11l. I assume that the arrangement entered into in 1893 was a highly beneficial arrangement for the company. The question remains, however, whether it was not *ultra vires*. I do not propose to discuss the early authorities with reference to the reduction of capital and the surrender of shares. They are neither consistent nor satisfactory. But the House of Lords has in three recent important cases laid down the principles which must govern our decision. They are *Trevor v. Whitworth* in 1887 (*ubi sup.*), *Ooregum Gold Mining Company of India v. Roper* in 1892 (*ubi sup.*), and *British and American Trustee and Finance Corporation v. Couper* in 1894 (*ubi sup.*). Two propositions may be asserted without doubt; first, a company may forfeit shares. This is recognised by sect. 26 of the Companies Act 1862, as well as by table A. Second, it is not competent to a company to purchase its own shares, and any such transaction is *ultra vires*. I think *Trevor v. Whitworth* (*ubi sup.*) also decides that under circumstances which would entitle a company to forfeit shares for nonpayment of calls the same result may be attained by means of a voluntary surrender. In the case of forfeiture the statute treats the forfeited shares as being the property of the company, and it may well be that the acquisition of its property by the company is equally lawful, whether it is acquired by hostile proceedings in the nature of forfeiture, or by a voluntary transaction producing the same result. There is no infringement of the statutory provision in either case. There is merely an unimportant difference in form. When, however, the transaction involves, as in the present case, the release by the company to the shareholders of uncalled capital on their shares, it seems to me that it is, within *Trevor v. Whitworth* (*ubi sup.*), a reduction of capital not sanctioned by law. The decision of the House of Lords in *Ooregum v. Gold Mining Company of India* (*ubi sup.*) that shares in a limited company cannot be issued at a discount involves the principle that the company cannot by any device relieve a shareholder from the liability to pay the full amount due on his shares. This

OT. OF APP.]

Re HOPKINS; *Ex parte* DE STEDINGK—EWART v. FRYER.

[CHANC. DIV.]

would be the result if the shares had been retained by the plaintiffs instead of being surrendered to the company. But the fact that, in consideration of the release the shares were surrendered, seems to me to render the transaction no better. Uncalled capital is part of the assets of a company. It may be mortgaged: (*Re Pyle Works*, 62 L. T. Rep. 887; 44 Ch. Div. 534; *Newton v. Anglo-Australian Investment, Finance, and Land Company*, 72 L. T. Rep. 305; (1895) A. C. 244). And by art. 107, cl. (8), of the articles of association of the defendant company, a mortgage of its uncalled capital is expressly authorised. The company therefore parted with 415l., a portion of its assets, in consideration of the acquisition of the shares. This was a purchase of the shares and is directly within the authority of *Trevor v. Whitworth* (*ubi sup.*). It is not necessary, in my view, for the purpose of the present case to go beyond this. But a careful consideration of the speeches of Lord Macnaghten and Lord Watson in *Trevor v. Whitworth* and the *British American Trustee and Finance Corporation v. Couper* (*ubi sup.*) has satisfied me that the real objection to a surrender of shares does not lie in the fact that money has been paid by the company to acquire the shares. The objection is founded on a larger proposition. A company cannot be a shareholder in itself. Every surrender of shares, whether fully paid up or not, involves a reduction of capital, which is unlawful except when sanctioned by the court under the Acts of 1867 and 1877. Forfeiture is a statutory exception, and is the only exception, for I regard a surrender under circumstances which would justify a forfeiture as merely equivalent to a forfeiture. Kekewich, J. while holding that the surrender was *ultra vires* and void, yet refused to restore the plaintiffs to the register. In this respect I am unable to follow his view. If the plaintiffs are, as I hold they are, still shareholders, it seems to me that their names ought to be upon the register, so as to give them the full status and advantage of shareholders, unless something has happened to deprive them of that right. I may observe that no such case is pleaded in the defence. But putting that aside, in substance the only suggestion that can be made is that as the plaintiffs themselves removed their names and surrendered the shares it is not right or just that the court should help them. If, however, the transaction, though honest, was illegal and void, and if no Statute of Limitations applies, I fail to see what answer can be made to the claim. If the company were wound up, I think the liquidator might put their names on the register and hold them liable as contributories for 1l. per share. The original inability of the company to enter into the transaction applies equally to any suggested confirmation. Upon the whole, therefore, I think that the plaintiffs are entitled to the relief sought. It is not a case, I think, in which any costs ought to be given.

Solicitors: Bell, Brodrick, and Gray, agents for W. S. Gray, Whitby; Radford and Frankland.

Friday, June 20.

(Before WILLIAMS, ROMER, and STIRLING, L.JJ.)

Re HOPKINS; *Ex parte* DE STEDINGK. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Proof of debts—Breach of contract—Damages in tort—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 37.

S. stored goods with H. under a verbal contract, in breach of which H. sold the goods. S. brought an action against H., and in the statement of claim set out the contract and its breach, but made no claim for damages for breach of contract, but only for detinue and conversion. Before judgment a receiving order was made against H., of which S. had notice.

Wright, J. held that S., having elected to sue in tort rather than contract, must abide by the result, and that the trustee in H.'s bankruptcy had rightly rejected S.'s proof founded on that judgment debt and costs.

Held, by the Court of Appeal, that, on S. undertaking to abandon the judgment and stay all further proceedings under it, she should be permitted to carry in a proof in the bankruptcy for damages for breach of contract.

THIS was an appeal from a decision of Wright, J. reported ante, p. 504, where the facts and arguments are fully stated.

Muir Mackenzie and E. A. Abinger for the appellant.

Carrington for the trustee.

WILLIAMS, L.J.—We think we ought to make an order allowing the appellant to prove in the bankruptcy of Hopkins for damages for breach of contract if she abandons the judgment in the action and gives an undertaking to stay all further proceedings under it. The trustee in bankruptcy will have a lien on any dividends declared on that proof for his costs.

Solicitors: J. W. Browne; Hyman Isaacs and Lewis.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 2 and 6.

(Before JOYCE, J.)

EWART v. FRYER. (b)

Costs—Lease—Underlease—Forfeiture of lease—Vesting of property in underlessees—Inquiry—Conveyancing and Law of Property Act 1892 (55 & 56 Vict. c. 13), s. 4.

Where a lease became forfeited by virtue of a proviso contained therein, and the court, acting under sect. 4 of the Conveyancing and Law of Property Act 1892, made an order vesting the property in the underlessees, the underlessee was ordered to pay the costs of the inquiry that was necessary to determine the new rent.

By an indenture of lease, dated the 26th Oct. 1896, Colonel Ewart, the freeholder of a tavern known as the Boundary Tavern, Commercial-road, St. George-in-the-East, demised it, in con-

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

(b) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

sideration of a premium of 8500*l.*, to a company called Combe and Co. Limited, for a term of thirty years from the 25th Dec. 1895 at a yearly rent of 300*l.*

By an indenture of underlease, also dated the 26th Oct. 1896, Combe and Co. Limited, in consideration of a premium of 8000*l.*, sublet the tavern to the defendant Fryer for a term of twenty-nine years and a quarter from the 24th June 1896 at a yearly rent of 800*l.*, reducible to 300*l.* so long as he got his beer from the company.

The premium of 8000*l.* was not paid, but by an indenture of mortgage of the same date the defendant Fryer mortgaged his underlease, by way of subdemise, to Combe and Co. Limited, to secure 8400*l.* and further sums not exceeding in the whole 8700*l.*

The defendant Fryer took possession of the tavern in accordance with his underlease.

On the 29th June 1898 the defendant company—Watney, Combe, Reid, and Co. Limited—was incorporated for the purpose of amalgamating the undertakings of Combe and Co. Limited and two other companies; and, for the purpose of carrying this amalgamation into effect, special resolutions for the voluntary liquidation of Combe and Co. Limited and the two other companies were passed and confirmed on the 29th Dec. 1898 and the 13th Jan. 1899 respectively.

The original lease to Combe and Co. Limited, dated the 26th Oct. 1896, contained a proviso that the lease was upon express condition that, if and whenever the lessees, or their assigns, being a company, should enter into liquidation, whether compulsory or voluntary, it should be lawful for the lessor in or upon the demised premises to re-enter and the same peaceably to hold and enjoy as if the lease had not been made. The executors of the lessor Ewart claimed that the voluntary liquidation of Combe and Co. Limited had occasioned a forfeiture of the lease, and brought an action against the underlessee Fryer and the new company, Watney, Combe, Reid, and Co.—to whom the lease had been assigned by Combe and Co. Limited without the leave of the lessor—to recover possession of the tavern.

The defendant Fryer counter-claimed for an order under the Conveyancing and Law of Property Act 1892 vesting in him the demised premises for the residue of the term of his underlease upon such conditions as the court might think fit.

Kekewich, J., before whom the action came, declared that the plaintiffs were entitled to recover possession of the tavern as on a forfeiture; and made an order vesting the property in the defendant Fryer for a term commensurate with the original lease upon conditions thereafter to be settled in chambers.

An inquiry was directed as to what was a proper rent for Fryer to pay, having regard to all the circumstances of the case, including the absence of the covenant which made it a tied house; and the execution of a deed by Fryer was also directed, the deed to contain the necessary covenants.

His Lordship ordered the defendants Watney, Combe, Reid, and Co. Limited to pay the plaintiffs' costs of the action and counter-claim, Fryer to bear his own costs.

The costs of the inquiry and of the deed were reserved.

The defendants subsequently appealed to the Court of Appeal, but the appeal was dismissed with costs.

The defendants Watney, Combe, Reid, and Co. Limited then appealed to the House of Lords, and this appeal was also dismissed with costs: (82 L. T. Rep. 415; 83 L. T. Rep. 551; 86 L. T. Rep. 242; (1901) 1 Ch. 499; (1902) A. C. 187).

The inquiry ordered by Kekewich, J. was now completed, with the result that the tavern was vested in Fryer for a term of about the same length as there would have remained over of the original sublease at a rent of 600*l.* a year, free from the tie.

The costs of the inquiry and of the deed amounted to about 300*l.*, and the question now arose as to which party should bear these costs.

Hughes, K.C. and *T. T. Methold* for the plaintiffs.—Apart from the Act of Parliament the plaintiffs would have a right to possession as against both Watney, Combe, Reid, and Co. Limited and Fryer. The relief which Fryer has been granted is an indulgence provided by the Act; and, that being so, he should in accordance with the general rule pay the costs of the inquiry. They referred to

Quilter v. Mapleson, 47 L. T. Rep. 561; 9 Q. B. Div. 672;

Wardens of Cholmeley Schools v. Sewell, 71 L. T. Rep. 98; (1894) 2 Q. B. 906.

Leigh Clare, for the defendant Fryer, argued that the costs should be paid by Watney, Combe, Reid, and Co. Limited.

Cur. adv. vult.

JOYCE, J.—This is a question arising upon sect. 4 of the Conveyancing and Law of Property Act 1892, which gives the court power to protect underlessees on the forfeiture of superior leases. Where a lease is made by agreement between the parties, it is well known that, in the absence of any express stipulation, the solicitor of the lessor prepares the lease at the expense of the lessee, and the lessor pays for the counterpart. But this is a statutory lease, and by sect. 4 of the Act it is provided that "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit; but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease." It appears to me that, in the absence of any special circumstances, the Act seems to imply that the underlessee should pay the costs. It is also said that this is in the nature of statutory relief in favour of the underlessee against a legal right. It seems that the costs of the inquiry were reserved on the

same principle as in *Slack v. Midland Railway Company* (43 L. T. Rep. 434; 16 Ch. Div. 81)—namely, “in order that the judge before whom the inquiry was conducted might have full control over the costs, and see that they were not unreasonably exaggerated.” There is no suggestion in this case that the costs have been improperly or unreasonably incurred, and all that Mr. Cläre argued was that the costs should be paid by Messrs. Watney, Combe, Reid, and Co. Limited; but I find nothing to that effect in the Act, and the underlessee has come so well out of the litigation that I think he may fairly be made to pay the costs.

Solicitors for the plaintiffs, *Bolton and Co.*
Solicitor for the defendant Fryer, *J. Jobson.*

May 13 and 14.

(Before JOYCE, J.)

Re DUKE OF CLEVELAND'S SETTLED
ESTATES. (a)

Settled Land Acts—Investment of capital moneys—Right to appoint broker—Tenant for life or trustees—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 21 (1), 22 (2), 33 (1) (vi.).

The trustees have the right to appoint the brokers, through whom investments of capital money under sect. 21 of the Settled Land Act 1882 are to be made, and not the tenant for life.

THIS was a summons taken out by Francis William Forester, tenant for life of certain estates in the county of Somerset and of the Battle Abbey estates in the counties of Kent and Sussex, settled by a settlement made by the will, dated the 22nd July 1891, of Harry George Powlett, fourth Duke of Cleveland.

It was asked by the summons that the trustees might be directed to apply capital moneys in their hands applicable for investment under the Settled Land Acts 1882 to 1890 in the purchase, through the brokers nominated by the applicant or such other brokers of good credit and position as the applicant might select, of such investments authorised as investments for capital money arising under the said Acts as the applicant might direct.

The trustees maintained that they were entitled to choose the brokers, through whom the investments directed by the tenant for life should be made.

Younger, K.C. and *Brinton* for the tenant for life.—The question is, whether under sects. 21 and 22 of the Settled Land Act 1882 the trustees are entitled to select the brokers through whom investments shall be made or the tenant for life. The case of *Re Lord Coleridge's Settlement* (73 L. T. Rep. 206; (1895) 2 Ch. 704) decided that, by virtue of sect. 22, sub-sect. 2, of the Act, the tenant for life is entitled to select the particular investments made under sect. 21, sub-sect. 1. The tenant for life, being then the person entitled to direct the investments, is justified in taking the advice of brokers in making his selection; he must pay the brokers, and this expense would fall on the settled estates. The tenant for life has adopted that course here; and it would be unreasonable for the trustees to employ other

brokers to make the actual investments. This would only be to incur unnecessary expense. It was certainly held by *Cozens-Hardy, J.* in *Re Hotham; Hotham v. Doughty* (85 L. T. Rep. 543; (1901) 2 Ch. 790) that in the case of a mortgage under sect. 21, sub-sect. 1, of the Settled Land Act 1882 it was the duty of the trustees to satisfy themselves as to the value, title, and form of the particular mortgage. But we submit that the dictum of *Cozens-Hardy, J.* that the same principle applies to other investments under sect. 21, sub-sect. 1, is not sound. Yet if that dictum is sound, it is quite consistent with *Re Hotham; Hotham v. Doughty* that, although the trustees take all precautions, they should employ the brokers of the tenant for life. If the trustees can show that the broker of the tenant for life is not worthy of credit, then they can restrain the tenant for life from dealing through that broker. They also referred to

Re Llewellyn; Llewellyn v. Williams, 58 L. T. Rep. 152; 37 Ch. Div. 317.

Hughes, K.C. and *E. Beaumont*, for the trustees, were not called on.

JOYCE, J.—Generally speaking, if not universally, trustees, in the execution of their trusts, are entitled to choose the solicitor, broker, or banker with whom they will deal, and there is a well-known case—*Foster v. Elsley* (19 Ch. Div. 518)—in which *Chitty, J.* held that trustees were not bound to regard even the direction of their testator as to the solicitor they should employ. I may say, in passing, that if there were any question of the tenant for life or the trustees sharing in any brokerage to be earned upon an investment, of course neither one nor the other could be allowed, directly or indirectly, to participate in that. It is true that sub-sect. 2 of sect. 22 of the Settled Land Act 1882 provides that the investment of capital money arising under the Act shall be made according to the direction of the tenant for life. That has been considered in various cases, and it was held in *Re Lord Coleridge's Settlement* (*ubi sup.*) that the tenant for life is entitled to select a particular investment. But it has also been decided in *Re Hotham; Hotham v. Doughty* (*ubi sup.*) that upon an investment on mortgage under the Settled Land Act 1882 in accordance with a direction by the tenant for life given under sect. 22, sub-sect. 2, it is the duty of the trustees to satisfy themselves as to value, title, and form of the particular mortgage; and it was also said that the same principle applies to other investments under the Act. That case is under appeal, but at present I shall follow it. I am of opinion that the 2nd sub-section of sect. 22 has not the effect of entitling the tenant for life to select the broker any more than the solicitor to be employed by the trustees. Sect. 31, sub-sect. 1, of the Act, after giving the tenant for life power to enter into various contracts, provides that he “may, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.” The meaning of that section is, I think, that the tenant for life may enter into a contract to do such things as the tenant for life is by law entitled to do. I am confirmed in that opinion by sub-sect. 2 of sect. 31, which says that—“Every contract shall be binding on and shall enure for the

(a) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant in life," and so on. The acts then referred to in sub-sect. 1 of sect. 31 are naturally, if not necessarily, limited to acts which the tenant for life can do; I do not think they can be taken to extend to acts which the trustees must do. The trustees may select their own solicitor and their own broker. It was said by Lord Romilly that—"Trustees are liable for the default of their solicitor, because they select him." I agree with the decision in *Re Hotham*; *Hotham v. Doughty* (*ubi sup.*) and accordingly refuse this application.

Solicitors for the tenant for life, *Dawson, Bennett, Ryde, and Co.*

Solicitors for the trustees, *Jennings and Finch.*

May 13 and 15.

(Before JOYCE, J.)

SWEET v. BISHOP OF ELY. (a)

Ecclesiastical law—Separation order—"Persistent cruelty"—Declaration of vacancy of preferment—Validity—Matrimonial Causes Act 1878 (41 & 42 Vict. c. 19), s. 4—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), ss. 4, 5, 12—Interpretation Act 1889 (52 & 53 Vict. c. 63), s. 38—Clergy Discipline Act 1892 (55 & 56 Vict. c. 32), s. 1, sub-s. 1 (d) (e).

A separation order was made against a clergyman under the Summary Jurisdiction (Married Women) Act 1895, on the ground that he had been guilty of persistent cruelty to his wife, and by such cruelty had caused her to leave and live separately and apart from him.

Held, that this did not justify the bishop in declaring the preferment of the clergyman to be vacant under sect. 1 of the Clergy Discipline Act 1892.

ALGERNON SIDNEY OSBORN SWEET, the plaintiff in this action, was instituted to the vicarage of Cowlinge, in the county of Suffolk, in the diocese of Ely, on the 16th Feb. 1891, on the presentation of the Master, Fellows, and Scholars of Trinity Hall, Cambridge, the patrons of the living.

On the 31st Dec. 1901 a summons was issued requiring the plaintiff to appear before the justices sitting at Newmarket to answer a complaint made by the wife of the plaintiff to the effect that the plaintiff had been guilty of persistent cruelty to her, and by such cruelty had caused her to leave and live separately and apart from him, and that she was desirous of applying for an order or orders against the plaintiff under the Summary Jurisdiction (Married Women) Act 1895.

On the 28th Jan. 1902, the plaintiff having appeared, it was ordered and adjudged that the wife of the plaintiff should no longer be bound to cohabit with him; that the legal custody of the children of the marriage specified in the order should be committed to the wife of the plaintiff; that the plaintiff should pay to his wife personally the weekly sum of 1*l.* until the order should be altered, varied, or discharged in due course of law; and that the plaintiff should pay the sum of 12*s.* 6*d.* costs.

On the 21st Feb. 1902 the following notice was sent to the plaintiff:

Whereas a separation order has been made against the Rev. Algernon Sidney Osborn Sweet, Vicar of Cowlinge, in the county of Suffolk, under the Summary Jurisdiction (Married Women) Act 1895, which Act revoked and re-enacted with modifications the fourth section of the Matrimonial Causes Act 1878; and whereas the order has become conclusive within the meaning of the Clergy Discipline Act 1892; now, therefore, notice is hereby given that the Bishop of Ely will declare the preferment of Cowlinge, held by the said Algernon Sidney Osborn Sweet, vacant at the Diocesan Registry, Lynn-road, Ely, on Friday, the 7th day of March 1902, at the hour of twelve noon.—(Signed) WILLIAM JOHNSON EVANS, Registrar.

On the 7th March 1902, in accordance with the notice of the 21st Feb. 1902, the Bishop of Ely attended at the Diocesan Registry and declared the preferment held by the plaintiff vacant.

On or about the 7th March 1902 the defendant Pond, who was the only churchwarden of the parish of Cowlinge, took possession of the church, and prevented, and had since prevented, the plaintiff from having access thereto or officiating or taking any part in the service of the church.

On the 22nd March 1902 the defendant Pond gave the plaintiff notice to quit and give up the vicarage.

Under these circumstances the plaintiff brought an action against the Bishop of Ely, to which the churchwarden Pond and the Master, Fellows, and Scholars of Trinity Hall, Cambridge, were added as defendants; and this was a motion in the action for an injunction restraining the defendants from interfering with the plaintiff in the enjoyment of his preferment or in the possession or enjoyment of the emoluments of the vicarage and parish church of Cowlinge aforesaid, or in the possession or enjoyment of the church and vicarage house and premises, and from instituting any other person into the said preferment, or from in any way treating as valid or acting upon the declaration made by the defendant, the Bishop of Ely, on the 7th March 1902 that the said preferment was vacant.

Sect. 1 of the Clergy Discipline Act 1892 enacts that

(1) If either . . . (d) an order for judicial separation is made against a clergyman in a divorce or matrimonial cause, or (e) a separation order is made against a clergyman under the Matrimonial Causes Act 1878; then, after the date at which the order becomes conclusive, the preferment (if any) held by him shall within twenty-one days, without further trial, be declared by the bishop to be vacant as from the said date.

Sect. 4 of the Matrimonial Causes Act 1878 provides that

If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty.

That section was repealed by sect. 12 of the Summary Jurisdiction (Married Women) Act 1895, but sect. 4 of the last-mentioned Act provides that

Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her

(a) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction . . . for an order or orders under this Act. . . .

By sect. 5 of the Act a court of summary jurisdiction to which any application under the Act is made may make an order containing (*inter alia*):

A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty).

Sect. 38 of the Interpretation Act 1889 provides that

Where this Act or any Act passed after the commencement of this Act repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

Edward Clayton for the vicar.—The Clergy Discipline Act 1892, as its heading shows, is “an Act for better enforcing discipline in the case of crimes and other offences against morality committed by clergymen.” Now, sect. 1, sub-sect. 1 (e), of the Act requires the bishop to declare the preferment of a clergyman vacant where “a separation order is made against the clergyman under the Matrimonial Causes Act 1878.” This latter Act enables a separation order to be made if “a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife and the court or magistrate before whom he is so convicted is satisfied that the future safety of the wife is in peril.” Sect. 43 of 24 & 25 Vict. c. 100 shows that an “aggravated assault” is an assault on a child not exceeding fourteen or on a female, and is of such a nature as to merit more than two months’ imprisonment. That is the nature of the crime under which the Clergy Discipline Act 1892 required the bishop to declare the living vacant. Now, if a separation order had been made against the vicar under the Summary Jurisdiction (Married Women) Act 1895 on the ground of “aggravated assault,” then, although the Matrimonial Causes Act 1878 is repealed, the declaration would have been valid by virtue of sect. 38 of the Interpretation Act 1889. But the notice sent to the vicar by the bishop shows that the declaration was made because a separation order under the Act of 1895 on the ground of “persistent cruelty” had been obtained from the justices. It cannot be maintained that the provision as to “persistent cruelty” in the Act of 1895 is a re-enactment of the provision as to “aggravated assault” in the Act of 1878. Moreover, the Act of 1892 (as the heading shows) was directed against crimes and offences against morality on the part of clergymen; and some of the grounds for making separation orders under the Summary Jurisdiction (Married Women) Act 1895 do not touch crime

or immorality at all. The Legislature could not have intended that all these grounds for making separation orders should, likewise, be grounds for depriving a clergyman of his preferment.

Dibdin, K.C. and *G. J. Talbot* for the Bishop of Ely.—By sect. 1, sub-sect. 1 (d), of the Clergy Discipline Act 1892, the bishop is to declare the preferment of a clergyman vacant where “an order for judicial separation is made against the clergyman in a divorce or matrimonial cause.” Now, a separation order under the Summary Jurisdiction (Married Women) Act 1895 is to contain a provision that the applicant be no longer bound to cohabit with her husband, which provision, while in force, is to have the effect in all respects of a decree of judicial separation on the ground of cruelty. A separation order under the Summary Jurisdiction (Married Women) Act 1895 is therefore equivalent to an order for judicial separation. The only difference between the separation order and the order for judicial separation is one of procedure. In *Lane v. Lane* (74 L. T. Rep. 557; (1896) P. 133), *Jeune*, P. said: “Before the Act of 1895 persistent cruelty would have entitled a married woman to a judicial separation in this court, with all its attendant consequences; but the Act gives a speedier and cheaper remedy by enabling the wife to obtain an order from a court of summary jurisdiction. It is suggested that, even if the rest of the section is retrospective, this particular provision is not; but it is very difficult to concur in such an interpretation, which would have the effect of giving a statutory indemnity to all husbands who had been guilty of persistent cruelty to their wives, and who had not been reached under previous statutes. It is contended that this particular portion of the section creates a new offence and a new remedy, and is, therefore, prospective only in its operation. That is not, I think, a sound contention. It does not appear to me that a new offence is created, and there certainly was a remedy in this court for the very same thing that the respondent is accused of.” The bishop was then justified in making a declaration under sect. 1, sub-sect. 1 (d), of the Act of 1892. If the separation order is not sufficient to satisfy sect. 1, sub-sect. 1 (d), of the Act of 1892, the question as to whether a man keeps his living or not depends on the question whether his wife went to the Divorce Court or before the justices. The notice sent by the bishop to the vicar on the 21st Feb. 1902 was sent under rule 25 of the Clergy Discipline Rules 1892. Rule 25 does not require the ground to be specified for which the living will be declared vacant; so that the giving of the ground, if, indeed, the ground was wrong in itself, was merely superfluous. The bishop was not, therefore, debarred from declaring the living vacant on some other ground. Rule 96, which requires the forms in the appendix to be used where applicable, does not necessitate the forms to be followed in a slavish way. Again, sect. 38 of the Interpretation Act 1889 requires an actual, and not merely a substantial, re-enactment. So that, if our earlier argument is wrong, a whole class of flagrant cases, which once fell under the Matrimonial Causes Act 1878, would escape the Clergy Discipline Act 1892 altogether. If, however, the Summary Jurisdiction (Married Women) Act 1895 is to be taken as a re-enactment of the Matrimonial Causes Act 1878, sect. 4 of the

first Act must as a whole replace sect. 4 of the second. In that case a separation order on the ground of persistent cruelty will satisfy sub-sect. 1 (e) of sect. 1 of the Clergy Discipline Act 1892.

J. Pawley Bate for the Master, &c., of Trinity Hall, Cambridge.

Edward Clayton in reply.—The bishop has acted under sub-sect. 1 (e), and he cannot now show that the vicar has subjected himself to sub-sect. 1 (d). Form 35, which is to be followed in giving this notice, is substantially different in its language where there has been an order for judicial separation under sub-sect. 1 (d), and where there has been a separation order under sub-sect. 1 (e). Again, it was provided by sect. 4 of the Matrimonial Causes Act 1878 that a separation order under that Act should "have the force and effect in all respects of a decree of judicial separation on the ground of cruelty." If, therefore, the contention of the defendants is right, sub-sect. 1 (e) of sect. 1 of the Clergy Discipline Act 1892 would not be necessary, for the cases thereunder would be covered by sub-sect. 1 (d). The Act of 1895 does not say that a separation order is to be deemed to be, but merely says it shall have the effect of, a decree of judicial separation. The object of the provision was to give to married women obtaining separation orders the same rights of property as married women obtaining orders of judicial separation have under the Matrimonial Causes Act 1857. In Bankruptcy, a garnishee order absolute was held not to be a final judgment within the meaning of sect. 4, sub-sect. 1 (g), of the Bankruptcy Act 1883; although Order XLII., r. 24, of the Supreme Court Rules provides: "Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect": (*Ex parte Chinery*, 50 L. T. Rep. 342; 12 Q. B. Div. 342). So, too, an order, on the dissolution of a marriage, on the co-respondent to pay the costs was not a final judgment on which to found an act of bankruptcy:

Re Binstead, 68 L. T. Rep. 31; (1893) 1 Q. B. 199.

In both these cases, where the order was sought to be enforced as a judgment, the judgment could have been obtained. So, here, then the fact that the separation order is to have the same effect as an order for judicial separation does not constitute it, as a matter of fact, an order for judicial separation so as to satisfy sect. 1, sub-sect. 1 (d), of the Clergy Discipline Act 1892. Finally, the proceedings before the justices were not a "cause" at all. It is necessary to construe sect. 1 of the Clergy Discipline Act 1892 strictly, since it is of a penal character. [*JOYCE*, J. referred to *Green v. Lord Penzance* (45 L. T. Rep. 353; 6 App. Cas. 657).]

Cur. adv. vult.

JOYCE, J. (after stating the facts and referring to the statutes, continued:—) It is to be observed that the Act of 1878 does not authorise a separation order to be made upon the additional or alternative ground of persistent cruelty, which was introduced by the Act of 1895, but only upon the ground of conviction for an aggravated assault. Sect. 4, however, of the Act of 1878 is repealed by the Act of 1895, under which the separation order now in question was made.

[His Lordship then referred to the 38th section of the Interpretation Act 1889, and, continuing, said:] The Bishop of Ely was advised that, by virtue of that section, the reference in the Clergy Discipline Act 1892 to the Matrimonial Causes Act 1878 must now be construed and treated as a reference to the Summary Jurisdiction (Married Women) Act 1895, so as to require the bishop for the purposes of the Clergy Discipline Act 1892 to treat the separation order in the present case just as if it had been a separation order under the Matrimonial Causes Act 1878. Accordingly the bishop has proceeded to declare the preferment of the plaintiff—that is, the vicarage of Cowlinge—to be vacant, and hence the present action. In my opinion, this view of the law which the bishop and his advisers have adopted and acted upon cannot be maintained. Indeed, it was not very strongly supported by counsel for the defendants. I cannot regard the provision in the Act of 1895, which authorised the making of a separation order on the ground of persistent cruelty, to be a re-enactment or part of a re-enactment with modification of the provision in sect. 4 of the Act of 1878, enabling a separation order to be made upon the ground of conviction for an aggravated assault. The main contention of the counsel for the defendants was that the separation order in the present case was an order for judicial separation against a clergyman in a divorce or matrimonial cause within sect. 1, sub-sect. 1 (d), of the Clergy Discipline Act 1892. Now, it is quite true that by the 5th section of the Summary Jurisdiction Act of 1895 it is enacted that the provision, in a separation order under that Act, that the applicant be no longer bound to cohabit with her husband shall while in force have the effect in all respects of a decree of judicial separation on the ground of cruelty. Still it is not an order for judicial separation, and at all events such an order by justices, even if made in a cause at all, is not, in my opinion, an order for judicial separation made in a divorce or matrimonial cause, the jurisdiction in which is now vested in one of the divisions of the High Court. If the separation order here were correctly described as an order for judicial separation in a matrimonial cause, *a fortiori* would this have been the case with a separation order under sect. 4 of the Act of 1878. But if that had been the view of the Legislature, then sub-sect. 1 (e) of sect. 1 of the Act of 1892 would have been wholly unnecessary. These statutory enactments requiring a bishop to declare the preferment of a clergyman to be vacant must no doubt be strictly construed, and, under the circumstances, I find myself compelled to hold that the declaration made by the bishop in the present case was not authorised, and is invalid. As to the costs, the Act required the bishop (if right in his view of the law) to give the notice and make the declaration. The error on his part is a very pardonable one, and the order will be that the parties pay their own costs.

Solicitors for the plaintiff, *Ruston, Clark*, and *Ruston*, for *A. H.* and *A. Ruston*, Newmarket.

Solicitors for the Bishop of Ely, *Lee, Bolton*, and *Lee*.

Solicitors for the Master, &c., of Trinity Hall, Cambridge, *Cole* and *Jackson*, for *Francis*, *Francis*, and *Collin*, Cambridge.

K.B. Div.]

GOODWIN (app.) v. CORPORATION OF SHEFFIELD (resps.).

[K.B. Div.]

KING'S BENCH DIVISION.

March 16 and 17.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GOODWIN (app.) v. CORPORATION OF SHEFFIELD (resps.). (a)

Police—Pension—Calculation of—“Annual pay” —Free residence and fuel—Right to include for purpose of pension—Right of appeal from quarter sessions—Police Act 1890 (53 & 54 Vict. c. 45), s. 11, sched. 1, rr. 1, 11.

When a police constable appeals under sect. 11 of the Police Act 1890 to quarter sessions from the decision of the police authority on a reconsideration of the amount of his pension, the parties may appeal by case stated on a question of law for the opinion of the King's Bench Division, notwithstanding the provision in that section that the decision of the court of quarter sessions shall be final.

By the Police Act 1890, a police constable, after a certain number of years' service, is entitled as of right to retire and to receive a pension to be calculated on the amount of his “annual pay” at the date of his retirement.

A divisional inspector retired from the service with the right to a pension. At the date of his retirement he had, in addition to his weekly payment in money, a free residence for himself and family, and free fuel, gas, and water.

Held, that the value of the free residence, fuel, gas, and water was not a part of his “annual pay” for the purpose of calculating his pension, and ought not to be taken into consideration.

APPEAL from the recorder of the city of Sheffield.

The appellant appealed to the quarter sessions for the city of Sheffield against a decision of the watch committee of the Sheffield Corporation, under sect. 11 of the Police Act 1890, for a reconsideration of the amount of the pension granted under the Act to him upon his retirement. The watch committee had refused to increase the amount of the pension from the sum of 7l. 3s. 4d. per lunar month, the amount fixed by them, to the sum of 8l. 14s. 1d., the amount claimed by the appellant.

The appeal was tried before the recorder on the 11th July 1901, when he allowed the appeal and reversed the decision of the watch committee, and made an order that the amount of such pension should be 8l. 14s. 1d. per lunar month, instead of the 7l. 3s. 4d. per lunar month, subject to the opinion of the court upon this case.

The facts were as follows:—

The appellant joined the Sheffield police force in 1868; was appointed inspector in 1876, and was appointed or promoted divisional inspector in 1892, and retained that position until his retirement from the force in April 1901.

The appellant accepted the provisions of the Police Act 1890.

The appellant received as inspector the weekly pay of 2l. 10s., and a fire brigade allowance of 15s. per lunar month, which together amounted to 139l. 15s. per year, and there was deducted therefrom a sum equal to 1½ per cent. on such amount as a contribution towards the police pension fund.

The appellant when appointed or promoted to the position of divisional inspector was required to live at the divisional head police station, where he resided free of rent and rates, and further had the free use of the fuel, gas, and water provided for the station for the rooms therein occupied by himself and his family. These matters had been agreed for the purposes of this case to be of the value of 30l. per annum. On being appointed or promoted to the position of divisional inspector no alteration was made in the pay of the appellant except in so far (if at all) as these matters agreed to be of the value of 30l. may properly be described as “pay.” The deductions for contributions towards the pension fund were still calculated at 1½ per cent. on 139l. 15s. per annum as theretofore, though the appellant had on different occasions applied to the watch committee to have his cash pay increased to 170l., and to be allowed to pay for rent and other matters as above out of such sum, and to have a deduction for police pension fund made in respect of such sum of 170l., but the watch committee had on each occasion declined to entertain such application.

The appellant gave all requisite notices of his desire to retire from the force and to receive a pension, and was entitled as of right by the Police Act 1890 to retire and receive a pension for life of two-thirds of his “annual pay” at the date of his retirement.

The watch committee duly awarded the appellant a pension of 7l. 3s. 4d. per lunar month, or 93l. 3s. 4d. per annum, being two-thirds of the sum of 139l. 15s.

The appellant duly made application to the watch committee, under sect. 11 of the Police Act 1890, for a reconsideration of the amount of his pension, submitting that there should have been taken into account the payment in kind received by him—namely, house rent, fuel, gas, and water, amounting in value to 30l. per annum, on which, he submitted, pension ought to be awarded, but the watch committee, after reconsideration, declined to entertain such application.

Notice of appeal to the next General Court of Quarter Sessions for Sheffield against the decision of the watch committee on such reconsideration, was duly given by the appellant, upon the ground that the pension granted to the appellant was calculated on a wrong basis, being upon a lower rate of pay than the appellant was in law and in fact actually receiving.

In April 1893 the police force sub-committee of the watch committee presented a report, which was confirmed and adopted by the council, recommending that Inspector Moody be promoted to the rank of chief inspector of detectives and inspector of common lodging-houses, and that his remuneration should be equal to that of a divisional inspector, who, in addition to his pay, received an allowance for taking charge of the fire-extinguishing apparatus at his station, and was provided with a good house free of rent and rates, and supplied gratuitously with water, coal, and gas; and the sub-committee estimated the pay and allowances of one of these inspectors at 170l. per annum, and recommended that Chief Inspector Moody's pay should be increased to that amount. Since that time Chief Inspector Moody received an annual cash payment of 170l., less a sum equal to 1½ per cent. on that amount as a contribution towards the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

K.B. Div.]

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police pension fund. Under the "scale of pay" for the police force, which was adopted by the council in 1891, and was in force on the date when the appellant retired, the pay of an inspector in the position of appellant at the date of his retirement, was 2l. 10s. per week. In the weekly "pay sheet," signed by the appellant every week, there was entered, under the heading "Rate of Pay per Week," 2l. 10s., and under the heading "Deductions payable to Superannuation Fund," contributions, 7½d., and under the heading "Net Pay received by each Officer and Constable," 2l. 9s. 4½d., and under the headings "Allowance for Rent," "Allowance for Boots," "Gross Amount of Pay," there were no entries. A separate receipt for one lunar month's fire brigade allowance (15s.) was signed by the appellant, and under the heading "Nature of Special Duty" was the entry "Taking care of Hose-Reel."

If the matters hereinbefore mentioned, and agreed to be of the value of 30l. per year, formed part of the "annual pay" of the appellant within the meaning of the Police Act, the amount of his pension should have been 8l. 14s. 1d. per lunar month, and not 7l. 3s. 4d., as fixed by the watch committee.

The question for the opinion of the court was, whether upon the above facts the matters hereinbefore mentioned and agreed to be of the value of 30l. a year, were or were not part of the "annual pay" of the appellant, within the meaning and for the purposes of the Police Act 1890. If they were, then the order of the quarter sessions was to stand confirmed; but if not, then the order was to be quashed, and the decision of the watch committee was to stand confirmed.

The Police Act 1890 (53 & 54 Vict. c. 45) provides:

Sect. 1. Subject to the provisions of this Act, every constable in a police force—(a) if he has completed not less than twenty-five years approved service . . . shall, on the expiration of such time not exceeding four months after he has given written notice to the police authority of his desire to retire as the police authority may fix, be entitled without a medical certificate to retire and receive a pension for life.

Sect. 11. In any of the following cases—(a) Where a pension after being granted to a constable has subsequently in pursuance of this Act been declared to have been forfeited, and (b) where a constable is dismissed without a pension to which he would be otherwise entitled, and in any other case where a constable, or the widow or child of a constable, claims a pension or allowance under this Act as of right, and the police authority do not admit the claim, the constable, widow, or child may apply to the police authority for a reconsideration of the claim to the pension or allowance, and if aggrieved by the decision upon such reconsideration, may apply to the next practicable court of quarter sessions for the county within which the constable last served; or if the constable last served in the police force of a borough having a separate police force and a separate court of quarter sessions, then to the next practicable court of quarter sessions for that borough, and that court, after inquiry into the case, may make such order in the matter as appears to the court just, which order shall be final; but nothing in this section shall confer a right to appeal against the exercise of any discretion, or against any decision which is declared by this Act to be final.

Sched. 1.—As to pension scale:

(1) The pension to a constable on retirement shall be within the maximum and minimum limits following; that

is to say, (c) if he has completed twenty-five years approved service, an annual sum not less than thirty-sixtieths nor more than thirty-one fiftieths of his annual pay, with an addition of not less than one-sixtieth nor more than three-fiftieths of his annual pay for every completed year of approved service above twenty-five years, so however that the pension shall not exceed two-thirds of his annual pay. (11) In estimating any pension, gratuity, or allowance for the purposes of this Act—(a) a pension or gratuity to a constable shall be calculated according to the amount of his annual pay at the date of his retirement.

Macmorran, K.C. (*H. W. W. Wilberforce* with him) for Goodwin.—There is a preliminary objection that there is no right of appeal in this case, as the decision of the recorder is declared by sect. 11 of the Police Act 1890 to be final. This point was not raised in *Upperton v. Ridley* (82 L. T. Rep. 233; (1900) 1 Q. B. 680, and 84 L. T. Rep. 18; (1901) 1 K. B. 384), where the appeal was heard; but it is submitted that the appeal in that case was only entertained by the consent of the parties. Here the respondents never consented to have a case stated.

W. Valentine Ball (*Avory*, K.C. with him) for the Sheffield Corporation.—This is not a proceeding in the nature of an appeal at all; the learned recorder has only given a decision subject to a special case, and in the judgment delivered by him he expressed great difficulty in coming to a conclusion: (see the report in *Moore and others v. Mayor, &c., of Sheffield*, 65 J. P. 458). This court is asked to exercise its "consultative jurisdiction." It was held in *Re v. Justices of Sussex* (2 Bott's Poor Laws, 5th edit., p. 751) that a case may be stated by the quarter sessions on a point of law, without the consent of the parties. That case was cited with approval in 2 Nolan's Poor Laws, 4th edit. (1825), p. 558. The right to state a case has never been taken away. The Quarter Sessions Act 1849 merely gave the parties a right to consent to have a case stated. He referred to

Reg. v. Chantrell (33 L. T. Rep. 305; L. Rep. 10 Q. B. 587).

[He was stopped.]

Macmorran, K.C., in reply, referred to

Reg. v. Bridge, 62 L. T. Rep. 297; 24 Q. B. Div. 609.

Lord ALVERSTONE, C.J.—The court will hear the appeal on the merits.

Avory, K.C. (*W. Valentine Ball* with him) for the Sheffield Corporation.—These allowances are not part of the "annual pay" of the appellant. The case is really governed by the decision of the Court of Appeal in *Upperton v. Ridley* (*ubi sup.*), and the present is an *à fortiori* case, as the matters there in question might possibly have been held to be "pay," but the matters in question here cannot possibly be "pay." In *Upperton v. Ridley* (*ubi sup.*) an allowance of 1s. a day for special duty in the House of Lords in addition to the constable's ordinary pay, was held to be no part of the constable's "pay" for the purpose of calculating his pension. If so, then clearly these allowances of a free house, fuel, &c., form no part of the "annual pay" for the purpose of calculating the pension. As pointed out by Channell, J. in that case, there has for a long time been the distinction between pay and emoluments or allowances. This distinction is clearly recognised by the Legislature in the Police Act

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1893 (56 & 57 Vict. c. 10), for instance, in sect. 2, sub-sect. 2, which speaks of the "pay" of constables and the "allowances" of constables, and in sect. 1 there is the provision that constables employed on fire duty are to be deemed to be acting in the execution of their duty. But for that provision the fire brigade allowance would not be "pay" for the purpose of calculating the pension. The learned recorder in his judgment (reported 65 J. P., at p. 459) seems to have thought that the words in sect. 11 that the court "may make such order in the matter as appears to the court just," gave him a discretion in the matter, and that it would be inequitable that if an inspector were provided with something in addition to his pay, which he regarded as part of his "remuneration," he were not allowed to take that into consideration for his pension. The court of quarter sessions has no such discretion under sect. 11, which gives an appeal to that court only in certain matters affecting the pension, but gives no appeal in other matters which are left to the discretion of the police authority. In sect. 32 (5) there is a special provision that "emoluments" are to be taken into account for the purposes of the pension in the case of the commissioners of police in the metropolis. That shows that they are not to be included in other cases; and the distinction between "pay" and "allowances" has been drawn in other Acts on analogous matters such as the Superannuation Act 1859 (22 Vict. c. 26), and the Poor Law Officers' Superannuation Act 1896 (59 & 60 Vict. c. 50). In the latter Act the superannuation allowances are calculated on the salary or wages and "emoluments" (sect. 3), and the term "emoluments" is (in sect. 19) defined as including the money value of apartments and other allowances in kind. There is nothing in the Police Act 1890 analogous to that. In this case the appellant is claiming an allowance for coal, but an allowance for boots is in just the same position, and there is no suggestion that he could claim an allowance for boots. The recorder was dealing with a matter with regard to which he had not an absolute discretion; he can only decide the amount of the pension according to the statute, which gives him no discretion.

Macmorran, K.C. (H. W. W. Wilberforce with him) for Goodwin.—This case is not governed by the decision in *Upperton v. Ridley (ubi sup.)*. In that case there was no right to the special allowance, and the payment was a mere gratuity for special services, and if the constable were ill and someone else did the services, such person would get the allowance. Here there was a right to the allowances. The pay list does not necessarily determine what is "pay" and what is not. A man's pay may be more than he receives in cash; he may receive so much in cash, and he may have something more which is equivalent to cash, and that something more is part of his pay. That has been so held under the Workmen's Compensation Act 1897 (see *Pomphrey v. Southwark Press*, 83 L. T. Rep. at pp. 469-470; (1901) 1 K. B. at p. 90). In the city of Sheffield this allowance for rent is considered as part of the "pay," as it was in *Moody's* case; it is remuneration, and there is really no distinction between remuneration and pay, and all the parties treat remuneration as pay. It is a question of fact in each case what is a constable's pay; it may be more than he receives in

cash; and if it is a question of fact, the recorder has dealt with it. The words in sect. 11 that the court may make such order as may seem just, give the court a discretion, and in this case the recorder has exercised that discretion, and this court ought not to interfere.

Avory, K.C. in reply.

Lord ALVERSTONE, C.J.—In this case I have felt a great deal of difficulty in coming to a conclusion. In my opinion, it is not covered by the decision of the Court of Appeal in *Upperton v. Ridley (ubi sup.)*; but the court there lay down the principle that everything which a police constable receives in money or otherwise by way of remuneration is not necessarily to be included in his "pay" for the purpose of calculating his pension. The decision does not go further, or lay down any other rules binding the court in this case. The Master of the Rolls decided the case on the ground that the extra allowance was a mere gratuity, and Collins, L.J. said that "the evidence of what the Secretary of State has declared on the document signed by the constable to be his pay, the amount awarded as pension to the appellant, and the whole practice for many years with regard to the stoppage of the special allowance during absence from the special work and the deductions for a pension fund, point in the same direction, and show that this extra allowance which the constable received cannot be brought within the term 'annual pay.'" What we have to consider in this case is whether the "annual pay" of the police constable which is given in the 1st schedule to the Police Act 1890 as the basis for estimating his pension, includes an emolument of the kind received by the appellant in this case. After a great deal of doubt, I think it should not be included, and that the decision of the recorder cannot be supported. "Pay" is to a certain extent a technical word, known and commonly used with reference to certain classes of persons, such as soldiers, sailors, and police. At the time when the Police Act 1890 was passed allowances in kind were made to the police and were well known; allowances for clothing, for boots, and in some cases for rent were made, and in some cases constables lived rent free at the police station or in the police barracks. If it had been intended that the "annual pay" of a police constable should be the fair money value of everything in money or in kind which the constable received, different considerations would apply. But the decision of the Court of Appeal, and the provisions of the Police Act 1890, show that to be "annual pay" within the meaning of the Act it must come within what is properly understood as pay. In the present case the employment of the appellant necessitated his living at the station, and he got coal, gas, and water free. It is difficult to bring under the word "pay" such things as the free use of a house, gas, coal, and other such things, especially as it was a necessary incident of his employment that he had to reside there; and when we once get away from the "pay" fixed by the employment we get into other considerations as to the annual value of emoluments. Sect. 32, to which Mr. Avory referred, points in the same direction. Therefore, upon the facts of this case, I think it is not possible to hold that these things were "annual pay." It was contended by counsel for

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the appellant that the question what was "annual pay" was a question of fact, and that the finding of the recorder as to what was "pay" cannot be reviewed. I do not, however, think that the recorder based his judgment upon such a finding of fact. Under the Act an appeal lies to the recorder only when the constable claims a pension as of right, and he can only claim a pension as of right when he claims in respect of something which comes within the words "annual pay." I therefore cannot avoid dealing with the point of law. I should also mention that the document signed by the appellant in this case is very different from that signed by the police constable in *Upperton v. Ridley* (*ubi sup.*), and the facts of the two cases are different. There the allowance was a mere gratuity. There is this further difficulty in the case, that it is impossible to put the parties back into the same position, as the deduction for the pension fund was not made on the value of the free house, fuel, gas, and water. The appellant received the full value of these things without any deduction; though on several occasions he asked to be put in the position of receiving the rent as an increase of salary and of having a deduction made therefrom for the pension fund. For these reasons I think this appeal should succeed. As to the preliminary objection, sect. 11 of the Police Act 1890 was not intended to prevent an appeal in these cases. It was not intended to interfere with the right of the parties to have a case stated on a question of law, and I think that the principle of *Reg. v. Bridge* (*ubi sup.*) applies so far as the argument upon the preliminary point is concerned.

DARLING, J.—I am of the same opinion. The case is, I think, one of considerable hardship, because the police constable tried to get his pay fixed at a higher sum, and to be allowed to pay for his rent, &c., which had been done in the case of Inspector Moody. The question we have to consider is whether the free residence and the other things mentioned in the case are "annual pay" within the meaning of the Act. I do not think they are. I do not think that free residence, with coal, gas, and water, was intended by the statute to be taken as part of a police constable's "annual pay." If his house were part of his pay, so also would his uniform, as each increases the value of his appointment, and he is bound to live in his house as well as to wear his uniform. I cannot see how we could hold that his house was part of his pay without also holding that his uniform was part of his pay, and no suggestion has been made that his uniform is part of his pay. It may be said that this does not apply to coal, gas, and water, but I agree that these things are merely incidents of the residence in the house. I think that the natural meaning of "annual pay" is that which is received in money, and does not include that which is received in other things.

CHANNELL, J.—I am of the same opinion. I think that the argument in this case and the consideration of the judgment of the Court of Appeal in the case of *Upperton v. Ridley* (*ubi sup.*) has rather confirmed me than otherwise in the opinion that I endeavoured to express in the Divisional Court in that case—namely, that "pay" in this Police Act of 1890 was used as a technical word to mean the money actually paid

which the police constable got, and which is properly distinguished from "allowances" or "emoluments" or any such words as those, which had in some former Acts been taken into consideration for some purposes, but which were not intended to be taken into consideration in this Act of 1890. There is an obvious convenience in making a fixed money payment to be the standard of the pension, which is to be so many sixtieths of the amount of his annual pay, rather than in taking in the allowances and things which had to be estimated in value, and which, therefore, would not be nearly so convenient for the purpose of estimating a pension on a given scale. I think that there is quite enough in this Act, and in the other Acts dealing with the same matter, to show that that is what was meant, and to show that "pay" is a technical word meaning the money payment according to the scale approved of by the Secretary of State, and I think that that was the scale adopted to calculate the pension upon. I agree that it is not quite clear that the Court of Appeal adopted that view to its full extent in the case of *Upperton v. Ridley* (*ubi sup.*), because in that case there were other grounds on which it might be said that the sum under consideration there was purely voluntary and gratuitous. There is, however, nothing inconsistent with this view in the decision of the Court of Appeal in that case, and I think the matter is quite clear.

Appeal allowed. Leave to appeal.

Solicitors for the appellant, Pitman and Sons, for Chambers and Son, Sheffield.

Solicitors for the respondents, Richard F. and C. L. Smith, for H. Sayer, Town Clerk, Sheffield.

Monday, March 17.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WOODFORD URBAN DISTRICT COUNCIL (apps.)
v. STARK (resp.). (a)

Local government—Urban district—Drain—New house—Block of two houses—Combined drain—Necessity of separate drain for each house—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 25.

An urban authority have power under sect. 25 of the Public Health Act 1875 to require in respect of each newly built house the construction of a separate drain for the drainage of each such house, and their powers under that section are not limited to questions as to the size, materials, and level of the drain.

The respondent deposited with the urban authority notice of his intention to erect a block of two houses, semi-detached, with a plan which showed a combined drain for the two houses. The urban authority on the report of their surveyor disapproved on the ground of the unsatisfactory provisions for drainage, and made an order, under sect. 25 of the Public Health Act 1875, for the construction of one drain for each house, to be properly constructed and to be connected with the public sewer:

Held, that sect. 25 required a separate drain to be constructed for each house, and that a combined drain for the block of two houses was not a com-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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pliance with the provisions of the section, and that the urban authority had power under the section to make an order for the construction of a separate drain for each house.

CASE stated by justices of the peace sitting as a court of summary jurisdiction at Stratford in the county of Essex.

On the 11th Oct. 1901 certain informations (hereinafter set out) preferred by the Woodford Urban District Council (the appellants) against Frederick Stark (the respondent) were heard and determined, and were dismissed by the justices, subject to this case.

On the 5th July 1901 the respondent deposited with the appellants notice of his intention to erect two houses in Maybank-road, Woodford, Essex, and attached to such notice was a block plan, which was produced before the justices and admitted as evidence. The plan showed a block of two semi-detached houses connected together, and having at the back a boundary fence between the gardens.

The notice and plan were passed on to the surveyor, who reported to the appellants that they should be disapproved on the grounds of unsatisfactory drainage and building line, and on the 15th July the appellants passed a resolution disapproving of the plans, and notice of disapproval was given by the surveyor to the respondent on the 16th July.

The surveyor to the appellants prepared a report to the appellants, setting forth what was, in his opinion, necessary for the satisfactory drainage of each of the two houses, and such report was considered by the appellants on the 12th Aug. 1901, when an order was made and sealed in pursuance of sect. 25 of the Public Health Act 1875, and was duly served on the respondent on the 13th Aug.

The order was in the following terms:

Urban District of Woodford.—The Public Health Act 1875, s. 25.—To Mr. F. C. Stark, of Waverley Villas, Crescent-road, South Woodford.—Whereas a certain plan has been deposited with us, the urban district council for the district of Woodford, for the erection by you of two houses in Maybank-road, South Woodford, within the said district, and whereas the means of drainage of the said two houses as shown upon the said plan have not been approved by us: And whereas a report has this day been presented to us by our surveyor specifying the drains necessary for the effectual drainage of each of the said two houses: Now therefore, we, the said urban district council, acting as the urban sanitary authority for the district of Woodford, in pursuance of the powers conferred upon us, do hereby declare that the drains which upon the said report of our surveyor appear to us to be necessary for the effectual drainage of each of the said houses are as follows, namely: One drain, properly constructed, of 4in. stoneware pipes with thoroughly water-tight joints, having in every part a fall of not less than 1 in 60, and in any part where it may be necessary for such a drain to pass under the house to be laid on 6in. of concrete, the said drain to be provided with necessary traps and means of ventilation as required by the bye-laws of this council, and to be laid at a depth of not less than 2ft. 6in. below the finished surface of the ground, and connected to the sewer in Maybank-road.—Given under the common seal of the Woodford Urban District Council, this 12th day of August 1901.

On the following day, the 14th Aug., the respondent wrote to the appellants' surveyor acknowledging the receipt of the order, and giving

notice of his intention to cover up the drains, which were then already constructed, on the morning of the 17th Aug. On the 16th Aug. the surveyor and one of the building inspectors attended at the premises and inspected the drains, when they found that they were not in accordance with the order, which had been served on the respondent, and that the respondent had constructed a combined drain for the two houses as shown on the plan, instead of a separate drain for each house. The surveyor accordingly refused to pass or approve the plans.

On the 27th Aug. the appellants gave further notice to the respondent that they proposed to take legal proceedings under the Public Health Act unless he proceeded to comply with the order of the appellants before the following Monday, but the respondent merely acknowledged the receipt of such notice, and had not since complied with the order.

The appellants then, on the 16th Sept., caused two informations (one in respect of each house) to be laid against the respondent, that the respondent did on the 17th Aug. 1901 unlawfully and wrongfully construct, erect, and build a certain house situate on the south-eastern side of Maybank-road, Woodford, without constructing a covered drain or drains of such size and materials and at such a level and with such a fall as upon the report of their surveyor appeared to the appellants to be necessary for the effectual drainage of such house, contrary to the provisions in that behalf of the Public Health Acts, and to the bye-laws of the council made thereunder.

These two informations were heard before the justices on the 11th Oct. Their attention was called to the case of *Matthews v. Strachan* (85 L. T. Rep. 68; (1901) 2 K. B. 540), and to the judgments therein. The justices were of opinion that the appellants were not entitled in making the above order of the 12th Aug. 1901, to take into consideration any other matters than those relating to the size, level, materials, and fall of the drain; that the requirements of the appellants under the section must be confined to those matters, and that the appellants had no jurisdiction under the section to make an order requiring a separate drain for each of the two houses instead of a combined drain for the two houses. They dismissed the informations accordingly.

The question for the opinion of the court was whether the above determinations of the justices were right in point of law. If in the opinion of the court the justices were right, then the informations were to stand dismissed; if otherwise, the case was to be remitted to the justices with the opinion of the court thereon.

Sect. 25 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

It shall not be lawful in any urban district newly to erect any house or to rebuild any house which has been pulled down to or below the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed, of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house; and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use, and which is within one hundred feet of some part of the site of the house to be built or rebuilt; but if no such means of drainage are within that

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distance, then shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct. Any person who causes any house to be erected or rebuilt, or any drain to be constructed in contravention of this section shall be liable to a penalty not exceeding fifty pounds.

Macmorran, K.C. (Naldrett with him) for the appellants.—The decision of the justices was wrong in so far as they held that the only power which the local authority had under the section was in connection with the size, level, &c., of each drain. The section was intended to give to the local authority the largest possible discretion as to what drains should be made. The difficulty the justices felt arose from the case of *Matthews v. Strachan* (85 L. T. Rep. 68; (1901) 2 K. B. 540), in which the appellant had erected a house and had provided for its drainage by a single drain, which he proposed to connect with a sewer. All that was decided in that case was that the local authority, in deciding what is "necessary for the effectual drainage" of a new house, under sect. 25, must only consider what is necessary for the particular house in question. There are some expressions in the judgments in that case which misled the justices in this case; but assuming that the local authority are not entitled to go beyond the requirements of a particular house, as was decided in that case, it does not in the least touch the question in this case. In *Self v. Hove Commissioners* (72 L. T. Rep. 234; (1895) 1 Q. B. 685), Wright, J., in speaking of the local authority, says: "They could have performed that duty in this case by ordering the plaintiff and the owner of the adjoining house to provide a separate drain running into the public sewer for each house. Instead of doing that, they ordered the plaintiff to repair the existing drain. . . . For myself, I should like to see the case of *Travis v. Uttley* (70 L. T. Rep. 242; (1894) 1 Q. B. 233) considered in the Court of Appeal. I think that local authorities may get out of the difficulties created by that decision by compelling people to make separate drains," &c. In *Travis v. Uttley* (*ubi sup.*) the distinction between "drain" and "sewer" was considered. Sect. 19 of the Public Health Act 1890 (53 & 54 Vict. c. 59) only applies when the two or more houses belong to different owners, and are connected with a public sewer by a single private drain. It therefore does not apply here, as the two houses do not belong to different owners; but if the contention of the respondent be right this drain may become a sewer, and as such the local authority would be responsible for it. The local authority in this case adopted the proper and the only means of preventing that—namely, by requiring a separate drain for each house when they had notice that there was only one drain for the two houses. He also referred to

Hill v. Hair, 72 L. T. Rep. 629; (1895) 1 Q. B. 906;

Mayor, &c., of Eastbourne v. Bradford, 74 L. T. Rep. 762; (1896) 2 Q. B. 205.

C. A. Russell, K.C. (Courthope-Munroe with him) for the respondent.—The justices were right in the view they took of the section. The respondent was not bound under sect. 25 to make a separate drain for each house; he was entitled to make a combined drain for the two houses, as they only constituted one building. Sect. 25 says

that a person shall not erect any new house unless and until a covered drain be constructed. Sect. 4 defines a "drain" as meaning "any drain of and used for the drainage of one building only, or premises within the same curtilage," &c. In the present case the justices were not asked to determine the question whether these houses constituted one building only. The question as to what constitutes one building was considered by Cozens-Hardy, J. in *Hedley v. Webb* (84 L. T. Rep. 526; (1901) 2 Ch. 126), and he, being judge of fact as well as of law, held that a pair of semi-detached houses constituted "one building only" within the meaning of sect. 4. He said: "Apart from authority, I should have thought that, as regards the drainage of one building only, it was a question of fact to be considered in each case, 'Aye or no, is this one building?'" The question was also considered in *Vestry of St. Martin-in-the-Fields v. Bird* (71 L. T. Rep. 868; (1895) 1 Q. B. 428), as to the Lowther Arcade; in *Kershaw v. Taylor* (73 L. T. Rep. 274; (1895) 2 Q. B. 471); and in *Pilbrow v. Vestry of St. Leonard, Shoreditch* (72 L. T. Rep. 135; (1895) 1 Q. B. 483). [Lord ALVERSTONE, C.J.—In the last case referred to, which was under the Metropolis Management Act, and in the case of *Hedley v. Webb* (*ubi sup.*), before Cozens-Hardy, J., the word "building" was the word to be considered, not the word "house" as in this case under sect. 25]. There is no finding here that these two houses were more than one building. The justices were entirely wrong on the construction of the section. If the two houses were one building, then a combined drain would have been sufficient, and the justices would have had no power to order a separate drain for each house; but if they were two buildings then the statute gives them no power, either in sect. 23, which has some bearing on the matter, or in sect. 25, to sanction the drainage of two buildings by one drain.

Macmorran, K.C. in reply.—There is no power in the matter except under sect. 25. Sect. 23 deals with existing houses; sect. 25 with new houses, and that section does enable the local authority to say that there must be a separate drain for each house, and, if so, what it shall be. In sect. 25 "house" does not include or contemplate flats. These are two houses, and, if so, it is a case for which sect. 25 makes provision.

Lord ALVERSTONE, C.J.—This is a case stated in reference to an offence alleged to have been committed by the respondent under sect. 25 of the Public Health Act 1875, for not having complied with an order made under that section, inasmuch as he had constructed a house without effectual drainage. He had deposited a plan showing one drain which took away the drainage from the two houses. When the case came before the justices it was argued that there was no case against the respondent, as the district council had no power under the section to require a separate drain for each house. Upon that the justices took the view that the jurisdiction of the council under sect. 25 was limited to matters relating to the size, level, materials, and fall of the drain. In so deciding, it seems to me that the justices overlooked the point which they ought to have decided. The question which they ought to have decided was whether a house had been built without a drain constructed according to the

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section in a manner approved by the local authority. They could not decline to entertain the matter because the local authority showed that the drain drained two houses connected together. It was argued for the respondent that although this combined drain drained two houses, yet, as the two houses formed one building only, the one drain was sufficient, and that consequently there was no offence under the section. I think that is a wrong construction of sect. 25, and a wrong view of the legal obligation under the section. Whatever may be the true meaning of the word "building," I think that sect. 25 is a distinct enactment on the point that a person who rebuilds a house which has been pulled down, or who newly erects a house, must provide for that house a drain which shall empty into a sewer. I come to that conclusion chiefly on the ground that, if that were not the true view of the section, a person by making a combined drain of this kind would make a construction which might become a sewer, and which would then impose upon the local authority the obligation and cost of maintaining it, although it had been thrust upon them without their consent or against their will. In my opinion, therefore, sect. 25 does mean that there shall be for each house newly erected a separate drain, and the case must go back to the magistrates with the intimation of our opinion that they were not entitled to decline to entertain the informations on the ground that the complaint of the local authority was in respect of the fact that the drain was for more than one house.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree. I think that sect. 25 contemplates a separate drain for the "house," and that that drain is to go to the sewer.

Appeal allowed. Case remitted to the justices.

Solicitors for the appellants, *Pettiver and Pearkes.*

Solicitors for the respondent, *Vincent and Vincent.*

KING'S BENCH DIVISION, IN BANKRUPTCY.

Tuesday, May 13.

(Before WRIGHT and PHILLIMORE, JJ.)

Re A DEBTOR (No. 3 OF 1902); Ex parte THE PETITIONING CREDITORS v. THE DEBTOR. (a)

Bankruptcy — Petition—Attestation—Amendment—Bankruptcy rules 146, 350.

A bankruptcy petition not properly attested under rule 146 ought, if possible, to be amended at the hearing.

APPEAL from a decision of the registrar of the County Court of Macclesfield, who had dismissed the petition.

The petition was presented jointly by two creditors, but the signature of only one creditor was attested by a solicitor.

Rule 146 provides:

Every bankruptcy petition shall be attested. If it is attested in England, the witness must be a solicitor or justice of the peace or an official receiver or registrar of the court. If it be attested out of England, the witness

must be a judge or magistrate or a British consul or vice-consul or a notary public.

Rule 350 provides:

Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceeding void, unless the court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the court may think fit.

Muir Mackenzie in support of the appeal.—The registrar should have allowed the petition to be amended and the attestation made by a solicitor. He referred to

Sect. 143 of the Bankruptcy Act 1883.

[He was stopped by the Court.]

Hansell for the debtor.—Want of proper attestation is not a formal defect, and is not capable of amendment. He cited

Parsons v. Brand, 62 L. T. Rep. 479; 25 Q. B. Div. 110;

Re Maund; Ex parte Maund, 72 L. T. Rep. 58; (1895) 1 Q. B. 194;

Re Maughan; Ex parte Maughan, 59 L. T. Rep. 253; 21 Q. B. Div. 21.

The act of bankruptcy was a deed of assignment for the benefit of creditors executed on the 16th Dec. 1901. The petition was not presented till the 13th March 1902, and the hearing was on the 25th March. It was then too late to amend the petition, as more than three months had elapsed.

Muir Mackenzie in reply.—Cases under the Bills of Sale Acts have no application, as under these Acts there is no such rule as rule 350. The courts have constantly amended the petition at the hearing, even where the petition did not state an act of bankruptcy. He referred to

Re Fiddian, 66 L. T. Rep. 203;

Re Collier; Ex parte Rylands, 64 L. T. Rep. 742;

Re Low; Ex parte Gibson, 72 L. T. Rep. 450; (1895) 1 Q. B. 734;

Re Tomkins, 84 L. T. Rep. 341; (1901), 1 K. B. 476;

Re Dunhill; Ex parte Dunhill (1894) 2 Q. B. 234.

WRIGHT, J.—I do not think there is any difficulty in this case, for in my view this petition was wrongly dismissed by the registrar. [His Lordship read rules 146 and 350.] This was not like the case where a new petitioning creditor is added, but here there has been merely an omission to follow the rule. I think the attestation by a solicitor ought to have been allowed at the hearing.

PHILLIMORE, J.—I agree.

Appeal allowed. Receiving order made on petition being resigned.

Solicitors: *Doyle and Co.* for *Bennett and Baddeley*, *Hanley*; *Sharpe, Parke, and Co.*, for *Sheldon, Plant, and Barclay*, *Macclesfield.*

(a) Reported by J. ANWYL THEROALD, Esq., Barrister-at-Law.

IN BANK.]

Re BILLING; *Ex parte* THE OFFICIAL RECEIVER *v.* BLAKELY.

[IN BANK.]

Monday, May 12.

(Before WRIGHT and PHILLIMORE, JJ.)

Re BILLING; *Ex parte* THE OFFICIAL RECEIVER *v.* BLAKELY. (a)

Bankruptcy—Order for summary bankruptcy under sect. 121 of the Bankruptcy Act 1883—Claim for over 200l. not arising out of the bankruptcy—Jurisdiction of the Bankruptcy Court—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 102, 121—Bankruptcy rule 273.

An order for summary administration having been made under sect. 121 of the Bankruptcy Act 1883, the official receiver applied to the County Court judge for an order against a third party to pay him 343l. 14s. This claim did not arise out of the bankruptcy.

Held, that the County Court had no jurisdiction. The jurisdiction is the same in summary as in ordinary bankruptcies. Rule 273 does not affect the right of third parties to claim the protection given by sect. 102 of the Bankruptcy Act 1883.

APPEAL by the official receiver from a decision of His Honour Judge Harris Lea, given on the 17th March 1902, in the County Court of Herefordshire holden at Leominster.

On the 11th May 1901 a receiving order was made against the debtor on his own petition, and on the same day he was adjudicated a bankrupt.

On the 24th May 1901 an order for summary administration was made under sect. 121 of the Bankruptcy Act 1883, and the official receiver became trustee.

At the date of the receiving order the bankrupt was indebted to his bankers to the amount of 1045l. 8s., who had a deposit of shares to secure the overdraft.

In April 1901 the bankrupt instructed an auctioneer named Blakely to sell the effects on his farm, and arranged that the proceeds should be paid into his banking account, to effect which he signed the following authority:

To Mr. C. F. Blakely.—I hereby authorise you to pay the amount realised by my sale to the credit of my account with Messrs. Davies, Banks, and Co., Kington, and their receipt shall be your discharge.—Dated this 16th day of April 1901.—Signed, CHARLES BILLING. Witness, T. G. SPRAGUE.

After the sale, on the 26th April, the bankrupt's solicitor wrote to Blakely revoking the authority to pay the money into the bank.

On the 2nd May Blakely paid 343l. 14s., the proceeds of the sale, into the bank.

On the 17th March the official receiver, as trustee in the bankruptcy, applied to the judge of the County Court at Leominster for an order on Blakely to repay the 343l. 14s.

The motion was dismissed, on the ground of want of jurisdiction.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) enacts:

Sect. 102 (1). Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of the property in any

such case. Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute, does not, in the opinion of the judge, exceed in value two hundred pounds. (2) A court having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other court, nor shall any appeal lie from its decisions, except in manner directed by this Act. (3) If in any proceeding in bankruptcy there arises any question of fact which either of the parties desire to be tried before a jury instead of by the court itself, or which the court thinks ought to be tried by a jury, the court may, if it thinks fit, direct the trial to be had, with a jury, and the trial may be had accordingly, in the High Court in the same manner as if it were the trial of an issue of fact in an action, and in the County Court in the manner in which jury trials in ordinary cases are by law held in that court.

Sect. 121. When a petition is presented by or against a debtor, if the court is satisfied by affidavit or otherwise, or the official receiver reports to the court that the property of the debtor is not likely to exceed in value three hundred pounds, the court may make an order that the debtor's estate be administered in a summary manner.

Rule 273 of the Bankruptcy Rules 1886 provides as follows:

Where an estate is ordered to be administered in a summary manner, under sect. 121 of the Act of 1883, the provisions of the Act and rules shall, subject to any special direction of the court, be modified as follows, namely: (3) All questions of law and fact shall be determined by the court having jurisdiction in the matter, and no application for a jury shall be entertained.

Muir Mackenzie and *H. Lewis* in support of the appeal.—The Court in Bankruptcy has power to decide this question under sect. 102 of the Bankruptcy Act 1883, although it is a claim which does not arise out of the bankruptcy. They referred to

Re Hornblow, 53 L. T. Rep. 155;

Re Hawke; *Ex parte Scott*, 54 L. T. Rep. 54; 16 Q. B. Div. 508.

J. D. Crawford for the respondent.

WRIGHT, J.—It seems to me that it would be difficult to hold that under the bankruptcy rules made under the Bankruptcy Acts the jurisdiction in small bankruptcies is different to that in large bankruptcies. Sect. 102 of the Bankruptcy Act 1883 was intended to give to third parties a right to claim to come into the jurisdiction of the ordinary instead of the bankruptcy courts, where the claim does not arise out of the bankruptcy and where the matter in dispute exceeds in value 200l., while authorising the Court of Bankruptcy to exercise its jurisdiction within those limitations so far as is necessary to determine every sort of question. [His Lordship read sect. 121 of the Bankruptcy Act 1883, r. 273 (3), and continued.] Now, I do not think that we could hold that a rule meant to save expense in the administration of small bankruptcies was intended to cut down the protection given to third parties by sect. 102 in large bankruptcies and *a fortiori* in the case of small bankruptcies. Sub-sect. 3 of sect. 102 really means that no issue shall be sent elsewhere, and that all matters ordinarily in the jurisdiction of the County Court

(a) Reported by J. ANWYL TROSBALD, Esq., Barrister-at-Law.

IN BANK.] *Re* RICHARDSON AND COOK; *Ex parte* THE EXECUTORS OF J. GRIME. [IN BANK.]

should be kept in its hands. This claim is clearly one which does not arise out of the bankruptcy, and the County Court judge was right in holding that he had no jurisdiction to make the order asked for.

PHILLIMORE, J.—I agree. *Appeal dismissed.*

Solicitors: *Marshall and Pridham*, for *W. M. Akerman*, Hereford; *Harold Easton*, Leominster.

Monday, May 12.

(Before WRIGHT and PHILLIMORE, JJ.)

Re RICHARDSON AND COOK; *Ex parte* THE EXECUTORS OF J. GRIME. (a)

Bankruptcy—Power of County Court to stay proceedings in High Court—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 9, sub-s. 1, 10, sub-s. 2, 168, sub-s. 1.

The power given to the Bankruptcy Court under sect. 10, sub-sect. 2, of the Bankruptcy Act 1883, to stay proceedings against a debtor, ought not to be exercised by the County Court where the High Court has with knowledge of bankruptcy proceedings allowed the matter to proceed.

Quære, whether the power of the County Court, under sect. 10, sub-sect. (2), of the Bankruptcy Act 1883 is not limited to proceedings pending in it.

APPEAL from an order made by His Honour Judge Parry, at the Manchester County Court, staying an action in the Chancery Division of the High Court of Justice.

The appellants were the executors of James Grime, and they had, on the 2nd Aug. 1901 commenced an action in the Chancery Division against a firm of solicitors named George Richardson, Son, and Cook, who had acted as solicitors to their testator, claiming (1) an account of all moneys of James Grime, deceased, come to the hands of the defendants or received by them on his account or forming part of his estate; (2) an inquiry as to the dealings of the defendants with such moneys, and as to all transactions between the said James Grime and the defendants as his solicitors; (3) payment to the plaintiffs of all such moneys as might be found due to them and delivery of all securities and documents belonging to the said James Grime, or his estate, or to the plaintiffs as his executors.

The defendants delivered no defence, and on the 14th Dec. 1901 a motion for judgment was made on the hearing, of which accounts were ordered to be filed.

Richardson and Cook were adjudicated bankrupt on the 11th Jan. 1902, and C. W. Nasmith was appointed trustee.

On the 21st Feb. the appellants applied to the district registrar at Manchester to have the trustee joined as a defendant to the action, when the summons was adjourned.

On the 17th March a motion was made to the County Court judge at Manchester by the trustee to stay the action, when an order was made staying the action in the Chancery Division of the High Court of Justice on the trustee undertaking to give the appellants (the plaintiffs in the action) reasonable access to the bankrupt's books.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) enacts as follows:

Sect. 9 (1). On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose.

Sect. 10 (2). The court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

Sect. 168 (1). In this Act, unless the context otherwise requires, "the court" means the court having jurisdiction in bankruptcy under this Act.

Muir Mackenzie in support of the appeal.—The County Court judge had no jurisdiction to make this order; sect. 10, sub-s. 2 of the Bankruptcy Act 1883 only applies to the court in which the proceedings are pending. He referred to

Re Hastings; *Ex parte Hammond-Brown*, 67 L. T. Rep. 234;

Ex parte Coker; *Re Blake*, L. Rep. 10 Ch. App. 652;

Re Smith; *Hands v. Andrews*, 68 L. T. Rep. 337; (1893) 2 Ch. 1.

[PHILLIMORE, J. referred to *Ex parte Reynolds*; *Re Barnett* (53 L. T. Rep. 448; 15 Q. B. Div. 169.) The bankrupts have received money as officers of the court, and the Chancery Division has power to commit them in default of repayment under the Debtors Act 1869, s. 4. One division of the High Court cannot stay proceedings in another division, and in the exercise of its bankruptcy jurisdiction the County Court is in the same position as the High Court.

J. D. Crawford for the trustee.—The case of *Ex parte Reynolds* (*ubi sup.*) cannot override the plain words of sect. 10, sub-sect. 2, of the Bankruptcy Act 1883. In deciding that case the Court of Appeal was dealing only with its special facts, and this section was not dealt with. Here the Chancery Division of the High Court was a court in which proceedings were pending against the debtor, and under that section the Court of Bankruptcy has power to stay these proceedings. The question of expediency was not argued before the County Court judge.

WRIGHT, J.—This case involves a somewhat serious question as to the power of a County Court to stay an action in the High Court, and I do not myself propose to decide that question generally to-day, but I do say that it is clear that sect. 9 of the Bankruptcy Act gives no such power. It may be, however, that under sect. 10 a County Court has jurisdiction in certain cases to stay an action in the High Court, but I question very much whether the power of the County Court under sect. 10 is not limited to proceedings pending in it. I do not, however, decide that to-day. I am, however, quite clear that after the Chancery Division had allowed the matter to go on with a knowledge of the bankruptcy proceedings, it is out of the question that those pro-

(a) Reported by J. ANWYL TROBARD, Esq., Barrister-at-Law.

IN BANK.]

Re BAINES; *Ex parte* THE BOARD OF TRADE.

[IN BANK.]

ceedings can be stayed by the County Court. The Chancery Division may order these solicitors as officers of the court to pay a sum of money, and in case of their default may commit them. Apart, however, from that, this is a case in which the power if it exists ought not to be exercised—the Court of Chancery has all the machinery for taking the account, and it is not a case in which the Court of Bankruptcy has any special jurisdiction.

PHILLIMORE, J.—I agree. I only wish to add that “stay” (and the matter was much discussed after the passing of the Judicature Act) is what is done by the court before which the action is pending. An “injunction” is the act of a court restraining a person suing in another court. The word in sect. 10 of the Bankruptcy Act 1883 is “stay,” and probably means an action pending before the court itself. Apart, however, from the meaning to be placed on “stay” in that section, I agree that in this particular case this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Pritchard, Englefield, and Co.*, for *Boole, Edgar, and Co.*, Manchester; *Rooke and Sons*, for *Brown, Son, and Co.*, Manchester.

May 12 and 13.

(Before WRIGHT and PHILLIMORE, JJ.)

Re BAINES; Ex parte THE BOARD OF TRADE. (a)
Bankruptcy—Scheme of arrangement—Debts released by deeds delivered as escrows pending approval of scheme by court—Debts provable—Right of releasing creditors to vote on scheme—Bankruptcy Act 1890 (53 & 54 Vict. c. 71), s. 3, sub-ss. 2, 9.

In the absence of fraud the security required by the Bankruptcy Act 1890, s. 3, sub-s. 9, need not extend to debts, releases for which have been executed and delivered as escrows, to take effect on the approval of the scheme by the court; but the creditors who have executed such releases have no interest entitling them to vote upon the scheme.

Re E. A. B. (85 L. T. Rep. 772; (1902) 1 K. B. 773) considered and applied.

APPEAL by the Board of Trade and the official receiver, from an order, dated the 16th Jan. 1902, of His Honour the Hon. Arthur Russell, judge of the County Court of Berkshire holden at Reading, approving a scheme under sect. 3, sub-sec. 9, of the Bankruptcy Act 1900.

The receiving order was made on the 7th March 1901.

The statement of affairs disclosed liabilities to the amount of about 7500*l.*, with assets worth about 2700*l.*

On the 17th June 1901 the debtor filed a scheme of arrangement under which creditors for about 4926*l.* were to release their debts, and the remainder were to be paid 7*s.* 6*d.* in the pound.

The creditors who had agreed to release their debts had executed deeds of release delivered as escrows, to take effect on the approval of the scheme by the court, under which they were to receive 5*s.* in the pound.

The meeting of creditors to consider the scheme

was held on the 24th June, and the scheme was carried by the votes of the creditors who had delivered releases of their debts as escrows.

The Bankruptcy Act 1890 (53 & 54 Vict. c. 71), s. 3, enacts:

(2) In such case the official receiver shall hold a meeting of creditors before the public examination of the debtor is concluded, and send to each creditor before the meeting a copy of the debtor's proposal with a report thereon; and if at that meeting a majority in number and three-fourths in value of all the creditors who have proved resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors, and when approved by the court shall be binding on all the creditors. (9) If any facts are proved on which the court would be required either to refuse, suspend, or attach conditions to the debtor's discharge, were he adjudged bankrupt, the court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate.

Muir Mackenzie for the official receiver and the Board of Trade.—The security must extend to the debts released by the deeds delivered as escrows, and the court ought not to give its sanction to a scheme of arrangement the whole of which is not before the court. The creditors who delivered the releases as escrows voted on the scheme, and without their votes it would not have been carried. In *Re E. A. B.* (85 L. T. Rep. 772; (1902) 1 K. B. 773) these creditors who had given releases did not vote, and the money was not provided by the debtor.

H. Reed, K.O. and *F. C. Willis* for the debtor.—There is no reason why an arrangement of this kind should not be made openly outside the scheme. Those who released their debts for 5*s.* in the pound knew that the rest of the creditors would get 7*s.* 6*d.* in the pound, but they preferred 5*s.* paid immediately to the chance of 7*s.* 6*d.* at some future time.

WRIGHT, J.—I confess that but for the passage cited to us from the case of *Re E. A. B.* (*ubi sup.*) I should have thought that the requirement as to security being found for 7*s.* 6*d.* in the pound was inserted in the Bankruptcy Act of 1890 on the ground of public policy, for the very purpose of insuring that the debtor should not by means of private and piecemeal arrangements with friends escape the stigma and possible consequences of bankruptcy in a case where any misconduct was imputed to him, without securing 7*s.* 6*d.* in the pound on all the unsecured debts for which he was liable at the date of the receiving order. That point was left open by the Court of Appeal in *Re Burr* (66 L. T. Rep. 553; (1895) 1 Q. B. 724); but it has now been decided, as I read *Re E. A. B.*, in a sense contrary to Mr. Muir Mackenzie's argument. In view of that expression, we are obliged to hold, first of all, that the security itself—that is all the decision there went to—could not extend to debts which had been released before the approval of the scheme by the court where no undue advantage has been given in order to obtain releases. Further, the same case shows conclusively, so far as we are concerned, that the security need not cover the claims of those who have released their debts before the approval of the scheme by the court; and I think, if that is so, it would be pedantic to hold that the security must extend to those who have delivered releases

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.

[IN BANK]

Re DRUCKER; Ex parte BASDEN.

[IN BANK.]

as escrows, because practically it is the same thing, if the court is going to approve, whether the release was delivered before the approval or is ready to be delivered after. Then, having that authority, the question arises whether there was any fraud on the creditors in this case. I do not think there was. There is no reason to think that these releases were intended to deceive them, or that any of the creditors would have been better off if they had known of the terms of each release, except that they might not have supported the scheme. But there is a ground which is not touched by the case of *Re E. A. B. (ubi sup.)*, and which I am not able to get over. Certainly 755*l.* worth of creditors voted after they had executed the releases as escrows; and something like 2900*l.* of creditors voted after agreeing to the settlement in the scheme, by agreeing to release their debts upon the approval of the scheme by the court. Now, it seems to me that these creditors voted without any real interest in the matter. If the first set of them—that is, those amounting to 755*l.*—were struck off, that would involve the rejection of the scheme by the creditors. I think both these sets of creditors voted not really as creditors for a scheme under the Act, but as part of a bargain by the debtor, by which not one scheme within the meaning of the Act was carried under the Act, but two schemes were to be carried out, and the part in which the creditors who were no parties to the release were concerned, was carried out at the meeting, not on its merits, but by these creditors voting as part of their arrangement with the debtor. In effect they forced the acceptance of 7*s.* 6*d.* in the pound on the other creditors who had not agreed to execute releases. It seems to me that before anything can be done to make this scheme valid, the escrows must be delivered, and then, when the escrows are delivered, the remaining creditors may, if they think fit, pass the scheme, and then the court can approve it.

PHILLIMORE, J.—I am of the same opinion, and precisely for the same reasons. I will only add three or four words of my own to show that I have travelled through the same process of reasoning as my learned brother. We are, I think, bound by the authority of *Re E. A. B. (ubi sup.)* in the Court of Appeal to hold that any creditor may, for the purpose of assisting the bankrupt to make his scheme of arrangement, release his debt wholly or for some consideration which is not illegal and not injurious to the other creditors, and when his debt has been released, if the scheme provides for 7*s.* 6*d.* in the pound for the remaining creditors, and has been properly voted upon by the remaining creditors in sufficient value, the scheme may be approved by the court. But it would be going a long step beyond *Re E. A. B. (ubi sup.)*, and it would be leading the way to a large amount of mischief, if we were to hold that creditors could at the same moment release their debts and vote upon a scheme which would compel the other creditors to take 7*s.* 6*d.* in the pound and no more. Therefore, upon those short grounds, I agree with the judgment of my learned brother.

Appeal allowed. Order approving scheme discharged. New meeting of creditors directed.

Solicitors: *The Solicitor to the Board of Trade; J. T. Champion.*

Thursday, May 29.

(Before WRIGHT, J.).

Re DRUCKER; Ex parte BASDEN. (a)

Bankruptcy—Private examination of witness—Power of court to order in foreign country—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 27, 105, 118.

The power of the court under sect. 27 of the Bankruptcy Act 1883 to make an order for the private examination of witnesses is limited to the British dominions.

THIS was an *ex parte* application by the trustee in bankruptcy for an order for the examination of witnesses in Switzerland.

The bankrupt had failed to surrender for public examination, and had gone abroad without giving any information to his trustee.

His mother had put in a proof for 10,000*l.* which the trustee had rejected, and against this decision she had lodged an appeal supported by an affidavit. She was a foreign subject residing out of England, and had refused to come to this country for cross-examination.

On the 16th May a special examiner was appointed to take her evidence at Zurich, and by this application the trustee sought for an order under sect. 27 of the Bankruptcy Act 1883 for the examination of the bankrupt and his brother before the same examiner, as it appeared likely that they would be with their mother on the date fixed for her examination.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 27, sub-s. 6, enacts as follows:

The court may, if it think fit, order that any person who if in England would be liable to be brought before it under this section, shall be examined in Scotland or Ireland, or in any other place out of England.

Carrington for the trustees.—The words of sub-sect. 6 of sect. 27 of the Bankruptcy Act 1883 are wide enough to enable the court to make the order asked for by the trustee. If, however, the court entertains any doubt as to its jurisdiction, I ask for an order for the examination of such persons as may be willing to submit themselves for examination.

WRIGHT, J.—As at present advised, I am of the opinion that under sect. 27 of the Bankruptcy Act 1883 I have no power to make the order asked for. Although the words of sub-sect. 6 are *prima facie* wide enough to include a place not within the British dominions, yet they must be construed as limited to the British dominions. It seems to me, although I have not had an opportunity of fully considering it, that that restriction is *prima facie* necessary. It is impossible to suppose that that section means that the court is to have compulsory power in France or Germany. I cannot compel these persons to come up for examination, nor could I punish them if they refused to come, or came and refused to answer. Moreover, it has not even been shown that they are in Switzerland, where it is desired to examine them. I regret I cannot make the order. Nor can I make it in the optional form that they should be examined if they think fit to submit. I do not think that is within the function of the court or the kind of thing the section intended at all.

Application refused.

Solicitors: *King, Wigg, and Co.*

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.

IN BANK.] *Re* LAWFORD AND LAWRENCE; *Ex parte* THE TRUSTEE *v.* WARD. [H. OF L.]

June 9 and 12.

(Before WRIGHT, J.)

Re LAWFORD AND LAWRENCE; *Ex parte* THE TRUSTEE *v.* WARD. (a)*Bankruptcy—Pledge—Redemption after knowledge by pledgee of act of bankruptcy and of receiving order—Property of bankrupt—Relation back of trustee's title—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 43, 44.**A pledgee of goods on the receipt of the amount advanced is bound to return them to the pledgor, notwithstanding notice of the existence of an act of bankruptcy available against the pledgor or of the making of a receiving order against him.*

THIS was a motion by the trustee in the bankruptcy of Lawford and Lawrence asking for a declaration that certain cabs delivered by the respondent Ward to the bankrupts on the 26th Oct. 1900 formed part of the property of the bankrupts passing to the trustee in their bankruptcy, having been delivered by the respondent to the bankrupts with notice of an available act of bankruptcy.

The notice of motion also asked for a similar declaration in respect to other cabs delivered by the respondent to the bankrupts on the 11th Jan. 1901, two days after the making of the receiving order of which the respondent had had notice.

The notice of motion further asked for an order against the respondent for payment to the trustee of the difference between the value of the cabs and the amounts lent on them by the respondent.

On the 14th Sept. 1900 the bankrupts pledged to the respondent a number of cabs and horses to secure a loan of 435*l.*, and on the 27th Sept. 1900 pledged other cabs and horses to secure a further loan of 120*l.*

On the 6th Oct. 1900 the bankrupts committed an act of bankruptcy by suffering their goods to be seized and sold.

On the 26th Oct. the bankrupts repaid the first loan of 435*l.*, and the respondent, with knowledge of the act of bankruptcy, redelivered the cabs, &c., pledged on the 14th Sept.

On the 9th Jan. 1901 the receiving order was made against the bankrupts, and on the 11th Jan. they repaid the second loan of 120*l.*, and the respondent, with notice of the receiving order, redelivered to the bankrupts the cabs, &c., pledged on the 27th Sept.

Carrington and F. Mellor appeared for the trustee in support of the motion.

Muir Mackenzie and S. G. Lushington for the respondent.—A pledgee cannot refuse to return the goods pledged when repaid the amount advanced. They cited

Biddle v. Bond, 6 B. & S. 225;*Canon v. South-Eastern Railway*, 7 Ex. 843;*Knowles v. Horsfall*, 5 B. & Ald. 184.

Carrington and F. Mellor in reply.—The title of the trustee in bankruptcy related back to the act of bankruptcy of the 6th Oct. 1900, and the respondent cannot claim the protection of sect. 49 of the Bankruptcy Act 1883. The respondent delivered these goods to the bankrupts at his own

risk, and he must repay their value to the trustee. They referred to

Vernon v. Hankey, 2 T. R. 113;*Foster v. Allanson*, 2 T. R. 479;*Thorne v. Tilbury*, 3 H. & N. 534;*Rogers v. Lambert*, 62 L. T. Rep. 694; 24 Q. B. Div. 573;*Re Pollat*; *Ex parte Minor*, 68 L. T. Rep. 366; (1893) 1 Q. B. 455;*Re Lowe*; *Ex parte Lowe*, 62 L. T. Rep. 263; 7 Mor. 25.

WRIGHT, J.—In this case the trustee's title undoubtedly related back to the 6th Oct. 1900, and the respondent, knowing of the act of bankruptcy of that date, was not protected by sect. 49 of the Bankruptcy Act 1883. Still, though with great doubt, I think he is not liable to the trustee in bankruptcy for the value of these goods. It seems to me that, although it is true that the trustee's title related back to the act of bankruptcy of the 6th Oct. 1900, yet that the trustee only took his title and interest subject to the contract of pledge under which the respondent held the cabs. Now, the respondent has committed no wrong; he has been guilty of no conversion, nor has he retained any property of the bankrupts, nor has he received any money to their use. He had no option but to return the cabs when the money was paid, and it would have been illegal and wrong, both to the bankrupts and to the trustee through the bankrupts, if he had refused to give them up. I think the case of *Vernon v. Hankey* (*ubi sup.*) is not in point, and that my judgment must be for the respondent.

Motion dismissed.

Solicitors: Cecil F. Jennings; George Reader.

House of Lords.

Feb. 17, March 3, 6, and May 16.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, BRAMPTON, and LINDLEY.)

GRESHAM LIFE ASSURANCE SOCIETY *v.* BISHOP. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Revenus—Income tax—Insurance company—Interest received abroad—Income Tax Act 1842 (5 & 6 Vict. c. 35), s. 100, sched. D, 4th case.

An insurance company, having its head office in England, had branches and agencies abroad, and had foreign investments, the interest on which was not remitted to England, but was used in the business of the company abroad. Accounts were made up annually showing one entire business, and making no distinction between the income received and expenditure made in England, and that received and made abroad, but including all in one account. The profits out of which dividends were paid to the shareholders were calculated on the basis of this account.

Held (reversing the judgment of the court below), that the interest on the foreign investments was not received by the company within the United Kingdom, within the meaning of the 4th case in

(a) Reported by J. ARWYL TREGBALD, Esq., Barrister-at-Law.
Vol. LXXXVI., 2228.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

H. OF L.]

GRESHAM LIFE ASSURANCE SOCIETY v. BISHOP.

[H. OF L.]

sched. D to sect. 100 of the Income Tax Act 1842, and was not liable to income tax.
Scottish Mortgage Company of New Mexico v. Commissioners of Inland Revenue (14 R. 98) distinguished.

THIS was an appeal from a judgment of the Court of Appeal (Smith, M.R., Collins and Stirling, L.J.J.) (reported 83 L. T. Rep. 654; (1901) 1 K. B. 153), who had affirmed a judgment of the Divisional Court (Grantham and Kennedy, J.J.) (reported 81 L. T. Rep. 442) upon a special case.

The facts are set out fully in the reports in the courts below, and briefly in the headnote above.

The short question was whether income tax was payable by the appellants on the whole amount of the interest received abroad on foreign securities and brought into account in the statements of the society's affairs, such bringing into account constituting a "constructive" receipt in this country, or only on such amounts as were actually received in this country.

The difference between the two amounts for assessment was the difference between about 143,000*l.* and 17,000*l.*

The courts below decided in favour of the Crown.

Sir E. Clarke, K.C., Haldane, K.C. and Stewart Smith appeared for the appellants and argued that dividends on foreign investments received abroad were not "profits," and were not liable to income tax as such. The courts below relied on *Scottish Mortgage Company of New Mexico v. Commissioners of Inland Revenue* (14 R. 98; 24 Sc. L. Rep. 87), but see *Forbes v. Scottish Provident Institution* (23 R. 322; 33 Sc. L. Rep. 228) and the recent case of *Standard Assurance Company v. Allan* (3 F. 805; 38 Sc. L. Rep. 628), where the Scotch judges expressed an opinion that the Court of Appeal had misunderstood the *New Mexico* case. That case and *Forbes'* case properly understood are reconcilable, and are really in favour of the appellants. The "profits" cannot be represented by any specific payment of interest. Because the money received abroad was applied in making payments which would otherwise have had to be made from this country it cannot be said that the money was "received" here. See *London County Council v. Attorney-General* (83 L. T. Rep. 605; (1901) A. C. 26) and *Clerical, Medical, and General Life Assurance Society v. Carter* (59 L. T. Rep. 827; 21 Q. B. Div. 339; on appeal, 22 Q. B. Div. 444), against which this is really an appeal. The 4th case in sched. D to sect. 100 of the Act of 1842 is the only one which is applicable. Interest received in respect of foreign investments is not "profits," and is not liable to taxation unless it is brought to this country:

Colquhoun v. Brooks, 61 L. T. Rep. 518; 14 App. Cas. 493:

San Paulo Railway Company v. Carter, 73 L. T. Rep. 538; (1896) A. C. 31.

This interest is only one of a set of items, but income tax is only payable on the balance as shown by the account. The decision of the Court of Appeal runs counter to the Scotch decisions cited above. This is not profit at all, but is capital, and in any case it was not received in this country.

The *Attorney-General* (Sir R. Finlay, K.C.), the *Solicitor-General* (Sir E. Carson, K.C.), *Dankwerts*, K.C., and *Bowlatt*, for the respondent, contended that "interest" was an independent subject of taxation under the Act: (see *Clerical, Medical, and General Life Assurance Society v. Carter*, which is conclusive on this point). "Profits" in the Income Tax Acts is a general term not to be restricted to profits of trade. By bringing the foreign interest into one general account they liberated a corresponding sum here, and made it available for dividend, and therefore the money was constructively received in this country. The *New Mexico* case was rightly decided, and is distinguishable from *Forbes'* case and the *Standard Assurance Company* case.

Sir E. Clarke was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 16.—Their Lordships gave judgment as follows:

THE LORD CHANCELLOR (Halsbury).—My Lords: The question in this case seems to me to depend upon the actual words used by the Legislature, and I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature. To put the matter shortly, the Legislature has provided that, besides the proper amount of taxation upon the balance of profits and gains by any person resident in this country, he must also pay upon the interest on any investment made in foreign countries, and that in calculating that amount, the actual amount received on such investments, no calculation or deduction is to be allowed as to the expenses of obtaining such investment, but the duty must be levied upon the actual amount received; but then this impost is only to be levied provided the money is received in this country. Now here the money has not actually been received in this country. It is to be observed that the Legislature has assumed, by the distinction which it has made between the mode of ascertaining the amount payable generally upon the balance of gains and profits and the amount taxable in respect of the interest payable upon foreign investments, that it has earmarked that sum and made it subject to distinct and peculiar incidents. The difficulty of identifying the actual sum is no limit on the enactment. The Legislature must be supposed to have contemplated the possibility of drawing a distinction between money received in this country and money accounted for or credited in account. If it were not for the difficulty of earmarking money, I should think that no one would have any doubt that the money must be received in this country to bring it within the words of the statute. If it were not money, but some commodity, say, tobacco, which a trader carrying on business in London and Paris was accounting for to his London house, no one would say that though the Paris tobacco was credited in account as a set-off against some expense or something that the supposed London firm had to set off against the same claim, and that as the London firm was paid by the Paris tobacco, therefore the tobacco was liable to the import duty on tobacco because it was taken into account in the books of the London firm. In no way to which I can give any reasonable interpretation

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has the money reached this country or been received in this country. It, like the tobacco in the case suggested, has not been imported, and if the Legislature had intended that bringing it into account was to be equivalent to its being received, it would have been easy to say so. It cannot be said that the use of artificial meanings to be attached to ordinary language is either unknown or unusual in legislation; and if it was intended to make this a special subject of taxation to be taxed whenever and wherever an equivalent amount was credited or booked, or in any other way recognised as having come under the dominion of the owner in this country, nothing could have been easier than to enact it in plain terms. I decline to go beyond the words used, and I do not think that this money was received in this country. I do not think that any amount of book-keeping or treatment of these assets wherever they may be will be equivalent to or the same thing as receiving the amount in this country. The words are simple, intelligible, and represent an ordinary and simple thing. I cannot think that we ought to go beyond the words themselves, and I think that this judgment ought to be reversed.

LORD MACNAGHTEN.—My Lords: I also am of opinion that the judgment of the Court of Appeal cannot be supported. The question depends upon the meaning of the rule applicable to the 4th case of sched. D. To my mind the language of the rule is so plain that it is difficult, if not impossible, to add anything which would make the meaning plainer. The appellants are possessed of foreign securities. The duty to be charged in respect of interest arising from foreign securities is, according to the rule in question, to be computed on a sum not less than the full amount of the sums which have been, or will be, received in the United Kingdom in the current year. I do not understand what is meant by constructive receipt in such a case as this; or how any sums can be said to have been received in the United Kingdom unless they have been brought to the United Kingdom, or unless there has been a remittance "payable in the United Kingdom," to borrow the language of the rule applicable to the fifth case. The circumstance that the business of the society is "one indivisible business," and that the society in the statement of its affairs and in its dealings with its shareholders and customers takes into consideration its foreign assets and liabilities, seems to me to be immaterial to the present question. As my noble and learned friend Lord Robertson (when Lord President) observed in the case of *Forbes v. Scottish Provident Institution* (23 R. 322), "every man and every company having foreign or colonial investments of course knows of the interest arising from them, takes note of it, and enters it in any statement of affairs which may require to be made up." But that is, as I think and as the Lord President thought, a very different thing from bringing the interest home—a very different thing from the receipt of the money here, either in specie or as represented by a remittance payable in this country. The difficulty seems to have arisen from a misunderstanding or a misapplication of the judgment in *Scottish Mortgage Company of New Mexico v. Commissioners of Inland Revenue* (14 R. 98). That was a very special case. Whether the decision was right or wrong, it can have no bearing upon the question now before

your Lordships. Speaking for myself, I think that the decision was right. In that case, as it seems to me, in the transmission to this country of money which the company was free to distribute, and the transmission to America by way of exchange of an equivalent amount which the company was bound to reinvest, the company acted as their own bankers, and did for themselves, by an entry in their books, what might have been done less conveniently and less economically by an ordinary bank or financial agent on their behalf. I think that the appeal must be allowed.

LORD SHAND.—My Lords: I also am of opinion that the appeal should be allowed. It is true that the appellants received the interest on their foreign securities by the hands of their agents abroad. But I think it equally true that, as they left that interest where it was gained, it was never received in this country. When it was entered in the company's balance-sheet in order to ascertain the profits of the year, it was so entered as estate which had not been received in England, but as property belonging to the company which they acquired abroad, which had not been brought home or received here, but was part of their foreign assets. Money or securities in that position was properly taken into account in ascertaining the year's profits, not because it had been received in England, but because although not so received it was part of assets of value which the company had acquired and held abroad. In the Scottish case of *Scottish Mortgage Company of New Mexico v. Commissioners of Inland Revenue* (14 R. 98), the *species facti* was different, for there the company treated the money as received in this country, and merely saved themselves the expense of cross remittances. It appeared there that the company was not entitled to divide the money earned abroad unless it was received as profits in this country. It was treated as so received merely to avoid the expense and inconvenience of cross-remittances—money sent home and the same amount sent back by cross-cheques or drafts. That was a material point in the decision of the case as showing that the money had been really received in this country.

LORD BRAMPTON.—My Lords: It is conceded that no part of the money in question was ever received in the United Kingdom in specie, or in any form known to the commercial world for the transmission of money from one country or place to another. But it was argued that if not actually, it was "constructively" so received in the accounts of the society. I confess that I do not like that expression, nor do I quite understand what it means. If a "constructive" receipt is the same thing as an actual receipt, I see no reason for the use of the word "constructive" at all. If it means something differing from or short of an actual receipt, then it seems to me that a constructive receipt is not recognised by the statute, which, in using the word "received" alone, must be taken to have used it having regard to its ordinary acceptation. Smith, M.R. in his judgment in the Court of Appeal, while stating that there must be "an actual receipt of the amount," added "but that receipt need not be in specie, it may be in account." And he then proceeded to deal with the accounts of the appellants, and to draw from

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them the inference that the appellants had actually received and dealt with these foreign dividends in the United Kingdom, and had distributed them as having been so received. Now, I am not prepared to deny that accounts may be so worded as to contain admissions justifying such an inference, but I differ from the view which he took, that such admissions, or anything approaching them, are to be found in the accounts before your Lordships. Those accounts were framed partly to satisfy the requirements of the Life Insurance Companies Act 1870 (33 & 34 Vict. c. 61) that at the end of each financial year a statement of the company's revenue account and of its balance-sheet, in the forms contained in the 1st and 2nd schedules, should be furnished to the Board of Trade; and partly in obedience to arts. 77 and 78 of the society's deed of settlement, directing books to be kept in which full entries shall be made of all matters which shall properly be the subject of debt or credit account, so that the financial state of the company may at all times appear as accurately as circumstances will permit, and further directing balance-sheets to be made up yearly and sent to every shareholder. The accounts before your Lordships profess to do no more than this, and no inference of fact can be drawn from them other than, or in addition to, those stated in them. In my opinion there is a total absence of any evidence to justify a finding that the interest in question has ever been received in the United Kingdom. For the Crown the case of *Scottish Mortgage Company of New Mexico v. Commissioners of Inland Revenue* (14 R. 98) was much relied upon. I am not satisfied with the correctness of the judgment in that case, but, assuming it to be sound, it is distinguishable from the present case, for in that case there was an admission that the amount charged with income tax had been applied in payment of interest and dividends to debenture-holders and shareholders in Glasgow. No similar admission is contained in the accounts in the case before the House. I am of opinion, with your Lordships, that the appeal should be allowed with costs.

LORD LINDLEY.—My Lords: This appeal turns upon the answer to be given to a simple question of fact. Has a certain sum of money entered by the Gresham Society in its accounts as an asset been received in this country by the society, or has it not? If it has, the appeal ought to be dismissed; on the other hand, if it has not, the appeal ought to be allowed. First let us consider what is meant by the receipt of a sum of money. I agree with the Court of Appeal that a sum of money may be received in more ways than one—e.g., by the transfer of coin or of a negotiable instrument or other document which represents and produces coin and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives it, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an

account which does not represent such a transaction does not prove any receipt, whatever else it may be worth. Now in this case the Gresham Company's accounts and the statements in the special case clearly establish the fact that the sum of 143,483*l.*, sought to be charged with income tax, consists of interest and dividends received abroad by the agents of the company from persons abroad who have paid those agents. The case and accounts do not state the exact mode in which the various sums making up the total of 143,483*l.* were paid to the agents of the company. The payment is admitted, and the receipt of that sum by the company, through its agents, is not in dispute. But then comes the second question, has that sum been received in this country by the Gresham Company? The special case clearly shows that it has not in fact been remitted to this country in any way whatever. Applying the test already suggested, no one here has received that sum; the agents who received it abroad still have it abroad, or have dealt with it otherwise than by sending it to the company here. No account even is forthcoming to show that the sum has ever been treated as remitted here so as justify the inference that in any commercial sense the sum has been received in the United Kingdom as distinguished from other countries. What has been done, and all that has been done, is that the Gresham Company, in making up its accounts with a view to ascertain what profits it could divide in a particular year, entered on its asset side the sum of 143,483*l.* as money received during the year. This was obviously right; for the object was not to ascertain the profit made in any particular country, but the profit made by the company on all its transactions all over the world. The company has paid duty on the profit so ascertained, and no question arises as to that. But when required to pay duty on the item of 143,483*l.* on the ground that this sum is made up of interest or dividends received in the United Kingdom, the company objects on the ground that it represents nothing of the sort. Nor does it, in truth. The fact that the profits shown by the account have been divided amongst the shareholders of the company does not carry the case any further. No part of the 143,483*l.* has come over here, or been in any sense received here, and then applied in payment of dividend. Some interest or dividends received abroad have been remitted here and duty has been paid on them accordingly, but the special case shows plainly that no part of the 143,483*l.* has been so remitted, either for the purpose of paying dividend or for any other purpose. It must be assumed that the language used by the Legislature in laying down the rules to be observed in the various cases contained in the Income Tax Act 1842 was carefully chosen, and that there was some good and sufficient reason for confining the duty on interest on foreign securities (mentioned in the fourth case falling under sched. D) to sums which had been or will be received in Great Britain during the year for which the duty is payable. The locality of the receipt is made all important, and it is only by ignoring it, or by introducing the expression "constructive receipt"—which may mean anything—that the claim of the Crown can be supported. Sched. D in the Act of 1842 was recast in 1853, and was replaced by a new sched. D; but

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the cases and rules in the Act of 1842 are applicable to the new schedule. (See sects. 2 and 5 of the Income Tax Act 1853.) Authorities have been referred to, and especially the Scotch cases of *New Mexico*, *Forbes*, and the *Standard Life Assurance Company*. The *New Mexico* case was very peculiar. Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry, but that entry was the business mode of carrying out cross remittances which it would have been unbusinesslike and really childish to have effected in any other way. But, thinking as I do that the *New Mexico* case may be properly upheld, I am not prepared to adopt it as a new starting point for further inferences. The language of the statute is the true starting point in each case. *Forbes'* case and the *Standard Assurance Company* case were both based on this sound principle, and were, in my opinion, both clearly rightly decided. The Court of Appeal, in my opinion, considered this case undistinguishable from the *New Mexico* case, but I am unable so to regard it. Assuming them to be undistinguishable, it would, in my opinion, be more correct to overrule the *New Mexico* case than to decide the present appeal in favour of the Crown. In my opinion the appeal should be allowed.

Order appealed from reversed. Respondent to pay to the appellants the costs here and below.

Solicitors for the appellants, *Devonshire and Co.*

Solicitor for the respondent, *F. C. Gore*, Solicitor of Inland Revenue.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 7.

(Before WILLIAMS, ROMER, and
MATHEW, L.JJ.)

Re AN ARBITRATION BETWEEN TYRER AND
Co. AND HESSLER AND Co. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Shipping — Charter-party — Time charter at periodical payments in advance — Power reserved to owners on default of payment to withdraw vessel — Waiver — Estoppel — Evidence.

By a charter-party a ship was let for nine months, the charterers to pay for the hire of the ship at an agreed rate, fortnightly in advance, and in default of such payment the owners to have the faculty of withdrawing the ship from the service of the charterers. The owners were to pay the wages of captain and crew, but the charterers were to pay for coals, port-charges, &c., and the captain was to be under their orders and directions as regarded employment. After the charterers had had the use of the ship for two months they made default in making the fort-

nightly payment due on the 21st June. The ship was then on a voyage to S. where she arrived on the 25th, and while there the captain telegraphed to H. to order the cargo to be ready. After lying two days at S. the ship started on the 27th for H. On the 28th the owners gave notice to the charterers of their withdrawal of the ship by reason of the charterers' default in the payment due on the 21st.

Held, reversing the judgment of the King's Bench Division (84 L. T. Rep. 653), that upon these facts there was no evidence of any waiver by the ship-owners of their right to withdraw the vessel, nor of any conduct on their part estopping them from insisting on their right.

THIS was an appeal by Hessler and Co. from a judgment of the King's Bench Division (Kennedy and Phillimore, JJ.) upon an award in the form of a special case stated by arbitrators for the opinion of the court.

By a charter-party dated the 13th Feb. 1900 and made between Hessler and Co., as owners, and Tyrer and Co., as charterers, the steamship *Lagom* was let by the owners to the charterers "for the term of about nine calendar months."

The charter-party provided that the owners should pay the wages of the captain and crew, and that the charterers should pay for the hire of the vessel at the rate of 425*l.* per calendar month, commencing on the day of delivery, and at the same rate for any part of a month, "payment to be made in cash fortnightly in advance to owners in West Hartlepool, and in default of such payment or payments, as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers"; and that the charterers should provide and pay for all the coals, port charges, pilotages, agencies, commissions, expenses of loading and unloading, and that the captain, although appointed by the owners, should be under the orders and directions of the charterers as regarded employment.

The ship was handed over to the charterers on the 6th April 1900, and on that day the first fortnight's payment in advance was duly made. The second payment was due on the 20th April, and was paid on the 27th April. The third payment was due on the 6th May, and was paid on the 10th May. The fourth payment was due on the 20th, and was paid on the 26th May. The fifth payment was due on the 6th, and was paid on the 11th June.

No complaint was ever made by the owners about the hire not being paid absolutely on the day when it was due, and no suggestion was ever made that, if the hire was not paid on the actual date when it became due, the vessel would be withdrawn from the service of the charterers.

On the 21st June another fortnight's hire became due in advance. No application for payment thereof was made, and no debit note was sent therefor, and no intimation was given that if the hire was not paid the vessel would be withdrawn from the charterers' service.

On the 21st June the vessel had just commenced a voyage from Burntisland to Stockholm on the charterers' account. She arrived at Stockholm on the 25th June, and lay there until the 27th, when she proceeded to Hernösand to load her homeward cargo on the charterers' account.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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While at Stockholm the master telegraphed to Hérnösand to order the cargo for the steamer to be ready.

On the 28th June the owners telegraphed to the charterers that, as they had not received the hire due on the 21st, they withdrew the steamer in accordance with the charter.

Prior to this telegram the owners never demanded payment of the hire or sent a debit note.

The dispute between the owners and the charterers as to the right of the owners to act in this way was referred to arbitration.

The arbitrators found as a fact that the owners had waived the immediate and punctual payment of the hire, and ought to have demanded payment of the hire before withdrawing the vessel from the service of the charterers; and that the withdrawal was not *bonâ fide* for the purpose of enforcing payment of the hire, freights at the time of the withdrawal having greatly increased; and that the withdrawal was an unlawful act on the part of the owners for which the charterers were entitled to damages.

The award was stated in the form of a special case for the opinion of the court, the question being whether, under the facts above stated, the owners were entitled to withdraw the ship from the service of the charterers.

The King's Bench Division (Kennedy and Phillimore, JJ.) were of opinion that the withdrawal was unlawful, and gave judgment for the charterers.

The owners appealed.

J. A. Hamilton K.C. (Bigham with him) for the owners.—The arbitrators have not found, nor is there in the facts any evidence that the owners waived their right to rescind. Nor have the owners done anything which could be construed as an intimation to the charterers that punctual payment would not be required so as to induce the charterers to alter their position by incurring expenses in dealing with the ship. The charter-party contains no provision that the owners shall give any notice to the charterers before demanding payment. The captain, so far as his employment is concerned, is, by the terms of the charter-party, under the orders and disposition of the charterers, and the fact of his continuing the voyage after the 21st June cannot be made use of as though he were for that purpose the "owner's" agent. The charterers chose to continue the voyage, knowing that they were in default with the payment; and what they did they did at their own risk. In the court below reliance was placed upon two cases:

Nova Scotia Steel Company Limited v. Sutherland Steam Shipping Company Limited, 5 Com. Cas. 106;

Williams v. Stern, 42 L. T. Rep. 719; 5 Q. B. Div. 409.

Carver, K.C. (Bateson with him) for the charterers.—The owners have waived their right to withdraw the ship. If they intended to exercise their right they should have given notice to the charterers on the 21st June. They allowed the ship to continue her voyage when they could by telegraphing have stopped her at once, and in consequence of their refraining to do so the charterers incurred expenses in dealing with the ship. Even if they were not bound to exercise

their option on the 21st June, they ought to have exercised it within a reasonable time after. The master of the ship was their servant, and they were bound by his acts in continuing the voyage after the charterers had made default. A forfeiture clause such as this one on which the owners rely should be construed strictly against them. The same principles should be applied as those which at common law apply to a forfeiture for nonpayment of rent.

WILLIAMS, L.J.—In my judgment this appeal must succeed. I agree with the decision of the Divisional Court in so far as the learned judges there held that there was no necessity for a demand of payment being made by the shipowners before they were entitled to exercise their power of rescinding the charter-party. The sole question is whether on the facts stated in the special case there is any evidence of a waiver by the shipowners of their power of rescission. In my opinion there is none. It was contended on behalf of the charterers that the owners' power of rescinding the contract ceased to exist unless the owners exercised it the moment they became entitled to it. There are no words in the charter-party requiring any such immediate exercise of the power, but it was argued that the owners' failure to exercise the power was evidence that they waived their right. I cannot agree to that. The argument involves this, that if the owners held their hand at all, while the expenses of the ship were going on, that of necessity operated as a waiver of their right to rescind. Reliance was placed upon the way in which the ship was employed between the 21st and the 28th June, and it was said that because the master of the ship was for some purposes the servant of the shipowners, the employment of the ship in that week amounted to a waiver by the shipowners of their right to withdraw the vessel. To my mind the facts show nothing of the sort. The charter-party expressly provides that the captain is to be under the orders and directions of the charterers as regards employment, so that what was done by him in prosecuting the voyage from the 21st to the 28th June was done under the orders and directions of the charterers. There is no ground whatever for relying on the mere lapse of time during which the owners held their hand as showing that the charterers were induced to alter their position by the conduct of the owners. The charterers were in default, and they must have known that they were in default, yet they ran the risk, and chose to go on and take the course they did. For these reasons I think that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. It is possibly a hard case upon the charterers, but to my mind the question as it arises on this charter-party is perfectly clear. There is no provision in the charter-party that the owners, before exercising their right to rescind on default being made in payment of the hire, must give notice to the charterers and demand payment. Nor can any such term be implied in this agreement. The charterers knew that the owners had a right to rescind the moment default was made in paying the hire. In a mercantile contract of this sort the court cannot imply a term that the owners must take any such steps as those which the charterers suggest before insisting on their right

to rescind, which arises in consequence of the charterers' default. I think that the owners were entitled to exercise their right without giving any prior notice to the charterers requiring payment. The charterers therefore can only succeed here by showing that the shipowners have waived their right or have estopped themselves from exercising their right. In my opinion there is nothing in the facts before us to justify the court in taking either view. The shipowners have done nothing at all. The master of the ship, in carrying out his duties as master and continuing the voyage of the vessel in accordance with the orders of the charterers, has not done anything which can be considered as an active step on the part of the owners bearing any relation to the question before us. The owners themselves have done nothing except to give the charterers a week's time in which to pay the money due from them. That is not such a delay as to justify the court in holding that the owners intended to abandon or waive their right of rescinding the charter-party. In my opinion, as at present advised, it would not be unreasonable for a shipowner, in a case like the present, to allow the charterers some little time in which to pay the money due before exercising a right to determine the charter-party. I should be sorry to hold that the owner lost his right unless he acted with absolute promptitude. Then it is said that when the owners gave time to the charterers they must have known that the charterers would probably go on making use of the ship and incurring expenses in her management. The owners are therefore, it is argued, estopped from now insisting on their right. But, as the owners had given time to the charterers to pay, the charterers must be taken to have known that what they did in that time was done at their own risk. How can the charterers now say that their continued working of the ship during a period when they knew that the charter-party was liable to be determined by reason of their own default has given them a right of depriving the owners of their power of rescission? I see no ground for saying that the owners lost their power of rescinding the charter-party, and I agree that the appeal should be allowed.

MATHEW, L.J.—I am of the same opinion. On the words of the charter-party I think that the matter is clear. Nothing could have been easier than to have inserted in the agreement a clause that the power of withdrawing the ship should not be exercised except within so many hours after a demand for the hire in arrear. But no such provision is to be found in the agreement, so that on the plain construction of the document no notice on the part of the shipowners was here necessary before they exercised their right of rescission. That right was simply one given to the owners to put an end to the charter-party. It is a misdescription to talk of "forfeiture," and it is out of place to discuss the law as to the forfeiture of a lease for non-payment of rent with the view of explaining a mercantile contract of this kind. The intention of the parties as shown by the agreement clearly is that, without giving any notice, the owners were to have the right of determining it in case of default by the charterers in paying the hire. Then it was said that the circumstances set out in the special case are evidence of a waiver, and an estoppel of the

owner's right. Reliance was placed on the fact that after the charterers had made default the master of the ship went on with the voyage, and it is said that the master was the agent of the owners. The answer to that is that by the express terms of the charter party the master was under the orders and directions of the charterers as regards his employment. I see no evidence on which we could say that the owners waived, or were estopped from exercising their right, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the owners, *W. A. Crump and Son*, for *Turnbull and Tilly*, West Hartlepool.

Solicitors for the charterers, *Field, Roscoe, and Co.*, for *Batsons, Warr, and Wimbhurst*, Liverpool.

Monday, May 12.

(Before WILLIAMS, ROMER, and MATHEW, L.J.J.)

CARIDAD COPPER MINING COMPANY LIMITED
v. SWALLOW. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Company—Directors' remuneration—Power of directors to postpone payment—Construction of articles of association.

The articles of association of a limited company provided that the directors should be allowed to receive as a remuneration for their services, and there should be allowed to them out of the funds of the company, the sum of 200l. per annum each, to be exclusive of the remuneration of any managing director, "and to be paid at such times as they may determine."

Held, that a resolution of the board of directors was a condition precedent to the right of any one of them to claim any remuneration.

THIS was an appeal by the defendant from a decision of Wright, J., at the trial of the action without a jury, giving judgment for the plaintiff company upon the defendants' counter-claim.

The action was brought by a limited company against a shareholder for calls.

The defendant, who had been also for two years a director of the company, counter-claimed for 400l., which he alleged to be due to him under the articles of association in respect of his services as a director.

Art. 80 of the articles of association was as follows :

The directors shall be allowed to receive as a remuneration for their services, and there shall be allowed to them out of the funds of the company from the date of the incorporation of the company the sum of 200l. per annum each, with 50l. per annum extra for the chairman, to be exclusive of the remuneration of any managing director and to be paid at such times as they may determine, and they shall also be entitled to receive and be paid in like manner 5l. per cent. of the net profits available for dividends in each year divisible equally amongst them.

The plaintiff company was incorporated on the 15th Feb. 1899, and the defendant was a director of the company from that date continuously up to the 15th Feb. 1901.

On the 28th Dec. 1899 at a meeting of the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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board of directors a resolution was passed that in view of the state of the funds of the company the payment of remuneration to the directors should remain in abeyance for the time being.

Wright, J., at the trial of the action, held that a resolution of the board that remuneration should be paid to the directors was a condition precedent to the right of any director to remuneration, and consequently the defendant was not entitled to any remuneration; and he gave judgment for the plaintiff company upon the defendant's counter-claim.

The defendant appealed.

Younger, K.C. and Lowenthal for the defendant.—Under art. 80 the defendant became absolutely entitled to 200*l.* a year for each year that he acted as a director of the company. The board of directors had no power to deprive any director of his right to be paid at the end of the year. The meaning of the clause "and to be paid at such times as they (the directors) may determine" does not make a resolution of the board a condition precedent to a director's claim to remuneration. The object of that clause is to enable the directors to apportion the remuneration given by the article, and pay themselves for the time they have actually served as directors, before it would otherwise become due at the expiration of the year. If it were not for this clause the directors would not be entitled to anything unless they served a complete year:

Salton v. New Beeston Cycle Company, 80 L. T. Rep. 521; (1899) 1 Ch. 775;

Re Central de Kaap Gold Mines, 69 L. J. 18, Ch.

The clause is not to be construed as restricting the previous words of the article, but as an enabling clause:

Nell v. Atlanta Gold and Silver Consolidated Mines, 11 Times L. Rep. 407.

Witt, K.O. and Montague Shearman, for the plaintiff company, were not called upon.

WILLIAMS, L.J.—I think that this appeal must be dismissed. The whole question turns on the construction of art. 80 of the company's articles of association, and especially on the clause in that article, "and to be paid at such times as they may determine." For the defendant it is contended that those words do not mean that a resolution by the directors is to be a condition precedent to their right to be paid remuneration. But that seems to me to be the meaning of the words according to their natural construction, and I see no reason why we should narrow the words, and give them any other meaning. The way that the clause is introduced seems to me to show that it was intended to put a condition on the director's claim to be paid remuneration. There is nothing that I can see to limit the power and discretion of the directors to anticipate or postpone the time of payment, but, on the contrary, these words seem to me to have been put in for the express purpose of enabling the directors to postpone payment, and to postpone it indefinitely: since, if the company should be in a bad financial condition, it would be impossible to fix definitely the date when the payment would be made. As to the case of *Nell v. Atlanta Gold and Silver Consolidated Mines* (*ubi sup.*), it is sufficient to say that the decision turned on the very special words of the articles of association of the company in ques-

tion. Moreover, it does not appear clearly from the report of that case whether or not the company had funds for the payment of directors' fees.

ROMER, L.J. concurred.

MATHEW, L.J.—I agree that on the plain language of this article the directors had power to postpone the payment of remuneration to themselves.

Appeal dismissed.

Solicitor for the company, *George Castle*.
Solicitors for the defendant, *Rowcliffes, Rawle, and Co.*, for *R. W. H. Thomas*, St. Helena.

Tuesday, June 3.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

FLETCHER v. LONDON UNITED TRAMWAYS COMPANY LIMITED. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—"Engineering work"—"Railroad"—Construction of tramway line—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 7.

The word "railroad," as used in the definition of "engineering work" in sect. 7 of the Workmen's Compensation Act 1897, is not synonymous with the word "railway," as defined in the same section; and it includes the running lines of a tramway laid along a public highway under the authority of a private Act of Parliament incorporating Parts 2 and 3 of the Tramways Act 1870.

THIS was an appeal by the plaintiff from an award of the judge of the Brentford County Court in proceedings to obtain compensation under the Workmen's Compensation Act 1897.

The plaintiff was a workman who had met with personal injury by accident arising out of and in the course of his employment by the defendant company in the construction or repair of a tramway line belonging to them.

The defendant company was the owner of a light railway which was made along the public highway leading from Uxbridge to Hanwell.

Being desirous of extending the line, they made an application to the Light Railway Commissioners, but failed to get the necessary authority.

They then applied for and obtained a private Act of Parliament, the London United Tramways Act 1900 (63 & 64 Vict. c. cclxxi), which authorised them to extend their line from Hanwell to Acton. This Act, by sect. 2, incorporated sect. 3 (interpretation of terms) and Parts 2 and 3 of the Tramways Act 1870.

The defendants afterwards extended their line from Acton as a light railway.

Though the line was constructed in this way, it was in fact one continuous line, worked by electricity on the overhead system, and running on a level with the public highway, and cars ran along it from one end to the other without any change.

The part of the line on which the plaintiff was working when he met with the accident was the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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part between Hanwell and Acton, constructed under the private Act of 1900.

At the hearing of the application before the County Court judge it was contended that the workman's employment was one to which the Workmen's Compensation Act 1897 applied, either as being employment on, in, or about a "railway," or on, in, or about an "engineering work" within the meaning of those words as defined in sect. 7 of the Act.

The County Court judge held that the word "railroad" in the definition of "engineering work" was synonymous with "railway," and that the workman's employment was not on, in, or about a "railway" within the definition in sect. 7. He therefore held that the workman was not entitled to any compensation under the Act.

The workman appealed.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides :

Sect. 7 (1). This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work. . . . (2) In this Act "railway" means the railway of any railway company to which the Regulation of Railways Act 1873 applies, and includes a light railway made under the Light Railways Act 1896; and "railway" and "railway company" have the same meaning as in the said Acts of 1873 and 1896. "Engineering work" means any work of construction or alteration or repair of a railroad. . . .

Compton for the workman.—The workman's employment was on the construction or repair of a "railroad," and therefore on an "engineering work," so as to entitle him to compensation under the Act. "Railroad" does not necessarily mean the same thing as "railway." It is a word that came into use before "railway," and it is quite applicable to a "tramway," which is an older invention than a "railway." The Legislature, after using, and carefully defining, the word "railway," has in this definition of engineering work deliberately used the word "railroad." From that the proper inference to be drawn is that they intended to refer to something different from a "railway." The word was meant to cover things which do not come within the strict definition of "railway." In a case under the Employers' Liability Act 1880 it has been held that the word "railway" in that Act included a temporary railway laid down by a contractor for the purpose of construction of works :

Doughty v. Firbank, 48 L. T. Rep. 530; 10 Q. B. Div. 358.

Ruegg, K.C. (R. P. Glasgow with him) for the defendant company.—The line on which the plaintiff was working was a tramway, pure and simple, subject to the Tramways Act 1870. A tramway is a thing the meaning of which is as well known as that of a railway. The Legislature has been careful to make this Act applicable to employment on a "railway" by specially naming that employment. If it had intended to make the Act applicable to employment on a tramway it would surely have named tramways just as it has named railways. The word "railroad" is synonymous with "railway." That seems to have been the opinion of the late Master of the Rolls :

Fullick v. Evans O'Donnell and Co., 84 L. T. Rep. 413.

The word "railroad" in this section may well be limited to mean a railway in course of construction or one not open for public traffic, which would not come within the definition of "railway" given in sect. 7.

COLLINS, M.R.—I think that the appeal must be allowed. The workman was engaged at the time of the accident in the construction or repair of part of a line which was one continuous line, though different parts of it were governed by different statutory provisions. The line began as a light railway, then came a piece of it which was governed by the Tramway Acts, and then the rest of it was apparently a light railway. The carriages were moved along the line by electricity, and the part of the line where the workman met with the accident for which he claims compensation was an ordinary electric tramway. The County Court judge held that the employment on which the workman was engaged was not one to which the Workmen's Compensation Act 1897 applied. The first ground on which it was sought to show that the workman was entitled to compensation was that his employment was on a "railway" within the definition in sect. 7. The County Court judge held that the line on which the workman was engaged was not a "railway" within that definition, and I see no reason for differing from him on that point. It was then argued that the workman was employed on an "engineering work" within sect. 7. In that section the expression "engineering work" is defined as including "any work of construction or alteration or repair of a railroad." The Legislature there introduced into the Act for the first time the word "railroad," having previously used the word "railway." Now, there is no vehement presumption as regards this Act that the Legislature, when using different words, intended to mean the same thing. In itself the word "railroad" would include a tramway, and it seems that formerly the word was used to describe that which we should now call a tramway. I cannot see why the word in this section should not be construed as embracing a tramway. We can only exclude a tramway from being an "engineering work" by saying that "railroad" means exactly the same thing as "railway." The word "railroad" may very well be used as a genus of which a "railway" is a species. From the fact of the use by the Legislature of the word "railroad" here, after previously legislating as to a "railway," I think a presumption arises that "railroad" was intended to mean something different from "railway," and its meaning was probably intended to have a larger ambit. The workman was here engaged in working on what is in fact a railroad, and he was *prima facie* therefore engaged on an "engineering work." I can see nothing in the Act to exclude him from its benefits, and for these reasons I think he is within the Act and entitled to compensation.

MATHEW, L.J.—I am of the same opinion. The County Court judge was of opinion that the word "railroad" in the definition of "engineering work" in sect. 7, means nothing more than "railway." I cannot see the reason why he came to that conclusion. The Legislature has defined "railway" in an earlier part of the section, and then it has added this definition of "engineering work" as a comprehensive expression to apply to other matters not included in previous definitions.

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COZENS-HARDY, L.J.—I am of the same opinion. We have a full statement of the reasons of the County Court judge in coming to his decision, and it is clear that his opinion was that the word "railroad" in the definition of "engineering work" meant no more than "railway," a word which is also defined in the Act. The tram-line on which the workman was employed was not a "railway" within that definition, but I see no reason for saying that when the Legislature used the word "railroad," after making provisions as to a "railway," it did not intend to use a word of larger meaning than "railway." It was argued that "railroad" should have been limited to mean a line which, when completed and in working order, will come within the definition of "railway." But that argument cannot be right, because the definition of engineering work is applicable not merely to the construction of a railroad, but also to its "repair." The case of *Fullick v. Evans* (*ubi sup.*) does not seem to me to be opposed in any way to our decision. All that was then decided was that a signal-box on a new railway line was covered by the word "railroad."

Appeal allowed.

Solicitor for the plaintiff, *Walter Turner.*

Solicitor for the defendants, *Hugh C. Godfray.*

Wednesday, June 4.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

CLATWORTHY v. R. AND H. GREEN LIMITED. (a)
APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Admission of liability—Duty of widow to take out letters of administration—Subsequent application to court—Compensation paid into court—Costs—Stay of proceedings—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), sched. 1, pars. 4, 5; sched. 2, par. 6—Workmen's Compensation Rules 1898, r. 5 (3).

A workman, who was accidentally killed in the course of his employment, died intestate, leaving a widow and children, who as his dependants were entitled to be paid compensation by his employers under the Workmen's Compensation Act 1897. The amount of compensation was agreed upon between the widow and the employers, but the employers refused to pay this amount to her unless she first took out letters of administration. The widow refused this condition and commenced proceedings against the employers to obtain compensation under the Act. The employers paid the agreed amount of compensation into court. The County Court judge ordered the employers to pay to the widow the costs of her application up to the date of the payment into court. Against this order the employers appealed.

Held, that the employers were not entitled to insist on the widow taking out letters of administration before they paid over to her the agreed amount of compensation.

Held, also, that the proceedings for compensation having been rightly commenced, the County Court

judge had jurisdiction to order the employers to pay the widow the costs of her application up to the date of the payment into court.

THIS was an appeal by the defendants from an order made by the judge of the Bow County Court in proceedings to obtain compensation under the Workmen's Compensation Act 1897.

The plaintiff was the widow of a workman who had died from the results of an accident which happened to him in the course of his employment by the defendants.

The workman died intestate, leaving a widow and children who were his "dependants" within sect. 7 of the Act.

The defendants admitted their liability to pay compensation under the Act, and were willing to pay 300*l.* to the dependants.

Under par. 1 (a) (1) of the first schedule to the Act it is provided that where death results from an injury the sum which employers are liable to pay as compensation shall not in any case exceed 300*l.*

Though ready to pay this sum, the defendants refused to hand it over to the widow unless she first obtained letters of administration in respect of her deceased husband's estate.

The widow refused to do this, and commenced proceedings against the defendants in the Bow County Court on behalf of herself and her children to obtain compensation.

The defendants paid 300*l.* into court.

Afterwards, upon the plaintiff's application, the County Court judge made an order against the defendants, directing them to pay to the plaintiff her costs of the application up to the date of the payment into court.

Against this order the defendants appealed.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides as follows:

Sched. 1, par. (4). The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants. . . . Par. (5). Any question as to who is a dependant, or as to the amount payable to each dependant, shall in default of agreement be settled by arbitration under this Act.

Sched. 2, par. (6). The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. . . .

By the Workmen's Compensation Rules 1898:

Rule 5 (1). In any case in which the amount payable as compensation to the dependants of a deceased workman has been agreed upon or ascertained, but any question arises as to who are dependants or as to the amount payable to each dependant, an application for the settlement of such question by arbitration may be made either by the legal personal representative (if any) of the deceased workman on behalf of the dependants or any of them, or, if there is no legal personal representative, by such dependants or any of them. . . . (2) In any such case . . . if such compensation or any part thereof is still in his (the employer's) hands, he shall be made a respondent. (3) In any such case the employer, if made a respondent, may pay the amount of compensation in his hands into court, to be dealt with as the judge or arbitrator shall direct, and thereupon further proceedings against him shall be stayed.

Powell, K.C. and W. Addington Willis for the defendants.—The County Court judge had no jurisdiction to order the defendants to pay the plaintiffs any of the costs of her application. Under par. 4 of the 1st schedule the defendants'

duty was to pay the compensation to the deceased's legal personal representative, and they were justified in refusing to pay it to the widow unless she was appointed her husband's administrator. The deceased's children were entitled to share in the money, and the defendants would not have been justified in handing over the whole of the money to the widow to dispose of as she liked. The defendants could not pay the money into court. They could not properly pay it to anyone except the administrator of the deceased's estate. The court had jurisdiction to decide between the defendants how the money was to be disposed of, and therefore we admit that the defendants were rightly made respondents in the widow's application. But even then the County Court had no jurisdiction to make this order for costs against them. Par. 6 of the 2nd schedule only gives power to the County Court judge to deal with the costs of the "arbitration and proceedings connected therewith." There was no "arbitration" before the County Court judge, because there was no dispute between the widow and the defendants, who were willing to pay the maximum amount of compensation that is possible. Again under rule 5 (3) of the Rules of 1898, on the money being paid into court further proceedings against the defendants were stayed, and the judge had no power to make any order after that moment against the defendants.

Chester Jones, for the plaintiff, was not called upon.

COLLINS, M.R.—This is an appeal from an order of a County Court judge by which, in the exercise of his discretion, he directed that the defendants should pay to the applicant the costs of her application up to the date when the defendants paid money into court. The case seems to me to be a very simple one when the facts are clearly understood, and I think there is no ground whatever for the defendants' appeal. The applicant is the widow of a workman who died from the effects of an accident which happened while he was in the employment of the defendants. He died intestate, leaving a widow and children. The defendants admitted that they were liable to pay compensation under the Workmen's Compensation Act 1897 to the workman's dependants, and there was no dispute as to the amount, but they refused to pay it to the widow unless she first took out letters of administration. She declined to do that, and made an application for compensation under the Act on behalf of herself and her children. Now, in my opinion, the defendants had no right to insist on the widow taking out letters of administration as a condition precedent to their paying her the amount of compensation which it was agreed that they were liable to pay. She was consequently obliged to commence proceedings under the Act to obtain the sum she was entitled to. The defendants then paid 300l. into court, and thereupon, under rule 5 (3) of the Workmen's Compensation Rules 1898, further proceedings against them were stayed. But how about the costs up to the date of the payment into court? Par. 6 of the second schedule to the Act provides that: "The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator." Now, the facts were that the widow was willing to accept the defendants' offer

of compensation except so far as they made a condition, which they had no right to make, before they paid her the money. She was therefore entitled to take proceedings under the Act to enforce her claim. The County Court judge in these circumstances seems to me to have been perfectly justified in awarding her the costs of her application up to the date of the payment into court. But then it was said that the County Court judge had no jurisdiction to make any such order, because on the money being paid into court all further proceedings against the defendants were stayed. I think it is impossible to say that the provisions of rule 5 (3) negated the right of the County Court judge to deal with the costs necessarily incurred by the applicant in order to get payment of the compensation which she was entitled to.

MATHEW, L.J.—I am of the same opinion. The defendants refused to pay compensation unless the applicant complied with certain conditions which they had no right to make. If the applicant had not taken proceedings under the Act she would never have got any compensation. When those proceedings had been commenced the defendants paid the money into court. I think that the County Court judge had jurisdiction to make the order which the appellants complain of, and that he exercised his discretion properly in making this order.

COZENS-HARDY, L.J.—I agree. When once it is clear that the application to the County Court judge was a necessary one in order to enable the applicant to get the compensation due to her, and that the defendants were properly made respondents, I think the rest follows. The County Court judge had absolute discretion as to the costs incurred up to the payment into court, and I agree that his discretion was rightly exercised.

Appeal dismissed.

Solicitors for the plaintiff, *Shaen, Roscoe, Massey, and Co.*

Solicitors for the defendants, *Treadwell and Aylwin.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

April 29 and May 15.

(Before KEKEWICH, J.)

NIGHTINGALE v. REYNOLDS. (a)

Portions—Mortgage—Legal charge—Equitable charge—Priority.

A testator by his will charged all his real estate with payment of three portions to the children of each of his three daughters. Two of the portions having become raisable, under an order of the court the whole of the testator's real estate was mortgaged, subject to any charges subsisting thereon under the will, to raise the two portions. The third portion had not yet become raisable.

Upon action brought by the mortgagees to determine the respective priorities:

Held, that the third portion, although as yet only charged in equity, ranked pari passu with the mortgagee's legal charge.

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

HENRY MUSKETT, who died in 1851, by his will dated the 16th April 1849 charged all his real estate with the payment of a portion of 5000*l.* to such of the children of his daughter Julia Matilda (then unmarried, but who subsequently married Mr. Etheridge) as should attain twenty-one or marry as therein set out; he also confirmed a bond into which he had entered with the trustees of the marriage settlement of his daughter Mrs. Emily Dashwood for his executors, administrators, and assigns, to pay a sum of 5000*l.* as a portion for such of her children as should attain twenty-one or marry, charging his real estate only therewith, but exonerating his personal estate; he also confirmed a covenant which he had made with the trustees of the marriage settlement of his daughter Mrs. Reynolds, for his executors, administrators, and assigns, to pay a sum of 5000*l.* as a portion for such of her children as should attain twenty-one or marry, charging his real estate only therewith, but exonerating his personal estate.

In May 1880, in consequence of Mrs. Etheridge and Mrs. Dashwood having died and having left children who had attained twenty-one, the portions to be paid to them became raisable, and Henry Joseph Musket, the testator's son and devisee for life of his real estate, then commenced an action properly constituted intituled *Musket v. Musket* to clear the real estate from the charges thereon. Mrs. Reynolds (who is still living) had at that time had several children, one of whom at least had then attained twenty-one.

On the 17th May 1882 an order was made in this action directing that the two portions then raisable, together with the taxed costs and a small sum of 185*l.* 19*s.* 10*d.* for enfranchising copyhold land of the testator's, should be raised by mortgage of all the testator's real estate to one Samuel Nightingale, the mortgage to be settled by the judge.

The mortgage deed so settled made between Henry Joseph Musket and Samuel Nightingale and executed on the 21st July 1883, was expressed to be made as to all the hereditaments comprised therein "without prejudice to any charge which may be subsisting thereon under the said will of the said Henry Musket." The mortgagees duly paid the money lent, amounting to 10,862*l.* 12*s.* 3*d.*, into court, and thereout the two portions of 5000*l.* were paid to the children of Mrs. Etheridge and Mrs. Dashwood entitled thereto, and also 676*l.* 12*s.* 5*d.* was paid out for costs and 185*l.* 19*s.* 10*d.* for enfranchising the copyholds. It appeared that the mortgage debt with arrears of interest was now due and owing, and that the mortgaged hereditaments would prove insufficient in value for the payment in full of the respective sums of money charged upon them, and questions thereupon arose as to the respective priorities of the money lent on the mortgage and the remaining portion of 5000*l.* equitably charged upon the hereditaments though not yet raised.

This was an action brought by Samuel Nightingale, son of the original mortgagee, to whom the mortgage had been transferred, claiming a declaration that he was entitled to priority in respect of his mortgage over the remaining portion of 5000*l.* covenanted to be paid to Mrs. Reynolds' children, and by the will of the testator charged upon all his real estate. The plaintiff also asked for foreclosure or sale.

For the defendants, Mrs. Reynolds, her children, and persons claiming through them, it was alleged that Samuel Nightingale entered into his mortgage with full knowledge of and subject to their charge, and it was submitted that the plaintiff was not entitled to any priority over their charge, and it was further alleged that the charges in favour of their family and Mrs. Dashwood's family took precedence of the charge in favour of Mrs. Etheridge's family by reason that the trustees of the two former were specialty creditors of the testator at the time of his death, so that their charge ranked *pari passu* with that in favour of Mrs. Dashwood's family, but in priority to that in favour of Mrs. Etheridge's family. They admitted the priority of the cost of enfranchising the copyholds, but alleged that the costs of raising the charges ranked with the charges.

P. O. Lawrence, K.C. and T. K. Young for the plaintiff.—We are entitled to priority so far as the two portions and the costs are concerned. We have a legal mortgage sanctioned by the court, whereas Mrs. Reynolds' portion is only charged in equity. With respect to the costs they referred to Seaton's Judgments and Orders, 6th edit., vol. 2, p. 1736.

Warrington, K.C. and Tyssen for Mrs. Reynolds and her children.—The plaintiff took his mortgage with express notice of our charge and subject to it. He can therefore claim no priority over us. Under the will we claim to rank *pari passu* with the other two charges, and as a specialty debt in priority to Mrs. Etheridge's portion. The order of the court could not give the mortgagees any greater right than the will gave the persons in whose favour the charges were made. They referred to

Kidney v. Coussmaker, 12 Ves. Jun. 154.

W. A. Peck, for persons claiming through a deceased child of Mrs. Reynolds, adopted the same arguments.

Daniel Jones for the persons entitled to the testator's estates subject to the charges thereon.

Cur. adv. vult.

KEKEWICH, J.—Henry Musket, the charges on whose real estate have given rise to this action, had three daughters, Emily Louisa Dashwood, Clara Hannah Reynolds, and Julia Matilda Etheridge. The first two married before he made his will, but the other was then a spinster. On the marriage of Mrs. Dashwood he secured to her by bond given to the trustees of her marriage settlement a sum of 5000*l.*, and on the marriage of Mrs. Reynolds he secured a like sum of 5000*l.* by covenant. The sum of 5000*l.*, which was in each case made payable after the death of Henry Musket, was also in each case settled on the children of the marriage attaining twenty-one. In each case a life annuity was also secured as a provision for the daughter and her husband until the 5000*l.* became payable. These annuities must not be lost sight of, and may enter into some questions later on, but I do not propose to complicate this statement of the facts with further reference to them. Henry Musket made his will dated the 16th April 1849. He thereby gave to his daughter Julia Matilda (then unmarried, but who afterwards married Mr. Etheridge) an annuity of 200*l.* for her life, and in case his daughter should marry and leave children, he

gave for the portions of such children attaining twenty-one the sum of 5000*l*. He subjected and charged specified real estate (which was in fact all his real estate) with the annuity to his said daughter, as also with an annuity given to his wife, and with the said sum of 5000*l*. He referred to the bond given on the marriage of Mrs. Dashwood and the settlement of the 5000*l*. thereby secured, and after confirming such bond and settlement in every respect, he exonerated his personal estate from the payment of the several annuities and sums of money so secured and made payable, stating his intention that the same should be charged upon and payable out of his real estate only. He referred to the settlement made on the marriage of Mrs. Reynolds, confirmed that, and also exonerated his personal estate from the payment of the several annuities and sums of money thereby secured and made payable, and stated his intention that the same should be charged upon and payable out of his real estate only. He gave the residue of his personal estate to his son Henry Joseph Muskett, subject nevertheless to and after payment of his just debts and his funeral and testamentary expenses, and certain legacies (not here specified) which he had given to his wife and daughters respectively, and he provided that in case his personal estate should be insufficient for the payment of his debts and funeral and testamentary expenses and the legacies thereinbefore last mentioned, the same should be a charge upon and payable out of his real estate, which he thereby gave to his said son for his life with remainder to his children. Henry Muskett died in 1851. His daughter Julia Matilda married Mr. Etheridge in 1856, and died in 1858, leaving one child, who attained twenty-one in Oct. 1879. Mrs. Dashwood died in 1870. She had two children, who attained twenty-one before May 1880. Mrs. Reynolds had several children, one of whom at least attained twenty-one before May 1880. She is still alive and is the first defendant. In May 1880 Henry Joseph Muskett, the testator's son and devisee for life of the real estate, commenced an action in the Chancery Division, intitled *Muskett v. Muskett*, in order to get the real estate cleared of the charges thereon. The action was properly constituted for this purpose such of the parties interested as were not made defendants in the first instance being served with notice of the decree, and therefore equally bound by the proceedings as if they had been named defendants. There was a statement of claim to which I will refer presently, and on the 3rd July 1880 a decree was made by Hall, V.C. directing numerous inquiries mainly concerned with the parties interested in the real and leasehold estates passing by the will and the charges thereon. The 1st and 13th inquiries are in the following terms: "1. An inquiry whether the debts of the testator other than the bond debt of 5000*l*. to the trustees of Mrs. Dashwood's marriage settlement, and other than the sum of 5000*l*. secured by the testator's covenant with the trustees of Mrs. Reynolds' marriage settlement, in the testator's will respectively mentioned, and whether the funeral and testamentary expenses of the testator and the pecuniary legacies given by his said will other than the portion of 5000*l*. bequeathed to the child or children of his daughter Julia Matilda have been respectively paid. 13. An inquiry

whether any and which of the several portions of 5000*l*. and 5000*l*. in the said will respectively mentioned, and thereby charged upon the testator's real estate in exoneration of his personal estate are now raisable, and to whom such of the said portions as are now raisable ought to be paid." This decree was based on a statement of claim which set forth the will at length, and stated that the plaintiff to whom administration with the will annexed had been granted had long since received and got in the personal estate of the testator, and had paid thereout the testator's debts and funeral and testamentary expenses, and the legacies given by his will, other than the said portion of 5000*l*. for the child or children of his daughter Julia Matilda. It also stated that Mrs. Etheridge and Mrs. Dashwood and Mrs. Holmes, one of the latter's children who had attained twenty-one, had respectively applied to the plaintiff and had required payment of their portions of 5000*l*. and 5000*l*. The plaintiff claimed inquiries respecting the said several sums of 5000*l*. and 5000*l*., and that such sums, if any of them, were then due and payable might be ordered to be raised by mortgage of the real estate, and that provision might be made for raising the other or others of the said portions when the same became payable. It will be observed that the statement of claim and the decree based thereon recognised the distinction between Mrs. Etheridge's portion on the one hand, and the portions of Mrs. Dashwood and Mrs. Reynolds on the other, the former being bequeathed as a legacy, and though charged on the real estate, not so charged in exoneration of the personal estate, whereas the other portions were not in any sense legacies, and were charged on the real estate in exoneration of the personal estate. It will further be observed that the statement of claim contemplated that all the portions might not then be raisable, and that provision for raising those not then requiring to be raised would have to be made, and the decree gives liberty to apply in chambers for raising by sale or mortgage what was necessary for the purpose of satisfying such, if any, of the testator's debts as remained unpaid, and were then raisable out of his real estate, and also what should be certified to be due in respect of the principal of such of the said portions respectively as should for the time being be raisable together with the costs of action. I have referred thus fully to the statement of claim and decree because the important distinction between the portion of Mrs. Etheridge's children and the portions of the children of Mrs. Dashwood and Mrs. Reynolds escaped notice in the arguments before me, and it may lead to some further proceedings. On first recognising the importance of this distinction I thought of calling for further argument at once, but on reflection it seemed to me that further argument would be of no assistance in determining the real point now falling for decision, and that it would be better to determine that point and leave those concerned to raise such further questions as they might be advised. Strange to say, the distinction, though apparent on the face of the decree, was immediately lost sight of, and I am afraid that this has to some extent been the cause of the present litigation. The chief clerk's certificate, in answer to the inquiries directed by the decree, was made on the

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17th Feb. 1882. I need only to refer to that part of it which answers the inquiry No. 13 above set out. The answer to that inquiry commences thus: "Of the several portions of 5000*l.*, 5000*l.* and 5000*l.* in the said will respectively mentioned and thereby charged upon the testator's real estate in exoneration of his personal estate, only the following are now raisable—that is to say." And it then proceeds to find that the portion of 5000*l.* given for the children of Mrs. Etheridge, and also the portion of 5000*l.* given or secured to the children of Mrs. Dashwood, were then raisable and ought respectively to be paid to the persons in the certificate mentioned in that behalf. The decree did not reserve further consideration, but an application was made in chambers under the liberty to apply, and on that application an order was made, dated the 17th May 1882. It provides for the taxation of costs, and after reciting that it appeared by the chief clerk's certificate that the sums of 5000*l.* and 5000*l.* were then raisable in respect of the portion of the children of Mrs. Etheridge and Mrs. Dashwood, it was ordered that the said sums and costs should be raised by a mortgage of the real estate to one Samuel Nightingale, who was willing to lend the same, and that such mortgage should be settled by the judge. Provision was made for the execution of the mortgage in terms which gave rise to some discussion before me, but need not now be noticed. The money lent was ordered to be paid into court, and, after directing payment thereout of the taxed costs, it was further ordered that thereout also the said sums of 5000*l.* and 5000*l.* and 18*s.* 10*d.* which had been expended in the enfranchisement of copyholds should be paid to such persons as should be certified entitled to receive the same and in such proportions as should be also certified. The mortgage, to which I will presently return, was settled and executed as directed by the order, the moneys lent, including the taxed costs and the enfranchisement moneys, amounting altogether to 10,862*l.* 12*s.* 3*d.* were paid into court, and on the 2nd Aug. 1883 there was a further certificate finding to whom the moneys were payable. For the present purpose it is sufficient to say that 5000*l.* was certified to be payable and was paid to the trustees of Mrs. Etheridge's only child, and 5000*l.* was found payable and was paid to the children of Mrs. Dashwood or those claiming through them. The mortgage is dated the 21st July 1883, the parties being Henry Joseph Muskett and Samuel Nightingale. So much was made of this document on behalf of the plaintiff that it is worth while to particularly mention the important passages. It is a lengthy document, and there are many recitals, including of course all the Chancery proceedings. There are recitals to the effect that the portions of Mrs. Etheridge and Mrs. Dashwood were raisable by reason of those ladies having had children who attained twenty-one, and there is a recital that Mrs. Reynolds was still living and had had several children, but their ages are not mentioned. The operative part runs as follows: "Now this indenture witnesseth that in further pursuance of the said recited order, and by virtue thereof and in consideration of the said sum of 10,862*l.* 12*s.* 3*d.* as paid by the said Samuel Nightingale as aforesaid he, the said Henry Joseph Muskett, as beneficial owner so far as

relates to his estate or interest for life under the said recited will of the said Henry Muskett in the hereditaments intended to be hereby assured, and so as to pass the full benefit of the charge created by the same will in priority to the said life estate or interest for the purpose of raising the portions of 5000*l.* and 5000*l.* provided respectively for the child or children of the said Julia Matilda Etheridge and for the children of the said Charles Burton Dashwood and Emily Louisa his wife, and the interest on the same portions respectively, and as trustee so far as relates to the estate or interest of the persons entitled in remainder in the same hereditament, hereby grants and conveys unto the said Samuel Nightingale all and singular the manor or lordship, or reputed manor or lordship, advowson, capital, and other messuages, farms, lands, tenements, and hereditaments, specified and particularised in the schedule hereunder written, being part of the hereditaments and premises mentioned in the first schedule to the chief clerk's certificate made in the said action, to hold unto and to the use of the said Samuel Nightingale in fee simple, and particularly as to the premises specified and particularised in the second part of the said schedule thereto with the full benefit and advantage of the enfranchisement intended to be made thereof as aforesaid; but as to the premises specified and particularised in the third part of the same schedule according to the custom of the same manor of Burgh Vaux, and by and under the rents, suits, and services therefore due and of right accustomed and subject as to the life estate or interest of the said Henry Joseph Muskett to the mortgage thereon hereinbefore mentioned, and as to all the said hereditaments and premises without prejudice to any charge which may be subsisting therein under the said will of the said Henry Muskett, subject to the proviso for redemption hereinafter contained. It appears from what is above set out and otherwise in the deed that Henry Joseph Muskett had incumbered his life estate, and this explains some complications in the form of conveyance, but it is really immaterial for the present purpose, and cannot in the least affect the substance of the deed or any question arising thereon. The proviso for redemption is in effect that, on the principal and interest being paid, the property shall be conveyed to the then subsisting uses or limitations of the will. The plaintiff, who is not the original mortgagee, but takes his place by transfer, insists that under this deed the legal estate is vested in him. This must be so. The order of the 17th May 1882 is not expressed in the form generally adopted where one is appointed to convey on behalf of others who are treated as trustees, but it was undoubtedly the intention of the order to vest in the mortgagee the estate of the testator and such other estate as had been acquired under the orders of the court, and I cannot think that the neglect to follow the prescribed forms can diminish the effect of the order which was otherwise properly made in an action properly constituted for that purpose. The point is not to my mind one of much importance, but the plaintiff is so far right. This action has been brought for the purpose of asserting the plaintiff's rights as mortgagee and obtaining the relief to which he is entitled in that character. The serious and indeed only question is whether the plaintiff is

first mortgagee for the sum which he advanced, or whether Mrs. Reynolds' portion of 5000*l.* will have to be raised out of the same real estate on the footing of equality. The plaintiff contends that he is entitled to priority, and that whenever Mrs. Reynolds' 5000*l.* comes to be raised by a mortgage, that mortgage will be subject to his, so that the new mortgage will be a second charge, which the property may be unable to bear. The defences of those interested in Mrs. Reynolds' portion raise a point which I have found some difficulty in appreciating. They say, as I understand them, that because Mrs. Reynolds' and Mrs. Dashwood's portions were debts—and one defence adds specialty debts—therefore they are in a better position as regards priority of charge on the real estate than Mrs. Etheridge's portion, which was mere bounty, and that, therefore, Mrs. Reynolds' portion must rank *pari passu* with Mrs. Dashwood's portion, and that that of Mrs. Etheridge must be postponed to their portion, and they seek to impeach the plaintiff's claim of priority in this manner and to this extent. In the general administration of the testator's real and personal estate, for which the assistance of the court has not yet been invoked, this distinction between Mrs. Etheridge's portion on the one hand and the other two portions on the other (not, be it observed, the same distinction as that to which I have called attention in an earlier part of this judgment) may be of importance and may give rise to some nice questions, but for the present purposes we are only considering how and in what order the several portions are charged on the real estate by the will, and are raisable by reason of that charge, and are not at all concerned with the fact that some or all of the portions might for other purposes and in some other proceedings have been directed to be raised independently of that charge, and so raised accordingly. In what has been just said I have really decided the main question. Not only is the mortgage expressly made without prejudice to any charge which might be subsisting on the real estate under the will, but the whole form and substance of it go to show what undoubtedly must be the fact, that the whole object of the court in sanctioning and directing that mortgage was to give effect to the testator's directions respecting certain charges on his real estate so far as it was then convenient to give effect to them without for a moment ignoring whatever other charges he might have created thereon. The action was, as already remarked, properly constituted for the purpose of clearing the real estate; but it was not competent to the court in such an action to do more than investigate the charges on the real estate created by the testator's will and to provide for them as occasion required. This is the tenour of all the proceedings, including the order of the 17th May 1882. It is also the tenour of the mortgage deed itself. It may be that, looking back with subsequently acquired knowledge, we can say that it would have been better to have raised all the portions at one and the same time; but this is quite a different thing from saying, and we are not entitled to say, that the court, in fulfilling the testator's directions, which was its only duty, intended to place two of the portions in a better position than the third, or, in other words, to give the mortgagee a charge for the two in

priority to the third, which was from the first equally entitled to a like charge under the will. Nor can the mortgagee or the plaintiff claiming through him complain because, even if the mortgagee did not know for certain, as perhaps he did not, although it was a fact that the third portion would ultimately have to be raised, yet he did know that it would be a charge if there were children of Mrs. Reynolds to claim it, and that at least there were children in existence entitled in expectancy. In my judgment, therefore, the plaintiff can only claim a charge on the real estate for the two sums of 5000*l.* *pari passu* with the third sum of like amount, and this notwithstanding that this third sum is at present only charged in equity by virtue of the will, whereas the plaintiff has a legal mortgage sanctioned by the court. To put it in other words, he cannot claim priority by reason of his legal mortgage as against another charge of equal rank in equity of which he had express notice, and subject to which he accepted his mortgage. Having regard to the many possible questions which may have to be argued and worked out in order to give all parties their equitable rights (if in truth they can now all be secured in full), I think it better not only to content myself with deciding the one question of law which was the subject of argument before me, but further to suggest that before anything further is done, it will probably be better for the parties interested to consider their respective positions and to take an opportunity of ascertaining the facts hitherto not brought into prominence, and, so far as I am aware, not yet ascertained, which are necessary to a correct view of these positions. Obviously, for instance, it is impossible to adjust the rights of the parties without inquiring into the administration of the personal estate, about which I know nothing beyond what is mentioned in the statement of claim quoted above. But there are two subordinate questions which were discussed and can conveniently be disposed of. It has been mentioned incidentally that a sum of 185*l.* 19*s.* 10*d.* was required to carry out the enfranchisement of certain copyhold lands subject to the uses of the will. This was added to the sum which the mortgagee advanced, and was paid by the order of the court to the lord of the manor for such enfranchisement. It is agreed on all hands that all parties interested in the real estate have had and will have the benefit of this enfranchisement, and that it was necessarily raised for this purpose. There can be no question but that the plaintiff is entitled to priority as regards this sum. The mortgagee also advanced the sum of 676*l.* 12*s.* 5*d.*, the amount of the costs of the action of *Muskett v. Muskett*, including the costs of the mortgage itself, which costs were, by the order of the 17th May 1882, directed to be taxed and paid to the persons entitled to receive the same. About the position as regards the other incumbrances of this sum there was some discussion, and it was urged for the plaintiff that he is entitled to priority as regards this sum also. It is quite settled: (see *Armstrong v. Armstrong*, 18 Eq. 541) that trustees who have power to raise a certain sum by mortgage for the benefit of a particular person or class of persons, have also by implication power to raise the incidental costs by mortgage of the same property, and if and whenever it becomes necessary to resort to the court for the

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purpose of enforcing and raising a charge, it is the established rule that the costs of the proceedings are also raised as an addition to the original charge. There may, of course, be cases in which there has been litigation in the strict sense of the word, the costs of which the court may hold to be payable either wholly or partially by those who are responsible for the litigation, but where the proceedings are of an administrative character the general rule obtains as to the entire costs of such proceedings. Any other result would be unjust to those entitled to the benefit of the charge, who would get, not what the testator has provided for them, or which has been secured by some bond or covenant, but only that sum less costs which might amount to a considerable deduction. Cases dealing with a different character of administration need not be noticed, for the proceedings in *Muskett v. Muskett* clearly belong to the general class above indicated. It may hereafter be necessary to distribute the costs of that action, including the costs of the mortgage, between the portions of Mrs. Etheridge and Mrs. Dashwood, but it is clear to my mind that, regarding the mortgage as a whole, the costs are attached to the aggregate sum of 10,000*l.*, and the plaintiff is entitled to the same priority as regards the principal sum, and no more or less.

Solicitors: *Pasco Daphne; J. M. Yetts; Grundy, Isod, and Co., for Wiltshire and Sons, Great Yarmouth; Iliffe, Henley, and Sweet.*

KING'S BENCH DIVISION.

Nov. 25, 1901, and Jan. 28, 1902.

(Before WILLS, J. at Manchester Assizes.)

MEE v. CRUIKSHANK. (a)

Prisons—Governor of prison—Prisoners—Legal custody of, during trial in court—Illegal detention of prisoner by warder after acquittal—Liability of governor for illegal act of warder—Prison Act 1865 (28 & 29 Vict. c. 126), ss. 58, 63—Prison Act 1877 (40 & 41 Vict. c. 21), ss. 5, 35—Prison Rules for Local Prisons of April 1899, rr. 103, 124.

The legal custody of prisoners when at the place of trial and during actual trial in court is in the governor of the gaol from which they have come, or from which, if bailed, they would have come if they had not been bailed, as the effect of the Prison Act 1865 and the subsequent legislation has been to transfer such custody from the sheriff to the gaoler; and consequently, if, after a prisoner, whether he has come from the prison or having been admitted to bail has surrendered in court to take his trial, has been tried, acquitted, and ordered to be discharged, the warders unlawfully detain him, the governor of the prison is responsible for the illegal act of the warders, although he may not have been present in court or have ordered or directed it.

The plaintiff was committed to quarter sessions on a charge of felony; he was admitted to bail, he surrendered, took his trial, and was acquitted, and was ordered by the chairman of the court to be discharged; whereupon the warders who were in charge of the prisoners for trial, instead of allowing the plaintiff to go, took him to the cells below the court and detained him for a consider-

able time, and questioned him as to his age, parentage, and other particulars, and noted down his answers in a book, and afterwards allowed him to go. The governor of the prison from which the plaintiff would have come if he had not been bailed was not present in court, and the unlawful detention by the warders was not by his orders or directions. In an action for false imprisonment against the governor:

Held, that the legal custody of the plaintiff after he had surrendered and during his trial was in the governor of the prison, and that the governor, whose duty it was to see that the plaintiff was properly discharged after acquittal, was responsible for the illegal acts of the warders in so detaining the plaintiff.

FURTHER consideration by WILLS, J. at Manchester, in an action tried before him with a special jury at the Manchester Assizes on the 11th Nov.

The action, which was originally brought in the Manchester County Court, but was removed by *certiorari* to the High Court, was brought by the plaintiff, John Mee, an infant suing by his father, against the defendant, Robert Cruikshank, the governor of His Majesty's prison at Strangeways, Manchester, to recover 50*l.* damages for an alleged false imprisonment.

The statement of claim alleged that on the 15th April 1901 the plaintiff having entered into recognisances to appear and take his trial at the quarter sessions to be held at Strangeways, Manchester, did so appear and was tried and acquitted and discharged; and that after his acquittal and discharge the defendant by his servants or agents, or persons under his control, wrongfully assaulted and falsely imprisoned the plaintiff and detained him for a long time, and searched and examined him and recorded in a book certain distinctive marks personal to the plaintiff.

The defendant in his defence said (*inter alia*) that he was the governor of His Majesty's prison at Strangeways, Manchester, and was appointed such by the Home Secretary under the provisions of sect. 5, sub-sect. 2, of the Prison Act 1877; that the warders of the prison were not appointed by him, and that he had no power to dismiss them, nor did he pay them; that he did not after the acquittal and discharge of the plaintiff, by his servants, agents, or persons under his control, do the acts complained of, and that after such acquittal and while the plaintiff was in lawful custody a warder in charge of him asked him certain questions and wrote down his answers thereto, and at the same time noted down from observation a description of the plaintiff's personal appearance, &c.; and the defendant denied that the acts complained of were done by him or by his order or authority.

The facts as proved at the trial were these: The plaintiff, who was a carter and was about twenty years of age, was arrested on a charge of stealing a sack of oats at Eccles in April. He elected to be tried by a jury, and he was accordingly committed for trial to the quarter sessions to be held at Manchester. He was then released on bail, and at the quarter sessions he surrendered, pleaded not guilty, was tried and was acquitted, whereupon the chairman of quarter sessions directed him to be discharged. At the time the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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jury returned their verdict the grand jury had not been discharged. After the plaintiff had been acquitted and the chairman of quarter sessions had ordered him to be discharged, the warder in charge of the plaintiff, instead of discharging him, took him to the cells below the court and, according to the plaintiff's account, he was locked in a cell and detained there for about an hour, but, according to the warder's account, for only a quarter of an hour; shortly afterwards another warder came with a book and questioned the plaintiff as to his age, place of birth, trade, religion, residence, the address of his father, and other particulars, and his answers thereto, and a description of the plaintiff's personal appearance and characteristics were noted down in a book. The warder then left, but returned in a few minutes and gave the plaintiff some articles which had been taken from him before his trial. The plaintiff was then taken to the chief warder in court, when he was allowed to go.

He then brought the present action for assault and false imprisonment against the governor of the prison. The governor of the prison was not present in court at the trial of the plaintiff, and the alleged detention of the plaintiff was not by him or by his orders or directions. The jury found a verdict for the plaintiff, and awarded him 50*l.* damages, and the question of law as to the liability of the governor for the acts of the warders was then reserved by the judge for further consideration.

The Prison Act 1865 (28 & 29 Vict. c. 126) provides:

Sec. 4. "Prison" shall mean gaol, house of correction, bridewell, or penitentiary; it shall also include the airing grounds or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto; "gaoler" shall mean governor, keeper, or other chief officer of a prison.

Sec. 58. Every prisoner confined in a prison shall be deemed to be in the legal custody of the gaoler, provided that nothing in this Act contained shall affect the jurisdiction or responsibility of the sheriff in respect of prisoners under sentence of death, or his jurisdiction or control over the prison where such prisoners are confined, and the officers thereof, so far as may be necessary for the purpose of carrying into effect the sentence of death, or for any purpose relating thereto; and in any prison in which sentence of death is required to be carried into effect on any prisoner, whether such prison is or not the common gaol of the county, the sheriff shall, for the purposes of carrying that sentence into execution, be deemed to have the same jurisdiction with respect to such prison as he has by law with respect to the common gaol of a county, or would have had if this Act had not passed.

Sec. 63. A prisoner may be brought up for trial, and may be removed by or under the direction of the gaoler from one prison to another, or from one place of confinement to another, to which such prisoner may be legally removed, for the purpose of being tried or undergoing his sentence, and no prisoner whilst in the custody of a gaoler shall be deemed to have escaped, although he may be taken into different jurisdictions or different places of confinement.

The Prison Act 1877 (40 & 41 Vict. c. 21) provides:

Sec. 5. Subject as in this Act mentioned—(2) The appointment of all officers, and the control and safe custody of the prisoners in the prisons to which this Act applies; also all powers and jurisdiction at common law or by Act of Parliament or by charter vested in or exer-

cisable by prison authorities or the justices in sessions assembled, in relation to prisons or prisoners within their jurisdiction, shall, on and after the commencement of this Act, be transferred to, vested in, and exercised by one of Her Majesty's principal Secretaries of State, in this Act referred to as the Secretary of State.

Sec. 35. The officers attached to prisons at the time of the commencement of this Act (in this Act referred to as existing officers of a prison) shall hold their offices by the same tenure, and upon like terms and conditions, as if this Act had not passed, and shall receive salaries of not less amount than those which they have hitherto received. Such existing officers as aforesaid may be distributed amongst the several prisons to which this Act applies in such manner as may be directed by the Secretary of State, and they shall perform such duties as they may be required to perform by the said Secretary of State, so that such duties are the same or analogous to those they performed previously to the commencement of this Act, and, subject as aforesaid, they shall perform the same duties as nearly as may be as they are performing at the time of the commencement of this Act.

The Prison Act 1898 (61 & 62 Vict. c. 41) provides:

Sec. 2 (1). The Secretary of State may make rules (in this Act called prison rules) for the government of local prisons and convict prisons, and may thereby regulate, among other things—(a) any matter dealt with by the regulations in schedule 1 to the Prison Act 1865; and (b) any matter which under this Act may be regulated by prison rules.

The Prison Rules, dated the 21st April 1899, made by the Secretary of State under the above Act, which came into operation on the 1st May 1899, provide:

Rule 103. All officers of the prison shall obey the directions of the governor, subject to the prison rules, and all subordinate officers shall perform such duties as may be directed by the governor, with the sanction of the commissioners, and the duties of each subordinate officer shall be inserted in a book to be kept by him.

Rule 124. The governor shall strictly conform to the law relating to prisons and to the prison rules, and shall be responsible for the due observance of them by others. He shall observe the conduct of the prison officers, and enforce on each of them the due execution of his duties, and shall not permit any subordinate officer to be employed in any private capacity, either for any other officer of the prison or for any prisoner.

Rule 125. The governor, in case of misconduct, may suspend any subordinate officer, and shall report the particulars without delay to the commissioners.

Nov. 25.—*Shee, K.C. (Edmund Sutton with him) for the defendant.*—The question is whether the relationship in which the governor of the prison stood to the warders was such as to make the governor liable for the illegal acts of the warders. If there were any illegality committed by the warder then the warder and not the governor would be liable. Even if the plaintiff had been in the legal custody of the governor, the governor would not be liable for any illegal act done by the warder. The warder was not authorised to do an illegal act, and even if the illegal act of the warder had been done in the gaol itself the governor would not have been responsible unless he had ordered it, or had been present and had sanctioned it. Even if the governor as gaoler had appointed the warder to act as gaoler in court, that could only have been an employment of the warder to do the work lawfully. It could not have been an employment of the warder to do the work unlawfully or ille-

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gally, and if in carrying out the work the warder had acted illegally the governor would not have been liable. The plaintiff had been acquitted and discharged, and it was the warder's duty to discharge him. Instead of doing his duty he detained and took him to the cells below and questioned him. These were acts done by the warder after his duties as warder to the governor had ceased; and clearly the governor cannot be held responsible for such acts. [WILLS, J.—The warrant of commitment says that the prisoner is committed to the custody of "the gaoler and keeper of the house of correction" to "safely keep him until he shall be thence delivered by due course of law." That would be a strong argument to show that the prisoner committed for trial was in the custody of the gaoler.] That might be so if the prisoner came direct from the gaol; but it would not apply to prisoners out on bail who are not in the statute described as "prisoners." [WILLS, J.—As soon as a prisoner who is out on bail surrenders he must be in the custody of somebody; it would seem to me that he must be in the same custody as he would have been in if he had been in custody all the time and had not been out on bail, and if he had not been out on bail, he would have been in the custody of the gaoler. That would seem to show that the jurisdiction of the gaoler is the same in the case of a prisoner who has surrendered to his bail as in the case of a prisoner who has not been on bail.] When he surrenders he is then in the custody of the "proper officer of the court," and the officers in court are not gaolers in the same sense as when they are in the prison. The "proper officer of the court" probably means the warder in the dock, and as the plaintiff could not be said to be a "prisoner," the governor, even if present in court, could not have the custody of him as governor of the gaol, but only as an officer of the court; and as the warder could only have had the custody of the plaintiff as gaoler or officer of the court, and could have had no relationship in that capacity to the governor as governor of the prison, the governor cannot be responsible for the illegal acts of the warder. At the time of the detention the grand jury had not been discharged, and until their discharge the plaintiff's detention was justified. He referred to the Prison Acts 1865 and 1877, and the Standing Rules for Local Prisons, drawn up by the Home Office, and dated the 21st April 1899.

C. H. M. Wharton for the plaintiff.—By the terms of a commitment warrant a prisoner is committed to the custody of the governor of the gaol. When a prisoner is admitted to bail the warrant is for the time being suspended, but when he surrenders the warrant is again in force and the prisoner is in the same custody as before; as, when he surrenders to his bail, he must surrender to the same person to whom the warrant was originally made out—that is, to the governor of the prison, the gaoler. The act done by the warder was an act done by him in the interests of the gaoler. The gaoler is made responsible by the Acts of Parliament, and he is responsible for the acts of his agents, the warders, and by the regulations it is the duty of the gaoler to see that those regulations are properly carried out. The relationship between the governor and the warder is similar to that of principal and agent, for the warder is bound

to obey the governor, whose subordinate officer he is. The dock and place where prisoners are kept for trial are clearly parts of the prison; and, if so, the plaintiff was confined within the prison and was in the legal custody of the gaoler, who is therefore responsible for the illegal acts done by the warders. [WILLS, J.—The case is one of very great importance, and I must consider it carefully.] *Cur. adv. vult.*

Jan. 28.—WILLS, J. at Manchester read the following judgment: The plaintiff was committed to the quarter sessions holden at Strangeways, Manchester, in April 1901, on a charge of felony. He was admitted to bail, surrendered, took his trial, and was acquitted, whereupon the chairman of quarter sessions directed that he should be discharged. He was, however, taken by the warders of the gaol to the cells below the court, and was there detained until a warder had questioned him as to his name, parentage, and a number of particulars, and had taken a note of his answers and also of his personal and physical characteristics. The detention occupied, according to the warders, a quarter of an hour, according to the plaintiff, an hour. He was then allowed to depart. The defendant is the governor of the gaol at Strangeways. He was not present at the trial of the plaintiff, being engaged elsewhere on duties connected with his office; and the detention of the plaintiff was actually effected not by him or his orders, but by the warders who were in charge of the prisoners who had to take their trials. The jury assessed the damages for the plaintiff's detention, and for the indignity to which he was subjected, at 50*l.* The question I have to decide is whether the defendant is liable for the acts of the warders. They are not his servants. He cannot either appoint or dismiss them, and he does not pay them. Their duties are regulated by Act of Parliament and by rules made under statutory authority. It is, therefore, not a case in which the rules as to the liability of a master for the acts and defaults of his servants apply, and the liability of the defendant, if it exist, must depend upon the status of the gaoler in respect both of the officers of the prison and the prisoners. The first step in the inquiry appears to me to be to ascertain in whose custody are prisoners when actually upon their trial. At common law the custody of all prisoners committed for trial or convicted of indictable offences was in the sheriff: (see 4 Edw. 3, c. 10, and the references to him in 19 Hen. 7, c. 10; 24 Geo. 3, c. 54, s. 6, c. 56, s. 8; and 31 Geo. 3, c. 46, s. 3). The gaoler was his officer. I cannot find any express authority that the prisoner during his trial was still in the custody of the sheriff, but neither can I find any trace of authority for the proposition that he was in the custody of anyone else. The inconvenience of a shifting right to the custody of the prisoner would be very great, and I cannot suppose that at common law anything of the kind took place. The gaol was in old times the only public establishment for the imprisonment of persons committed on remand, or for trial, or under sentence, and the gaoler the only principal officer appointed to keep such prisoners in ward; he was appointed by the sheriff and paid either by the sheriff or by the fees he was entitled to take from prisoners. By degrees other kinds of prisons for

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convicted offenders were constituted by Acts of Parliament under the names of bridewell, houses of correction, and penitentiaries, and statutes have been passed from time to time, especially within the last one hundred and fifty years, to regulate the mode of appointment and remuneration of gaolers and of the keepers of the other prisons I have mentioned: (see, for example, 24 Geo. 3, c. 54, s. 20; 31 Geo. 3, c. 46, s. 1), but no Act affecting the legal custody of persons confined in the common gaol was passed until 28 & 29 Vict. c. 126 (the Prison Act 1865), and up to that time the custody of such persons was in the sheriff. By sect. 58 of that Act, every person confined in a prison is to be deemed to be in the legal custody of the gaoler, except prisoners left for execution, as to whom the authority and jurisdiction of the sheriff remains unaltered. It follows that, with this exception, prisoners in a prison are no longer in the custody of the sheriff. "Prison" is defined by sect. 4 to mean a "gaol, house of correction, bridewell, or penitentiary," and "gaoler" to mean "governor, keeper, or other chief officer of a prison." Sect. 58 therefore applies to persons under remand, committal, or sentence, and in one of the classes of prisons enumerated. It does not touch the detention of a prisoner on the way from a prison to the place of trial, nor during the period when he is at the place of trial but untried, or during trial. By sect. 62 the sheriff is relieved of the duty of preparing and delivering to the judges of assize, or to the justices in quarter sessions, a calendar of the prisoners in custody for trial at such assizes or sessions, and this duty is cast upon the gaoler. By sect. 63 a prisoner may be "brought up for trial"—the expression is in the Act—and may be removed by or under the direction of the gaoler from one prison to another, or from one place of confinement to another to which such person may be legally removed for the purposes (amongst others) of being tried, and whilst in the custody of a gaoler shall not be deemed to have escaped, although he may be taken into different jurisdictions or different places of confinement. I have been unable to find any other statutory authority for the detention of prisoners at and within the precincts of the court houses at which they take their trial. But the practice of detaining prisoners at such places immediately before and after trial is as old as any part of our legal history, and I cannot doubt that the cells attached to a court-house where criminal justice is regularly administered, and the dock itself in the court, are places of confinement to which prisoners committed for trial may be legally removed for the purpose of being tried. The gaoler, therefore, of the prison to which an untried prisoner is committed may order his removal to the cells attached to the court house and to the dock for the purpose of being tried. The expression "brought up for trial" must cover appearance in the dock. By 40 & 41 Vict. c. 21 (the Prison Act 1877), s. 5, the control and safe custody of the prisoners in the prisons to which the Act applies, was transferred to the Secretary of State. I do not, however, think that the Act meant to alter the status of the gaoler in respect of the prisoners. The expression used is that the "control and safe custody" of the prisoners shall be vested in the Secretary of State. I think the intention was to give him a general

supervision and superintendence, and not to restrict the legal right of the gaoler to confine his prisoners. The section applies not only to the transfer of the "safe custody" of prisoners, but to that of the appointment of all officers in prisons and the powers of various prison authorities. Sect. 35 provides in express terms that the officers attached to prisons shall hold their offices by the same tenure and upon the like terms and conditions as if the Act had not been passed, and that subject to the orders of the Secretary of State requiring them to perform any duties analogous to those already performed by them, they shall perform the same duties as nearly as may be as they were performing before that Act was passed. So far as this case is concerned, the term "prison" in this Act bears the same meaning as in the Act 28 & 29 Vict. c. 126, above cited. The same Act gave the Secretary of State power to make rules: amongst other things which the Secretary of State may do is the specification of duties which the prison officers may be required to perform (sect. 35). Rules were made, dated the 21st April 1899. In these rules the gaoler is always spoken of as the governor. Rule 103 is very nearly a repetition of regulation 93 appended to 28 & 29 Vict. c. 126. By sect. 20 of that Act (that is, of 28 & 29 Vict. c. 126) such rules are to have the same force as if they were in the Act itself. Rule 103 of the Secretary of State's Rules provides that all officers of the prison shall obey the directions of the governor and all subordinate officers (which the warders are), shall perform such duties as may be directed by the governor. Rule 124 is a repetition of regulation 69 in the schedule to the same Act (28 & 29 Vict. c. 126), and provides that the governor shall be responsible for the due observance "by others" (which must include the warders) of the law relating to prisons and of the prison rules. He is also to enforce on each of the subordinate officers the due execution of his duties. Before the Act of 1865, which vested the custody of prisoners in prisons in the gaoler instead of the sheriff, certain Acts of Parliament were passed which appear to treat what was done at shirehalls in respect of trials as mere parts of the common law. By various statutes, of which the most important are 7 Geo. 4, c. 63; 7 Will. 4 and 1 Vict. c. 24; and 10 & 11 Vict. c. 28, powers were given to county justices to build, acquire, rent, or contract for the use of buildings for the purpose of holding assizes and sessions therein, and the only provision for the exercise therein by any one of powers of detention and custody is an enactment that all things done therein shall be as valid as if done in the ancient and immemorial shirehalls. It may be mentioned by way of illustration that when Birmingham was made by Orders in Council an assize town, no provision was made by statute, or by order made under statutory authority or otherwise, for the custody of prisoners. For some years the assizes were held in the municipal buildings, which had no special provisions for the safe keeping of prisoners, who were detained when awaiting trial in some of the ordinary rooms in the buildings, never designed for any such purpose and never appropriated to it by statute. I believe the same state of things existed when a few years back, upon the occasion of an epidemic of typhoid at Maidstone, the assizes were held at Canterbury. In both

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cases, no doubt, the conditions required by the statutes I have cited existed, and thereupon it was assumed that the common law provided for all that was necessary. Up till the Act of 1865, therefore, such matters were left to the common law, and there can, I think, be no doubt that by common law the sheriff had the legal custody of persons committed for trial, during preliminary detention, during removal to and from the shire-hall or other place of trial, until trial and during the trial itself, and in the case of convicted prisoners during removal back to the prison and whilst they were serving their sentences in the prisons; and the question is reduced to whether it can be collected from the Act of 1865 and subsequent legislation that the custody was thereafter to be that of the gaoler, at the place of trial and during trial. I have come after careful consideration to the conclusion that, although the legislation may be somewhat wanting in distinctness, such was the intention of the Legislature. If it were not so, there would be a shifting custody, the custody being in the gaoler during removal to the place of trial and during removal back to the prison, and until he is "brought up for trial"—that is, until he appears in the dock (for I do not think it can be doubted that such is the effect of sect. 63), and in the sheriff during and till the end of the trial—a most inconvenient arrangement, and one which it is extremely unlikely that the Legislature should have intended. His jurisdiction and responsibility in respect of persons under sentence of death are expressly reserved. Nothing in the Act is to affect them (sect. 58). It would be strange if an Act which dealt specially with his status as to prisoners sentenced to death should, if it was intended that his responsibility as to such prisoners amongst others during the actual trial should continue unaffected, have made the saving clause begin to operate only after sentence. A further portion of sect. 63 has a bearing upon the subject. The prisoner is not to be deemed to have escaped whilst in the custody of "a gaoler," though taken into a different place of confinement, and into different jurisdictions. This general expression covers, and was, I have no doubt, meant to cover, such a case as that of a prisoner removed from one of the local prisons in the county to Strangeways prison for trial at Manchester. Can it be doubted, in the face of such a section, that upon being removed from Manchester gaol to the cells below the court, he would, although in a different place of confinement, still be not "escaped," but in the custody of the only gaoler who could bring him there, and also the only gaoler who ever interferes with or regulates prisoners when so brought from the gaol? In no court-house that I have ever sat in is there a gaoler appropriated either to the cells belonging to the court-house or to the dock; and the only person who ever acts as gaoler there is the gaoler of the gaol from which the prisoners are brought for trial. In sect. 66 provision is made for cases in which under the powers of the Act the authorities of one prison may contract with the authorities of another prison for the reception of prisoners who would naturally and primarily go to the first prison. Under such circumstances the prison of the receiving authority shall be deemed to be the prison of the contracting authority for all purposes incidental to the commitment,

trial, detention, and punishment of the prisoners of the contracting authority. These words are, I think, meant to cover the whole of the processes by which arrest develops into punishment; and the whole series of events are treated as attached, so to speak, to the prison. The expenses to be paid for by the contracting authority to the receiving authority, are to include all costs incurred in respect of the prisoners: (sect. 32). There is no doubt that the prisoners sent from any prison for trial at any place outside the prison are maintained during detention at the assizes or sessions by the prison from which they come; which is a strong reason for concluding that they are still in the custody of the gaoler of that prison. It has been suggested that different considerations apply to a prisoner on bail, but I do not think that it makes any difference whether he was committed to prison, or was out on bail. When once he has surrendered he must be in the same custody as if he had been in prison awaiting his trial. The condition on the bail bond is that he shall surrender himself into custody, which must be the same custody as that of prisoners who have not been on bail. I thought that some light might have been thrown upon the question raised in this case by the form of commitment given in Jervis' Act (11 & 12 Vict. c. 42, form H in the schedule), but clearly the framers of the Act did not think of the removal to a distant court, and detention and trial there. The only direction given to the gaoler is "to receive him into your custody in the said prison, and him there safely to keep until he shall be thence delivered by due course of law." It is obvious that no gaoler who removed a prisoner out of a prison to a court for trial ever did obey the direction to keep the prisoner "in the prison" till his delivery thence by due course of law. Indeed, it is an impossible direction, and therefore affords no assistance towards the solution of the present question. It is, however, of some importance to observe that the condition of the bail bond is that the accused shall appear at the assizes or quarter sessions in question, and there surrender himself to the custody—of whom? Not of the sheriff, but of the keeper of the common gaol, or whatever the prison may be to which such keeper belongs. It is the constant practice, and must have been so in the year 1848, when that Act was passed, for the surrender to take place when the case is actually called on for trial. If I am right in the view that a prisoner when on trial is in the custody of the gaoler of the prison from which he came, if not on bail, or from which, if bailed, he would have come had he not been bailed, it follows, I think, that the gaoler ought either to set him free, or to take care that he is set free, when the court has ordered his discharge. It is true that the gaoler cannot always be present in court; but it is an important part of his duty to exercise control over what is done there to prisoners. It is true that the officers are not his servants, and he is not responsible for what they do, or do not do, on that ground, nor probably to the same extent as if they were his servants, but they are bound to obey his orders (Regulation 93 in the schedule to 28 & 29 Vict. c. 126, and r. 103 of April 1899). I do not rely upon the expressions either in the schedule to the Act 28 & 29 Vict. c. 126, or in rule 124 of the Rules of April 1899, that the gaoler shall be responsible for the due

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observance by others of the law relating to prisons and to the prison regulations as imposing upon him an unqualified civil responsibility for any breach of these duties by a warder; but the legislation certainly imposes upon him the necessity of taking ordinary precautions that his officers shall exercise their duties in a manner consistent with law, and the least he can do, if he cannot be present, is to tell his officers what they ought to do, and to take some care that they do not act as they did in the present case. The warder in charge of the prisoners at the quarter sessions in question appeared to have no notion that there was anything improper in putting a man, who had been acquitted, into a cell, questioning him as to his birth, parentage, age, religion, and the like, and taking down particulars of his appearance and physical characteristics. It is an instructive fact worthy of the notice of those who industriously compile what are called judicial statistics as to criminal matters, that one of the "particulars" entered by the warder on his sheet was "reading imperfect." I asked whence the information came. The warder's answer was "we get that from his appearance." The defendant was called and examined upon several points, but he did not say that he had ever told the warders that a man who had been acquitted ought to be discharged at once and not put in a cell, detained, questioned, or have any record made of his appearance or history. It was urged upon me for the plaintiff when the case was argued before the close of the assizes, that the cells in question were really a part of the Strangeways prison. The point was not made when the case was before the jury, and although they very possibly might have found that they were so, there is no such finding, and I therefore cannot act upon any such view. In my opinion, however, the defendant is liable on the other grounds already discussed, and I must therefore give judgment for the plaintiff.

Judgment for the plaintiff for 50l.

Solicitors for the plaintiff, *Smiles and Co.*, for *J. H. Cooper*, Manchester.

Solicitor for the defendant, *The Treasury Solicitor*.

Friday, March 21.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

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Customs—Customs officer—Search of ship—Obstructing officer—Reasonableness of search—Right of magistrate to judge of—Service of notice of appeal and case—Sufficiency of service—Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), s. 12, sub-s. 5—Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43), s. 2.

Where a person is summoned under sect. 12, sub-sect. 5 of the Customs and Inland Revenue Act 1881, for obstructing a customs officer in execution of his duty while on board a ship for the purpose of searching the same, the magistrate has no jurisdiction to inquire into the reasonableness or unreasonableness of the search, or to dismiss the information upon the ground that in his opinion the search was under the circumstances

unreasonable, unless he finds that the search was a mere pretence for the purpose of justifying an interference or annoyance by the officer. The duty of deciding what search there shall be is by the Act imposed on the customs officer, and not on the magistrate.

The notice of appeal and copy of the case stated by the magistrate could not be personally served on the defendant, who was a master mariner and was at sea, within three days after the receiving of the case by the appellant, but within the three days the appellant served the notice and copy of the case on the solicitor who had represented the defendant before the magistrate, but who had ceased to represent him in the matter, and efforts were made to have the defendant personally served on his return, and he was personally served with the notice and case some months afterwards on his return to the United Kingdom.

Held, that the provisions of sect. 2 of the Summary Jurisdiction Act 1857, as to giving notice of appeal to the defendant, were sufficiently complied with to enable the court to hear the appeal in the absence of the defendant.

CASE stated by the stipendiary magistrate for the borough of Middlesbrough, being one of the justices of the peace for the borough, pursuant to an order of *mandamus* in that behalf of the King's Bench Division dated the 24th April 1901.

The information, dated the 7th Dec. 1900, and signed by the magistrate, as amended at the hearing, was in the following terms:

Be it remembered that William Anderson, an officer of customs under the direction of the Commissioners of the Customs, informs me (police and stipendiary magistrate and one of Her Majesty's justices of the peace in and for the borough of Middlesbrough), that John Reid, master of the ship *Bankhall*, lying at Bolokow, Vaughan, and Co.'s wharf in the river Tees, did on the 5th day of Dec. instant obstruct William Anderson, an officer of customs, who was acting in the execution of his duty on board the *Bankhall* aforesaid, contrary to sect. 12, sub-sect. 5, of the Customs and Inland Revenue Act 1881, whereby the said John Reid has forfeited the penalty of not exceeding one hundred pounds.

At the hearing before the magistrate on the 10th Dec. 1900 at the Middlesbrough police-court, the following facts were proved:

(a) That the ship *Bankhall* arrived at the port of Middlesbrough on the 28th Nov. 1900, and was searched on several occasions without anything dutiable being found, and that on the first of such occasions the captain's cabin and state room were searched and rummaged. The captain's state room was not again searched or rummaged, but his cabin was again searched and rummaged on the second and third of such occasions. The officers of the ship rendered every assistance to the customs officers in their search.

(b) On the 5th Dec. 1900, at about 7.45 p.m., the appellant William Anderson, who was an officer of customs, with two other officers of customs named Cottrell and Craven, went on board the *Bankhall*, and went first to the captain's cabin, but finding the respondent sitting down at a meal there with his wife and the mate, they proceeded to rummage the store rooms and pantry; they afterwards returned to the cabin, but the respondent refused to allow them to enter his state room or to search there..

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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Upon the appellant attempting to enter such state room for the purpose of searching it for prohibited or uncustomed goods, the respondent took him by the shoulders and pushed him out. The appellant then made a second attempt to enter the respondent's room to search it, but was again prevented and pushed out by the respondent.

(c) In cross-examination the appellant and his witnesses admitted that they had no suspicion that anything dutiable could be in the apartment which the officers desired to search, that is to say, the state room, unless it had been about the person of the respondent or some other person on board the vessel at the time of the previous searches, and had been placed in such apartment after such searches. They also admitted that they had no ground for suspicion that such had been the case.

The magistrate asked the respondent if the officers ever desired to search him, and he said "No," but had they wished to do so he would willingly have submitted to such search, and he was not cross-examined.

The magistrate thought that the evidence showed that the repeated rummaging of the ship was most unreasonable, and there was evidence to show that the officers had no reason for believing that they were interfered with in the discharge of what they deemed their duty. He thought at the conclusion of the appellant's case that the conduct of the customs officer was an abuse of the power of search under the statutes, and hesitated as to whether he should dismiss the summons, or inflict a mere nominal penalty without costs. He adopted the former alternative, and dismissed the summons.

The question for the opinion of the court was whether, upon the facts above stated, the magistrate was right in dismissing the information.

If the court should be of opinion that his decision was right, the information was to stand dismissed; but if the court should be of the contrary opinion, then the court was to remit the case to the magistrate with the opinion of the court thereon.

The mayor sat on the bench during the hearing of the case, but took no part in it, leaving it to the police magistrate to decide.

The Customs Consolidation Act 1876 (39 & 40 Vict. c. 36) provides:

Sect. 182. Any officer of customs or other person duly employed for the prevention of smuggling may go on board any ship or boat which shall be within the limits of any port of the United Kingdom or the Channel Islands, and rammage and search the cabin and all other parts of such ship or boat for prohibited or uncustomed goods, and remain on board such ship or boat so long as she shall continue within the limits of such port.

The Customs and Inland Revenue Act 1879 (42 & 43 Vict. c. 21) provides:

Sect. 11. All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the High Court of Justice in England, . . . or by information in the name of some officer of customs or excise, before one or more justice or justices in the United Kingdom, the Isle of Man, or the Channel Islands, &c.

The Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12) provides:

Sect. 12. Any officer of customs or other person duly employed in the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided that such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person. A person shall be guilty of an offence—(5) If he assaults or obstructs any officer of customs, or any officer of the army, navy, marines, coastguard, or other person duly employed for the prevention of smuggling, going, remaining, or returning from on board a ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or in searching such a ship or boat, or in searching a person who has landed from any such ship or boat, or in seizing any goods liable to forfeiture under the Customs Acts, or otherwise acting in the execution of his duty. And a person so offending shall for each such offence forfeit the penalty of not exceeding one hundred pounds, and he may either be detained or proceeded against by information and summons.

As the respondent did not appear, a preliminary question arose as to whether there was a sufficient service of the case upon the respondent to satisfy the requirements of sect. 2 of the Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43), which, after providing for the stating and signing of a case by the justice or justices, provides as follows as to the service of the case on the respondent:

And such party, hereinafter called "the appellant," shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called "the respondent."

The facts in reference to the service of the case on the respondent, as appearing in the affidavits, were as follows:—

The case was dated and signed by the magistrate on the 28th Aug. 1901. It was received on the 3rd Sept. 1901 by the solicitor for the appellant at Middlesbrough, and on the same day, the 3rd Sept., the appellant's solicitor left at the office of the solicitor who had appeared for the respondent on the hearing of the information, and by way of service upon such solicitor, a notice that a case had been duly stated and also a copy of the case; and on the same day, subsequently to the service above referred to, the solicitor who had acted for the respondent wrote acknowledging that a copy of the case had on that day been left at his office; that he had represented the respondent on the hearing of the information, but that since that time he had had no instructions from him, and had long since ceased to have any connection with the matter. The respondent, being a master mariner, was at sea and could not be personally served, but a letter had been written to him in September giving him notice that a case had been stated, and this letter he acknowledged in Dec. 1901. Also, on the 23rd Sept., the appellant's solicitor wrote to the employers of the respondent requesting that immediately the respondent returned to the United Kingdom they would deliver to him a letter with the notice and copy of the case. Ultimately the case was personally served on the respondent on the 16th Jan. 1902, when he returned from sea.

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Sir Robert Finlay, A.G. (*Daddy* with him) for the appellant.—As the respondent does not appear, it is necessary to show by the affidavits that there has been a sufficient notice and service of the case on the respondent to satisfy sect. 2 of the Act 20 & 21 Vict. c. 43, and to enable the court to hear the appeal. The material words of the section are that the appellant shall “within three days after receiving such case transmit the same . . . first giving notice in writing of such appeal, with a copy of the case, to . . . the respondent.” The facts show a sufficient compliance with the section. [Lord ALVERSTONE, C.J. referred to *Edwards v. Roberts* (1891), 1 Q. B. 302, where it was held that the court had no jurisdiction to hear an appeal by case stated under sect. 2 of 20 & 21 Vict. c. 43, unless the case had been served on the respondent within three days.] There are several cases bearing on the point. The first and most important is in 1858, the case of *Syred v. Carruthers* (E. B. & E. 469), where it was held that sect. 2 is satisfied if the appellant within three days of his obtaining the case seeks to find the respondent and cannot do so, and within such three days gives notice to the solicitor who represented the respondent before the magistrate, and afterwards gives notice to the respondent, who does not object. Acting on that case, the appellant served the notice upon the solicitor within the three days, and tried to find the respondent. In *Woodhouse v. Woods* (1 L. T. Rep. 59; 29 L. J. 149, M. C.), the giving of the notice with a copy of the case to the respondent was held to be a condition precedent to the right to have the case heard; but there it was stated that if the appellant has done all he could to comply with the statute it is sufficient, so that that case really follows *Syred v. Carruthers* (*ubi sup.*). Then in *Local Board of Health of Gloucester v. Chandler* (7 L. T. Rep. 722), the present point did not arise. The only other case, besides that of *Edwards v. Roberts* (*ubi sup.*), is *Hill v. Wright and Wilson* (60 J. P. 312), where a notice sent to the respondents’ solicitors and not to the respondents themselves, was held not to be sufficient. There is nothing in these cases throwing any doubt upon *Syred v. Carruthers* (*ubi sup.*), and the court ought to act upon it. [Lord ALVERSTONE, C.J.—We think the appellant is entitled to have the case argued.] The case raises a short but very important point. It is quite clear from the statute that a magistrate is not entitled to say that in his opinion the search is unreasonable, and for that reason to dismiss the information. The duty of deciding what search shall be made is cast on the customs officer. There are, no doubt, certain cases in which he is at liberty to search only if he has reasonable grounds for thinking there are smuggled goods there; for instance, under sect. 12 of the Act of 1881 the searching the persons of individuals can only be done by the officer if he has reasonable ground for suspecting that there are goods concealed; under sect. 203 of the Customs Consolidation Act 1876, the stopping and examining carts can only be done by the officer if he has reasonable suspicion that there are smuggled goods on those carts, and the same applies under sect. 205 as to the searching of houses. The power to search in other instances as regards the ship, conferred upon the officers, is necessarily not limited by any such condition,

and it is the duty of the officer to decide whether there ought to be a search or not. If the magistrate found that under the pretence of exercising the power of the Act, it was a mere excuse and the officer did not want to search at all, but was gratifying an impertinent or malicious desire of annoyance, then it could not be disputed that he would be entitled to dismiss the information. Here it is not pretended that he was not acting in the exercise of the power of the Act; there is an express finding that the appellant was “attempting to enter such state-room for the purpose of searching it for prohibited or uncustomed goods.” That being so, it is not for the magistrate to say that the officer was acting reasonably or unreasonably; it is quite enough that he was acting in pursuance of the power of the Act, and that the Act has thrown upon the officer the duty to decide. If once it were settled that the defendant was at liberty to go into evidence before the magistrate as to whether the officer was or was not acting reasonably, and to call evidence and to ask the magistrate to say that the search was unnecessary, a very serious blow would be struck at the administration of the Customs Act. The court ought therefore to send the case back.

The respondent did not appear.

Lord ALVERSTONE, C.J.—When this case was before us on the occasion of the rule for a *mandamus* being moved, we certainly thought upon the affidavits that were then produced that the magistrate had not entertained the real question on which alone he would have been justified in dismissing the summons—namely, the ground, as pointed out by the Attorney-General in his argument, that there was a mere pretence of searching, and that the search was not *bonâ fide*, but was merely for the purpose of justifying the interference of the customs officer. A mere pretence of searching would not compel the magistrate to convict. In this case, however, it is found as a fact that the officer was purporting to search, and that he was intending to search. The ground on which the summons was dismissed by the magistrate was that he thought that it was unreasonable for the officer to be searching having regard to the circumstances that he had previously examined other parts of the ship, and that if there were anything dutiable in the apartment the officer desired to search, it must have been on the person of the respondent or some other person on board at the time of the previous searches, and must have been placed there since such previous searches, as to which the appellant had no suspicion that such was the case. I think there is in such cases no preliminary question of reasonableness or unreasonableness for a magistrate to deal with, and that the learned magistrate ought to have entertained this matter and have dealt with it on the basis that, there being a search, the customs officer was in fact obstructed in the execution of that search, and that therefore an offence against the Act had been committed. I think the case must go back to the magistrate with this intimation of our opinion thereon.

DARLING, J.—I am of the same opinion. It seems to me that the first impression of the learned magistrate in this case was the right one. He says: “I thought at the conclusion of the

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appellant's case that the conduct of the customs officer was an abuse of the power of search under the statutes, and hesitated as to whether I should dismiss the summons or inflict a mere nominal penalty without costs. I adopted the former alternative." If he had adopted the second alternative, it seems to me that he would have been perfectly right. If he really came to the conclusion that, although the customs officer was exercising his statutory power, he was exercising it in an unreasonable way, though with lawful excuse, but not with any real prospect of getting any good out of it, he could have convicted the respondent, and imposed a nominal penalty without any costs. That would have amounted to a censure of the conduct of the customs officer, and if the matter wanted to be made clearer the magistrate could have said so. That, it seems to me, would have been the proper course for the magistrate to have adopted, if he held the opinion, which he says he did, relative to this case.

CHANNELL, J.—I agree.

Appeal allowed. Case remitted to magistrate to convict the respondent of the offence.

Solicitor for the appellant, *The Solicitor of Customs.*

Saturday, May 3.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, J.J.)

MANNERS (app.) v. TYLER (resp.). (a)

Adulteration—False warranty—Proceeding for giving warranty—Jurisdiction of justices—Successive warranties—Warranty not given in place where article was purchased for analysis—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 25, 27—Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 20, sub-ss. 5, 6.

Sub-sect. 5 of sect. 20 of the Sale of Food and Drugs Act 1899, which extends the jurisdiction of justices in the hearing of proceedings for giving a false warranty, is confined in its operation to the warranty given to the person from whom the article was purchased for analysis, and does not contemplate or provide for the case of a series of successive warranties. Consequently, where proceedings for giving a false warranty are taken under sect. 27 of the Sale of Food and Drugs Act 1875, such proceedings must still be taken before a court having jurisdiction in the place where the warranty was given, unless the proceedings are in respect of the warranty given to the person from whom the article was purchased for analysis, in which case the proceedings for giving the false warranty may be taken before the court which has jurisdiction to hear the original information under sect. 6 of the Act of 1875, as well as before the court having jurisdiction in the place where the warranty was given.

CASE stated by justices of the peace for the county of Middlesex, sitting at Brentford.

At a petty sessions held at Brentford, in the county of Middlesex, on the 12th Dec. 1901 and 9th Jan. 1902, an information was preferred by W. Tyler (the respondent), an inspector of weights

and measures, against Manners (the appellant), a farmer residing and carrying on business at Stratton St. Margaret's, Swindon, in the county of Wilts, under sect. 27 of the Sale of Food and Drugs Act 1875, as amended by sub-sect. 6 of sect. 20 of the Sale of Food and Drugs Act 1899, charging the appellant for that he, at the parish of Acton, in the district of Brentford and county of Middlesex, did, on the 14th Sept. 1901, unlawfully give a false warranty in writing to the Great Western and Metropolitan Dairies Limited in respect of new milk, sold by him as principal to the Dairies Company.

The appellant was convicted and was ordered to pay a fine of 5s. and 40s. costs.

The following facts were proved and found by the justices:—

The appellant was a farmer, and on the 14th Sept. 1901 he supplied to the Dairies Company two churns of milk, which churns of milk arrived at Paddington station at 10.30 p.m. on the 14th Sept. 1901, one of the churns having attached to it a label.

The churns of milk on arrival at Paddington station were received by a servant of the Dairies Company and remained at the station under his personal observation until the following morning, the 15th Sept., at 4 a.m., when one of the churns of milk was with other milk taken by a carman of the Dairies Company and delivered to Mrs. Dew, who carried on business as a milk seller at Shepherd's Bush, in the county of London, and the respondent at nine o'clock on the same morning of the 15th Sept. purchased from William Dew, the husband of Mrs. Dew, at Acton, in Middlesex, a pint of milk from the churn which on analysis proved to have been adulterated with water.

The analyst certified that the milk contained 8 per cent. of added water, and he stated in his certificate that his opinion was based on the fact that the sample only contained 7.74 per cent. of solids not fat, whereas genuine new milk should contain at least 8.5 per cent. of solids not fat.

The Dairies Company supplied the churn of milk (with other milk) to Mrs. Dew under a contract in writing, dated the 20th March 1901 and extending over twelve months, which stated: "All milk to be delivered by the vendors at the purchaser's address in a sweet, pure, and saleable condition and warranted by them pure with all its cream as received from the cow."

William Dew was summoned before the justices at Brentford on the 17th Oct. 1901, on the information of the respondent, for unlawfully selling an article of food—namely, the milk—which was not of the nature, substance, and quality of the article of food demanded by the respondent.

William Dew gave notice to the respondent (pursuant to sect. 25 of the Sale of Food and Drugs Act 1875, as amended by sect. 20, sub-sect. 4, of the Sale of Food and Drugs Act 1899) that he relied on a written warranty from the Dairies Company, and also gave notice to the Dairies Company that he intended to rely on such warranty. No notice was given by him to the appellant of his intention to rely on any warranty given by the appellant.

The summons against William Dew was heard by the justices on the 17th Oct. 1901, when they dismissed the summons against him on the ground that he had proved to their satisfaction that he

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was entitled to the protection of sect. 25 of 38 & 39 Vict. c. 63, as amended by sect. 20, sub-sect. 4 of 62 & 63 Vict. c. 51, he being a servant of the person who purchased the article in question with a written warranty, and that he had sold it in the same state as when it was purchased.

The appellant did not appear and was not represented before the justices on the hearing of that summons on the 17th Oct., and had no notice of the proceedings.

The respondent then (on the 17th Oct. 1901) laid an information before the justices against the Dairies Company, under sect. 27 of the Sale of Food and Drugs Act 1875, as amended by sect. 20, sub-sect. 6, of the Sale of Food and Drugs Act 1899, charging that they did on the 15th Sept. 1901, at Acton, in the county of Middlesex, unlawfully give a false warranty in writing to one Mrs. Dew in respect of a certain article of food—to wit, new milk—sold by them as principals.

The Dairies Company duly gave notice to the respondent, under the same sections as in the previous summons, that they relied on a written warranty from the appellant, and they also gave notice to the appellant that they relied on such warranty.

The summons against the Dairies Company was heard before justices on the 14th Nov. 1901, and was dismissed by them on the grounds that it had been proved to their satisfaction that the Dairies Company were entitled to the protection of sect. 25 of 38 & 39 Vict. c. 63, as amended by sect. 20, sub-sect. 6 of 62 & 63 Vict. c. 51, and that they purchased the article with a written warranty, and that they had sold it in the same state as when it was purchased.

The respondent thereupon applied for a summons against the appellant for that he did on the 15th Sept. 1901 (which was on the hearing amended to the 14th Sept. 1901), in the parish of Acton, in the county of Middlesex, "unlawfully give a false warranty in writing to the Dairies Company in respect of a certain article of food—to wit, new milk—sold by him as principal."

On the hearing of this summons the respondent produced the label attached to one of the churns of milk delivered to the Dairies Company on the 14th Sept. This label (dated the 14th Sept.) was directed to the Dairies Company by the appellant, and contained the words "Warranted pure, with all its cream."

It was proved that such label was removed from the churn at Paddington Station by the Dairies Company on the 15th Sept., and before it was dispatched for delivery to Mrs. Dew.

The appellant and his son were called as witnesses, and gave evidence that the milk when consigned by rail at Stratton St. Margaret's Station for carriage to Paddington was in the same state as given by the cows.

No evidence was called in reference to the milk whilst in transit. It was admitted that the appellant paid for the carriage of the milk to Paddington station, where it was taken possession of by the Dairies Company, the consignees.

On behalf of the appellant it was objected (*inter alia*) that the offence was alleged in the summons to have been committed in the parish of Acton, but that the appellant had not com-

mitted any offence within the jurisdiction of the court; that the warranty by the appellant to the Dairies Company was given at Stratton St. Margaret's Station, in the county of Wilts, where the milk was placed on rail, and that the onus was on the respondent to produce evidence that the milk was then adulterated; that the facts proved before the justices disclosed no offence as having been committed by the appellant against the provisions of the Sale of Food and Drugs Acts; and that the appellant had given no warranty to William Dew or Mrs. Dew, and that therefore the warranty relied on by William Dew on the 17th Oct. 1901 was not one given by the appellant.

The justices overruled the objections on points of law raised by the appellant on the following (amongst other) grounds: That as it was admitted and proved to their satisfaction that the label warranty was given by the appellant at Stratton St. Margaret's, in Wiltshire, and remained affixed to the churn till removed by the consignees at Paddington, it was not for them to determine whether the appellant's warranty did or did not continue while the milk remained in bulk in an unopened churn during the transit in the ordinary course of trade by the consignees, the Dairies Company, to Mrs. Dew's shop in Acton, in the county of Middlesex, inasmuch as sect. 20, sub-sects. 5 and 6, of 62 & 63 Vict. c. 51, gives the justices jurisdiction whenever a false warranty was given, and over every person who writes such false warranty; that the churn during its transit to Paddington was constructively in the possession of the appellant, who as consignor had paid for its carriage, and as both the consignees and Dew when defendants had respectively proved to their satisfaction that they severally had purchased the milk as the same in nature, substance, and quality, and with a warranty to that effect, as that demanded by the respondent from Dew; and as the proceedings against the appellant were by way of having given a false warranty, and as the notice to the appellant by the Dairies Company required by sect. 20 of the Act of 1899 had been duly given, the onus of having the milk analysed during transit on the railway was not required by law in the case of a prosecution for having given a false warranty; and on the facts they convicted the appellant, as aforesaid.

The question for the court was whether the justices were right in law in so holding and convicting the appellant.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) provides:

Sect. 25. If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.

Sect. 27. Every person who shall give a false warranty in writing to any purchaser in respect of an article of food or a drug sold by him as principal or agent, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding twenty pounds.

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The Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), provides :

Sect. 20 (1). A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person. (2) The person by whom such warranty or invoice is alleged to have been given shall be entitled to appear at the hearing and to give evidence, and the court may, if it thinks fit, adjourn the hearing to enable him to do so. (4) Where the defendant is a servant of the person who purchased the article under a warranty or invoice he shall, subject to the provisions of this section, be entitled to rely on section twenty-five of the Sale of Food and Drugs Act 1875, . . . in the same way as his employer or master would have been entitled to do if he had been the defendant, provided that the servant further proves that he had no reason to believe that the article was otherwise than that demanded by the prosecutor. (5) Where the defendant in a prosecution under the Sale of Food and Drugs Acts has been discharged under the provisions of section twenty-five of the Sale of Food and Drugs Act 1875, as amended by this Act, any proceedings under the Sale of Food and Drugs Acts for giving the warranty relied on by the defendant in such prosecution, may be taken as well before a court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a court having jurisdiction in the place where the warranty was given. (6) Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction for the first offence, to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds, unless he proves to the satisfaction of the court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true.

Morton Smith for the appellant.—The justices had no jurisdiction to entertain the summons against the appellant, because the alleged offence was committed outside the jurisdiction of their court. The justices were wrong in assuming that the proceedings against the Dairies Company were taken under sub-sect. 5 of sect. 20 of the Act of 1899. They were taken, not under sub-sect. 5, but under sub-sect. 6 of that section. In *Reg. v. Smith* (74 L. T. Rep. 348; (1896) 1 Q. B. 596) it had been held that the justices, who had heard an information under sect. 6 against the ultimate seller to the purchaser for analysis, had no jurisdiction to entertain an information under sect. 27 against the person who had given a warranty to such seller where the warranty was given outside their jurisdiction. Sect. 20, sub-sect. 5, of the Act of 1899 was passed to remedy the difficulty raised in that case as to the jurisdiction of the justices in such a case. The first summons was against Dew for selling in contravention of sect. 6 of the Act of 1875. Sect. 25 only contemplates the case of the defendant who is prosecuted as the seller to the purchaser who purchases for analysis, and applies only to the original prosecution by such purchaser. Before the Act of 1899 the person who had given that warranty could not have been

prosecuted under sect. 27 for giving a false warranty before the justices who heard the original prosecution where the warranty was given outside their jurisdiction: (*Reg. v. Smith, ubi sup.*). Sub-sect. 5 of sect. 20 of the Act of 1899 has altered that, but its operation is confined entirely to such cases, and the extended jurisdiction of the justices is given only in respect of the warranty to the ultimate purchaser. The second summons, that against the Dairies Company, was taken out, not under sub-sect. 5, but under sub-sect. 6 of sect. 20 of the Act of 1899. In that prosecution the Dairies Company could not rely on the defence of a warranty under sect. 25, but they would say that they believed their own warranty which they gave was true at the time they gave it, and the evidence of that would be the warranty given to them by the appellant. That would be their statutory defence under sub-sect. 6. They could use that warranty as a defence under sub-sect. 6 of sect. 20 for the purpose of showing that when they gave the warranty to Dew they "had reason to believe that the statements contained therein were true." Sub-sect. 6 applies to the case; and under that sub-section there is no extension of the jurisdiction as in sub-sect. 5, and the offence must be prosecuted in the place where it was committed. As to the question of onus, there was no onus on the appellant to show that the milk had not been tampered with on the railway.

Lewis Richards (*J. C. Earle* with him) for the respondent.—The justices were right in holding that they had jurisdiction to entertain the proceeding against the appellant. Sub-sect. 5 of sect. 20 is express upon the point, and applies to this case. It says that where a defendant in a prosecution under these Acts has been discharged under the provisions of sect. 25 of the Act of 1875, proceedings for giving the warranty may be taken before the court having jurisdiction in the place where the article was purchased for analysis. This sub-section is in the most general terms, and and under it the proceeding against the Dairies Company was properly taken in the Brentford court. The Dairies Company were charged with an offence, and they then became "the defendants in a prosecution under the Act" within sect. 25 of the Act of 1875 and sub-sect. 5 of sect. 20 of the Act of 1899, and as such they were entitled to set up any defence which the Act allowed, and they did set up as a defence the warranty which the appellant had given them, and they said that they themselves had bought with that warranty. That gave them a defence under sect. 25 of the Act of 1875, and they were clearly entitled to set up that defence and to be discharged under that section, and they were so discharged. The respondent therefore would be entitled, under sub-sect. 5 of sect. 20, to proceed against the appellant as he did. He is a public officer and has a public duty cast on him to follow the various sellers until he comes to the guilty party. The object of inserting the provision in sub-sect. 5, giving the justices an extended jurisdiction, was to get rid of the difficulty that arose in *Reg. v. Smith* (*ubi sup.*), and to enable the justices who heard the original information under sect. 6, to deal with the whole matter. Sub-sect. 5 applies, and under that sub-section the respondent could proceed against the appellant for giving the warranty before the justices at Brentford, as being the court having

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jurisdiction in the place where the article was purchased for analysis.

LORD ALVERSTONE, C.J.—The question raised in this case is undoubtedly an important one—namely, whether there was jurisdiction in the magistrates, before whom the proceedings had properly been taken under sect. 6 of the Sale of Food and Drugs Act 1875, also to hear the subsequent trial of an information against the original seller of the milk. The case is important because it might be thought desirable that all proceedings with regard to the same milk should take place before the same tribunal; but it must be remembered that in *Reg. v. Smith* (*ubi sup.*) it had been decided that, apart from special legislation, a metropolitan magistrate had no power to entertain a prosecution under sect. 27 of the sale of Food and Drugs Act 1875 in respect of the giving of a false warranty, where the warranty was given and where the sale and delivery had taken place outside the jurisdiction of his court. Then came the amending Act, the Sale of Food and Drugs Act 1899, which in sect. 20, sub-sect. 5, gives a certain extended jurisdiction, and if these proceedings were really in respect of a matter which came within sect. 20, sub-sect. 5, of the Act of 1899, then the objection to the jurisdiction of the justices could not prevail. That extended jurisdiction is given in these terms: "Where the defendant in a prosecution under the Sale of Food and Drugs Act has been discharged under the provisions of sect. 25 of the Sale of Food and Drugs Act 1875, as amended by this Act, any proceedings under the Sale of Food and Drugs Acts for giving the warranty relied on by the defendant in such prosecution, may be taken as well before a court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a court having jurisdiction in the place where the warranty was given." I call attention to the fact that the statute still recognises that there is original jurisdiction to try a proceeding for giving a false warranty in the place where the warranty was given and the offence committed, but it also provides that there shall be jurisdiction in the place where the article was purchased for analysis. We have got to consider what persons come within those words, and to do so we have to turn back to sect. 25 of the Act of 1875, which provides that "if the defendant in any prosecution under this Act prove that he had purchased the article in question as the same in nature, substance, and quality, as that demanded of him by the prosecutor and with a written warranty to that effect, . . . he shall be discharged from the prosecution." Therefore it is to be observed that sect. 25 deals with the special individual who has sold the milk to the prosecutor. Then sect. 20, sub-sect. 1, of the amending Act of 1899, says that a warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts, unless the defendant has sent to the purchaser a copy of the warranty with a written notice stating that he intends to rely on it, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to that person. Now, it is quite clear that the magistrates thought that the second proceedings here, which were taken against the Dairies Company, were either within

sect. 25, or could be treated by them as being within sect. 25. It is not unnatural that they did so, as the Dairies Company had given the notice contemplated by sect. 20, sub-sect. 1, of the Act of 1899. When we look at the information against the Dairies Company, it was for unlawfully giving a false warranty in writing to one Mrs. Dew in respect of new milk sold by them as principals, contrary to sect. 27 of the Act of 1875, as amended by sect. 20, sub-sect. 6, of the Act of 1899. I think it is quite right, as has been pointed out by counsel for the appellant, that in addition to the right to be discharged on producing a written warranty under sect. 25 of the Act of 1875, which is dealt with in sect. 20, sub-sect. 5, of the Act of 1899, there is a substantive offence created and power given to try it in the succeeding sub-section—namely, sub-sect. 6 of sect. 20 of the same Act. It is quite clear that there may be different considerations applying to charges made under different sections. I think that the Dairies Company were really charged under sub-sect. 6 of sect. 20 for giving a false warranty, and all that it was necessary for them to show under that sub-section was that when they gave the warranty they "had reason to believe that the statements or descriptions contained therein were true," and the sub-section does not give the same extended jurisdiction where the court has given effect to the defence and has discharged the defendant, as sub-sect. 5 of the same section does where the defendant is discharged under sect. 25 of the Act of 1875. The defence allowed by sub-sect. 6 of sect. 20 is quite a different matter from setting up as a defence a written warranty under sect. 25 of the Act of 1875. Under sect. 20, sub-sect. 6, the warranty received by the defendant is only evidence that he had reason to believe that the statements contained therein were true. Therefore, although the magistrates may have thought that in discharging the Dairies Company they were acting under sect. 25 of the Act of 1875, yet they were really acting under sect. 20, sub-sect. 6, of the Act of 1899; and I think, therefore, that, this being a charge of giving a false warranty and the case not coming within the language of sect. 20, sub-sect. 5, the magistrates had no jurisdiction in this case under sect. 20, sub-sect. 5, of the Act of 1899. The magistrates, therefore, had no jurisdiction to entertain these proceedings against the appellant, and this appeal must consequently be allowed and the conviction quashed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion. It seems to me that in the Act of 1899 the Legislature have sought to remedy various defects in procedure under the previous Acts, and amongst others the difficulty that arose in *Reg. v. Smith* (*ubi sup.*), as to proceedings in respect of a false warranty which was relied upon by the defendant in the original proceedings. They did that in the language which appears in sub-sect. 5 of sect. 20, but they did not consider the case of successive warranties, and have not provided for it.

Appeal allowed. Conviction quashed.

Solicitors: for the appellant, *W. T. Ricketts and Son*; for the respondent, *Sir Richard Nicholson*.

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ANDREW v. GROVE.

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Wednesday, March 19.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

ANDREW v. GROVE. (a)

County Court—Practice—Costs—Judge's discretion as to costs—Power to order successful defendant to pay plaintiff's costs—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 113.

A County Court judge has no power, under sect. 113 of the County Courts Act 1888 or otherwise, to order a successful defendant to pay the plaintiff's costs.

APPEAL by the defendant from Plymouth and East Stonehouse County Court.

The action, which was commenced in the High Court, but was remitted to the County Court, was brought to recover from the defendant, a betting agent, the sum of 96*l.*, being the balance alleged to be due to the plaintiff from the defendant in respect of two bets won.

The defendant made two defences, that the contract was a betting transaction, and he set up the defence of the Gaming Acts, and also that the plaintiff had applied to him too late, and that he was not able to "lay the money off" with other betting agents, and that he had returned the money which the plaintiff had paid him.

At the trial the plaintiff called the defendant as a witness, and he denied that the bet had been made or accepted by him. The County Court judge said that he did not believe a word of the defendant's evidence, and thought that it was a swindle. He accordingly gave judgment for the defendant under the Gaming Acts, but ordered him to pay the plaintiff the costs of the action.

The defendant appealed against the judgment in so far as it ordered him to pay the costs.

The County Courts Act 1888 (51 & 52 Vict. 43) provides:

Sect. 113. All the costs of any action or matter in the court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the court shall think just, and in default of any special direction shall abide the event of the action or matter, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court.

Sect. 116. With respect to any action brought in the High Court which could have been commenced in a County Court, the following provisions shall apply: (1) If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds, he shall not be entitled to any costs of the action.

Sect. 119. The judge may award costs on any scale higher than that which would be otherwise applicable to the plaintiff on any amount recovered, however small, or to a defendant who successfully defends an action brought for any amount, however small, provided that the said judge certifies in writing that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest.

R. F. Colam for the appellant.—The County Court judge had no jurisdiction, either under sect. 113 of the County Courts Act 1888, or otherwise, to make the order that the successful defendant should pay the plaintiff's costs. He has no jurisdiction to give the plaintiff costs except in respect of what he recovers in the action,

unless he certifies under sect. 119 of the Act that the action involved some novel or difficult point of law. That section does not apply here. The only other section which could be relied upon would be sect. 113, which provides that all the costs of any action or matter, not otherwise provided for, shall be paid by the parties in such manner as the court shall think just. That section, no doubt, gives the judge a certain discretion, but before he can exercise it in favour of a plaintiff, the plaintiff must have recovered something. It has been held that a judge of the High Court has no jurisdiction to order a successful defendant to pay the plaintiff's costs:

Dicks v. Yates, 44 L. T. Rep. 660; 18 Ch. Div. 76;
Foster v. Great Western Railway Company, 46 L. T. Rep. 74; 8 Q. B. Div. 515;
Re Mills' Estate, 55 L. T. Rep. 465; 34 Ch. Div. 24.

There is no greater power given to a County Court judge under sect. 113 of the County Courts Act 1888 to award costs to an unsuccessful party than is given to a judge of the High Court by the Judicature Acts and Rules. By Order L*a.*, r. 17, of the County Court Rules, costs not sanctioned by the scale are not to be allowed, and under the scales a plaintiff who recovers nothing can get no costs. The plaintiff was not entitled to any costs. The action was brought in the High Court, and the plaintiff has recovered less than 20*l.*, and, therefore, by sect. 116, he is not entitled to any costs at all, as the action was one which, within the meaning of that section, could have been brought in a County Court:

Solomon v. Mulliner, 83 L. T. Rep. 493; (1901) 1 K. B. 76.

Ashton Croes for the respondent.—Sect. 113 of the County Courts Act gives the County Court judge the same discretion over costs as a judge of the High Court has, and under that section the judge had jurisdiction to make this order. The cases cited merely show that if the plaintiff has no right to bring the action at all, the court has not jurisdiction to order the defendant to pay his costs; but the court has jurisdiction to do so where the plaintiff has a right to bring the action, and in the present case the plaintiff had a right to bring this action. Moreover, those cases were before the Judicature Act 1890 (53 & 54 Vict. c. 44), which in sect. 5 enacted that, subject to the Judicature Acts and Rules, "the costs of and incident to all proceedings in the Supreme Court, . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." In construing this section Kay, L.J. said in *Re Fisher* (70 L. T. Rep., at pp. 63-4; (1894) 1 Ch., at p. 453): "The object of words so plainly expressed must be to give the court power to do that which it had not power to do before. In my opinion, it is impossible to read sect. 5 in any way but this. It is an enabling section enlarging the jurisdiction of the court, giving it jurisdiction where it had not jurisdiction before in respect of costs." The words in sect. 113 of the Act of 1888 are as wide as those in sect. 5 of the Judicature Act of 1890, and under both sections the judge has power in his discretion to order by whom the costs are to be paid. There was here

(a) Reported by W. W. OAK, Esq., Barrister-at-Law.

K.B. DIV.] KNIVETON v. NORTHERN EMPLOYERS' MUTUAL INDEMNITY CO. LIM. [K.B. DIV.]

good cause in the conduct of the defendant himself for ordering him to pay the plaintiff's costs. The judge had therefore jurisdiction to make the order, and he was right in making it.

Colam in reply.

LORD ALVERSTONE, C.J.—It has been contended for the respondent in this case that the County Court judge had power, under sect. 113 of the County Courts Act 1888, to make the successful defendant in an action pay the plaintiff's costs. That is a somewhat startling proposition, inasmuch as, prior to the Judicature Act 1890, whatever may be the effect of that Act, a judge of the High Court had no such power. It may be observed that sect. 113 of the County Courts Act 1888 is not a new provision; it is substantially identical with the provision in sect. 89 of the County Courts Act 1846 (9 & 10 Vict. c. 95). Sect. 113 is, in my opinion, a section which enables a County Court judge to award costs according to his discretion, but to give him that discretion the plaintiff must first have established some right. The extent to which this principle that a judge cannot order a successful defendant to pay all the plaintiff's costs has been recognised, is well illustrated in the case of *Dicks v. Yates* (*ubi sup.*), in which the defendant, as in the present case, appealed against an order ordering him to pay the whole costs of the action. It was argued in that case that the appeal could not be entertained, as it was an appeal as to costs only, but it was held by the Court of Appeal that the decision appealed against was in effect that the plaintiff was entitled to bring the action and that the appeal therefore was not as to costs only, but on the merits. The same principle has been recognised in *Foster v. Great Western Railway Company* (*ubi sup.*), and in *Re Mills' Estate* (*ubi sup.*). It was argued, however, that the provisions in sect. 113 give a wider discretion as to awarding costs than the provisions of Order LXV., r. 1, of the rules of the Supreme Court, and were as wide as those contained in sect. 5 of the Judicature Act 1890, which give the court or judge "full power to determine by whom and to what extent such costs are to be paid." It is not necessary to express any opinion as to the effect of that section; but it seems to me that sect. 113 of the County Courts Act 1888 does not admit of the construction that would give the County Court judge power to order a successful defendant to pay the plaintiff's costs generally. Sect. 113 is obviously required for cases other than that. With regard to sect. 116, it is not conclusive to show that the plaintiff is not entitled to hold this order upon the ground that the plaintiff, having recovered less than 20*l.*, is not entitled to any costs. That provision contemplates the case where the plaintiff succeeds. That section, however, indirectly shows that it was not contemplated that the plaintiff should get costs where the defendant succeeded. I therefore think that the County Court has not this power, and that a County Court judge has no power to order a successful defendant to pay the plaintiff's costs generally.

DARLING, J.—I agree.

CHANNELL, J.—I agree. I would only wish to add that the County Court judge has, of course, jurisdiction to order a defendant, although successful, to pay a part of the plaintiff's costs where

it is proved that the defendant has been guilty of misconduct in the course of the action.

Appeal allowed.

Solicitors for the appellant, *Taylor, Willcocks, and Lemon*, for *J. G. Jackson*, Plymouth.

Solicitors for the respondent, *Riddell and Co.*, for *T. H. Geake*, Plymouth.

April 8 and 9.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

KNIVETON v. NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY LIMITED. (a)

Practice—Appeal—County Court—Workmen's Compensation—Order made by County Court judge against insurers of employer in respect of accident—Right to appeal to High Court—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 5—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 120.

An appeal lies, under sect. 120 of the County Courts Act 1888, to the King's Bench Division of the High Court, from an order made by a County Court judge under sect. 5 of the Workmen's Compensation Act 1897.

APPEAL from the Bolton County Court.

The plaintiff Kniveton was a workman employed by the Darcy Lever Coal Company Limited, and on the 13th Dec. 1900 he was injured by an accident arising out of and in connection with his employment.

The Darcy Lever Coal Company was a member of the Northern Employers' Mutual Indemnity Company Limited, and entitled under the articles of association to be indemnified against any claim made by a workman for any injury such as that sustained by Kniveton, and the company was formed for the purpose of indemnifying its members against such claims.

The plaintiff's claim of half wages, amounting to 1*4s.* 9*d.* per week, was paid weekly by the Indemnity Company to the employer, the Darcy Lever Coal Company, and by them to the plaintiff week by week up to the 30th March 1901, when the amount in the hands of the Indemnity Company available for the payments became exhausted, and the remittances by the Indemnity Company ceased.

In Feb. 1901 the Darcy Lever Coal Company went into liquidation.

The plaintiff took proceedings against his employers, the Darcy Lever Coal Company, under the Workmen's Compensation Act 1897, and on the 8th May, 1901 an award was made in favour of the plaintiff for the payment to him of the weekly sum of 1*4s.* 9*d.* during incapacity. The plaintiff then applied, under sect. 5 (1) of the Workmen's Compensation Act 1897, for an order that the Northern Employers' Mutual Indemnity Company should pay him the weekly sum due under the award, alleging that his employers, the Darcy Lever Coal Company, were entitled to these weekly payments from the Indemnity Company.

On the 4th Dec. 1901 the County Court judge made an order to the effect that the Indemnity Company should pay what was due to the workman between the 30th March, when the fund

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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standing to the credit of the plaintiff's employers was exhausted and the payments ceased, and the date of the hearing, and should continue to pay the sum of 14s. 9d. a week to the plaintiff as long as that sum was payable to him under the award, and without any reference to the rights and obligations of the Darcy Lever Coal Company.

The Indemnity Company appealed from this order of the County Court judge to the King's Bench Division, upon the ground that no claim could be sustained by the workmen against them, inasmuch as there was no money or indemnity due by them to the employers—the Darcy Lever Coal Company—and that the protection of the employers had been determined and the entry on the protected list cancelled.

The preliminary objection was taken that no appeal lay to the King's Bench Division.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

SECT. 5 (1). Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound-up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the County Court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the first schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

Sched. 2 (dealing with arbitration) provides:

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration: (4) The Arbitration Act 1889 shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the County Court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal: and the County Court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaintiff in the County Court.

Chester Jones for the respondent.—There is a preliminary objection that no appeal lies in this case to this court. The case arose under sect. 5, sub-sect. 1, of the Workmen's Compensation Act 1897, and was an application to the County Court judge under that section by the workman against an insurance company. The Workmen's Compensation Act 1897 is a complete code of procedure in itself, and the only right of appeal under the Act is the right of appeal given by the Act itself, and that is to the Court of Appeal, under clause 4 of sched. 2 of the Act. There is, therefore, no other right of appeal than that given by clause 4, and the Court of Appeal have held in *Leech v. Life and Health Insurance Association Limited* (84 L. T. Rep. 414; (1901) 1 K. B. 707) that there can be no appeal to the Court of Appeal under clause 4 of the 2nd schedule against the refusal

of a County Court judge to make an order under sect. 5, sub-sect. 1, of the Act. The section which gives the general right of appeal to the High Court from the County Court on questions of law, is sect. 120 of the County Courts Act 1888. That section has no application here. This proceeding is neither in contract nor in tort; and it is not an action or matter within the meaning of that section. [Lord ALVERSTONE, C.J.—You have to show that an order of the County Court judge under sect. 5 of the Workmen's Compensation Act 1897 does not come under sect. 120 of the County Courts Act.] That is shown by the fact that the Workmen's Compensation Act is a complete code of procedure in itself, and that the whole matter is a creation of the statute, and that the statute has provided no appeal other than that in clause 4 in the schedule, which has been held not to apply to this case.

Haldane, K.C. (*F. E. Smith* with him) for the appellants.—An appeal clearly lies to this court. The Court of Appeal in the case referred to have decided that matters other than those arising under sect. 5, sub-sect. 1, are dealt with in clause 4, and the effect of the decision is that the questions arising under clause 4 are confined to the arbitration sections. They have said that sect. 5 stands on a wholly different footing in this respect from the other matters so dealt with involving the right to compensation as between the employer and the workman, and that the question arising under that section is a question between the workman and the insurance company, and not between the workman and the employer. The proceeding under sect. 5 is a substantive and separate proceeding, and stands in the same position as an ordinary action in a County Court. What the appellants rely on as giving a right of appeal to this court is sect. 120 of the County Courts Act, which is perfectly general. It says that "if any party in any action or matter" is dissatisfied with the "determination or direction" of the judge in point of law or equity, the party aggrieved by "the judgment, direction, decision, or order" of the judge "may appeal from the same to the High Court." Clearly this proceeding under sect. 5 in the County Court was "an action or matter," and the judge has given a "direction" in a matter; he has given this "direction" either in a substantive "action" or in a "matter," and the case is clearly within the section.

Lord ALVERSTONE, C.J.—With regard to the preliminary objection, the case in the Court of Appeal of *Leech v. Life and Health Insurance Association Limited* (*ubi sup.*) shows that no appeal lies to the Court of Appeal in respect of a matter such as this arising under sect. 5, sub-sect. 1, of the Workmen's Compensation Act 1897. It seems to me that sect. 5 is merely a statutory subrogation of the workman to the rights of the employer, and in respect of that matter—it being a matter before the County Court judge, and an order having been made by him in that matter—it seems to me that the case comes within sect. 120 of the County Courts Act 1888, and that the appeal does lie to this court under that section.

DARLING and CHANNELL, JJ. concurred.

Objection overruled, and the appeal heard on the merits and allowed. Leave to appeal.

K.B. Div.] GREAT NORTHERN AND CITY RAILWAY COMPANY v. TILLET. [K.B. Div.]

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Peace and Ellis, Wigan*.

Solicitors for the respondent, *Chester and Co.*, for *Fielding and Fernihough, Bolton*.

April 21 and May 3.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GREAT NORTHERN AND CITY RAILWAY COMPANY (apps.) v. TILLET (resp.) (a)

Lands Clauses Acts—Compensation—Tenancy from year to year—Jurisdiction of justices to inquire into title of claimant—Requirement to give up possession before expiration of term—Condition precedent to right to compensation—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 121.

Where a claim for compensation is made under sect. 121 of the *Lands Clauses Consolidation Act 1845* by a person who has no greater interest than as a tenant for a year or from year to year, and the claimant alleges such an interest, the justices have no jurisdiction under that section to inquire into the title of the claimant to the interest which he alleges, but they are bound to assess the compensation upon the basis of his alleged interest, if there be no other objection to their jurisdiction.

It is a condition precedent to the right to obtain compensation under sect. 121 that the claimant should have been required to give up possession before the expiration of his term or interest in the premises, and the justices have jurisdiction to inquire and must ascertain whether the claimant has been so required to give up possession before the end of his term, as the question of the amount of compensation for the claimant's unexpired term will depend upon that, and if there be no evidence of a requirement to give up possession the justices ought not to assess compensation.

CASE stated by an alderman and justice of the peace of the city of London.

On the 10th Oct. 1901 the respondent made application to the court of summary jurisdiction sitting at the Guildhall that the court should determine the amount of compensation to be paid to the respondent under the *Lands Clauses Consolidation Act 1845* by the Great Northern and City Railway Company (the appellants) in respect of 32, Finsbury-pavement, in the city of London.

The respondent applied as the receiver and manager for himself and others trading as Messrs. Tillet and Yeoman, auctioneers, 38, Finsbury-pavement.

On the 28th Oct. the summons was heard at the Guildhall by the alderman (having by law the authority of two justices), when he determined the amount of compensation to be paid by the appellants to the respondent to be 560l.

The following facts were either proved or admitted on the hearing:—

In the year 1899 the respondent James Tillet, with Yeoman and Andrews, carried on the business of auctioneers and surveyors in part of the basement of No. 32, Finsbury-pavement, which

they held from their immediate landlord, Matthew Jarvis, who acted as solicitor for them and the respondent with reference to the claims and proceedings hereinafter mentioned. When the tenancy upon which Messrs. Tillet and Yeoman held the premises was created, it was agreed that it should expire on the 25th Dec. 1899, but Messrs. Tillet and Yeoman remained in possession after the 25th Dec. 1899.

Negotiations were entered into between Messrs. Tillet and Yeoman, and their landlord, Mr. Jarvis, with a view to extend the tenancy, the result of which was at issue between the respondent and the appellants, but the correspondence was not produced before the magistrate.

On the 12th June 1899 notice to treat was served on behalf of the company on Mr. Jarvis, and on the 14th June a like notice was served upon the members of the firm of Messrs. Tillet and Yeoman.

On the 3rd July 1899 Messrs. Tillet and Yeoman sent in a claim for compensation on the basis of an interest which they were ultimately unable to support.

Messrs. Tillet and Yeoman, in the month of March 1900, for their own purposes went out of actual occupation of the premises, but retained the keys.

On the 1st Jan. 1901 Mr. Jarvis assigned to the appellants his lease of No. 32, Finsbury-pavement. The assignment recited that the agreement for the sale of the lease was subject to the rights as against the appellants (if any) of Messrs. Tillet and Yeoman, who were stated therein to have been until recently in occupation of part of the basement.

The above assignment recited an alleged underlease, dated the 6th March 1900, from Mr. Jarvis to Messrs. Tillet and Yeoman, the validity of which was in the assignment stated to be disputed by the appellants, and the assignment was expressed to be made subject to the rights as against the appellants (if any) of Messrs. Tillet and Yeoman under the said underlease, or any other shorter tenancy (if any) there were, but the appellants did not thereby admit any rights.

The appellants, on or about the 22nd Jan. 1901, commenced to pull down the premises.

The before-mentioned claim was abandoned, and on the 29th Aug. 1901 the respondent James Tillet, as the receiver and manager of the business of Messrs. Tillet and Yeoman, sent in a claim for 560l. on the basis of a tenancy from year to year of a portion of the basement of No. 32, Finsbury-pavement. This claim was in respect of a "tenancy from year to year at 130l. per annum, and the loss sustained by reason of the removal of the business therefrom, which has been carried on by the claimants there and next door for the last seven years," and for some small sums in respect of the expenses of removing.

It was for the purpose of assessing the compensation under the above claim that the summons was issued, and the magistrate was asked to determine, under sect. 121 of the *Lands Clauses Consolidation Act 1845*, the amount of such compensation.

On the hearing of the summons it was objected on behalf of the appellants that the magistrate had no jurisdiction to determine the amount of the compensation claimed, and that the summons ought to be dismissed on the grounds (1) that the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

premises in respect of which compensation was sought were not in the possession of the respondent or Messrs. Tillet and Yeoman within the meaning of sect. 121; and (2) that the respondent and Messrs. Tillet and Yeoman on the facts before the magistrate were not within sect. 121, or entitled to issue the summons or to claim to have compensation assessed.

The alderman decided to assess the compensation as required by the summons on the ground that the respondent and Messrs. Tillet and Yeoman could only obtain compensation and get it assessed under sect. 121, and on the authority of *Reg. v. Kennedy* (68 L. T. Rep. 454; (1893) 1 Q. B. 533) and *Bexley Heath Railway Company v. North* (71 L. T. Rep. 533; (1894) 2 Q. B. 579), and he assessed the compensation at 560*l*.

The question for the opinion of the court was whether the respondent and Messrs. Tillet and Yeoman were entitled to have the compensation, the subject of the claim of the 29th Aug. 1901, determined under sect. 121 of the Lands Clauses Consolidation Act 1845, and whether the alderman was right in proceeding to assess the same accordingly.

If the court should be of opinion in the affirmative, the award of 560*l*. was to stand; if the court should be of opinion in the negative, then the award was to be set aside and the summons dismissed.

The Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) provides:

Sect. 121. If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such land be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the proprietors of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act.

Hansell for the appellants.—The question is whether the respondent is within sect. 121, and is entitled to have compensation assessed under that section. He is not entitled to have any compensation assessed. Originally Tillet and Yeoman were in possession for a term which expired on the 25th Dec. 1899. The notice to treat was served before that date, so that the tenancy which was existing at the date of the notice to treat expired at Christmas 1899. They remained on in possession for some three months, and then voluntarily went out of possession. Upon those facts they were not tenants at all; they were either holding over or were tenants at will. The sequence of events was the following: There was the notice to treat; there was the tenancy going on at the time; the tenants were not required to give up possession during the tenancy; the tenancy expired, and the tenants, holding over, went voluntarily out of possession. Whatever may

have been the nature of the respondent's occupation after the 25th Dec. 1899, it was not a tenancy in respect of which compensation could be claimed, and, in fact, Tillet and Yeoman were not turned out at all during the existence of any tenancy which existed at the date of the notice to treat; and the date of the notice to treat fixes the rights of the parties:

Ex parte Edwards, 25 L. T. Rep. 149; L. Rep. 13 Eq. 339.

A tenancy created after the date of the notice to treat is not a subject for compensation: (*Ibid*). Secondly, it is a condition precedent to the right of a claimant to compensation under sect. 121 that he must be in possession and be required to give up possession before the expiration of his term or interest. There must be a requiring of possession, and a notice to treat is not a requiring of possession or a demand for possession:

Reg. v. Stone, 14 L. T. Rep. 552; L. Rep. 1 Q. B. 529.

The claimants had to show a right to compensation under the section. They are not within the section at all, because they were not required to give up possession, as they gave it up voluntarily. The alderman was wrong in proceeding to award compensation, and the award ought to be set aside.

Park Goff for the respondent.—The alderman was right in assessing the compensation. Where a claim is made for compensation under sect. 121 the justices have no right to inquire into the title of the claimant, but they are bound to assess the compensation on the basis of the title which he alleges. In the case of *Re East London Railway Company* (63 L. T. Rep. 147, at p. 148; 24 Q. B. Div. 507, at p. 511) Lord Esher, M.R. says that under the Lands Clauses Act it is clear that no question could be raised as to the title of the claimant until the amount of the compensation has been settled by means of a trial before the sheriff and a compensation jury summoned under that Act. That was followed by the case of *Reg. v. London and North-Western Railway Company* (1894) 2 Q. B. 512. The compensation must be assessed by two justices under sect. 121, as there is no other section applicable in cases where the claimant has a less interest than a tenancy from year to year (*Reg. v. Manchester, Sheffield, and Lincolnshire Railway Company*, 23 L. T. Rep. O. S. 287; 4 E. & B. 88), and the question whether the claimant has such an interest cannot be dealt with by the justices under that section. The question of liability can only be raised as a defence to an action on the award, and the question whether the claimant has the title which he alleges can be determined in an action on the award, which is the proper way to raise the question:

Brierley Hill Local Board v. Pearseall, 51 L. T. Rep. 577; 9 App. Cas. 595.

[CHANNELL, J.—The question really is whether the smaller amounts which can be assessed before justices under sect. 121 stand in the same position as the larger sums where the arbitrator or jury only assess the amount, and the question of title is dealt with elsewhere.] The two cases stand in the same position; the justices can only determine the amount, and the question of title must be dealt with elsewhere. With regard to the second point, although it is found that the respondent

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went out of actual occupation in March 1900, they never really gave up possession until the appellants entered, as they retained the keys of the premises.

Hansell in reply.—The magistrate had no jurisdiction at all to entertain the claim or deal with the case unless the claimant brought himself within the section. There was absolutely no tenancy from year to year proved. None of the cases cited as to there being no jurisdiction to inquire into the title were under sect. 121, and do not conclude this case. The claimant must show some title and some right to take out the summons. He must show that he has some interest which comes within the section and, as the section indicates, he has to prove occupation. If he shows no interest at all, he is not within the section, and if he shows too large an interest he is outside the section. If he merely shows a tenancy from year to year created after the notice to treat, then he shows that there is nothing to assess under the section, as a tenancy from year to year created after the notice to treat is not within the section. The second point is conclusive for the appellants as there was no demand for possession.

Cur. adv. vult.

May 3.—The judgment of the court (Lord Alverstone, C.J., Darling and Channell, J.J.) was read by

LORD ALVERSTONE, C.J.—This was a case stated by an alderman of the city of London on an application made to him to assess compensation under sect. 121 of the Lands Clauses Act. That section requires that the amount of compensation payable to persons who have no greater interest than as tenant for a year or as from year to year, shall be determined by justices. The facts raise two questions, whether in such a case the justices have power to inquire and determine—first, whether the claimant has the interest which he alleges, and, secondly, whether the claimants were required to give up possession before the expiration of their term within the meaning of the section. As regards the first point—namely, whether the justices have any jurisdiction to inquire into the title of the claimant to the interest which he alleges, we are clearly of opinion that they have no such right. The duty of the justices is, in this respect, practically the same as that which is, under other sections of the Act, to be discharged by juries and arbitrators. As was pointed out in the case of *Reg. v. Lord Mayor of London* (16 L. T. Rep. 280; L. Rep. 2 Q. B. 292) the 121st section of the Act comes by way of proviso taking out of the previous general enactment a particular branch for which it makes a particular provision, and, therefore, on principle, the same rules as to investigation of title should apply, although the tribunal for assessing the amount of compensation is different. A long series of authorities, commencing with *Reg. v. London and North-Western Railway Company* (22 L. T. Rep. O. S. 346; 3 E. & B. 443), and followed by many subsequent cases, has conclusively established that the jury or arbitrator has no right to try a question of the claimant's title to the interest which he alleges; any such question must be raised in subsequent proceedings. Although there is no authority expressly dealing with the case under sect. 121, the same principle is in our opinion

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practically recognised in the case of *Reg. v. Hannay* (31 L. T. Rep. 702; 44 L. J. 27, M. C.), and *Cranwell v. Mayor, &c., of London* (22 L. T. Rep. 760; L. Rep. 5 Ex. 284). Therefore upon the first point raised we are of opinion that, the claimants alleging that they had an interest as tenants from year to year, the justices were bound to assess compensation upon that basis, assuming no other objection could be taken to their jurisdiction. It is, however, a condition precedent to the right to claim compensation under sect. 121 that the claimant shall have been required to give up possession before the expiration of his term or interest therein, and that in that case he shall be entitled to compensation for the value of his unexpired term or interest. It is, we think, obvious from this language that the justices must ascertain whether or not the claimant has been required to give up possession before the expiration of his term, because the question of compensation will depend upon that fact. If the claimant was required to give up possession only a few days before the expiration of his term, the compensation would be very different from that which he would receive if he was required to give it up more than six months, or it might be nearly eighteen months, before his interest could be determined, and the cases of *Reg. v. London and Southampton Railway Company* (10 A. & E. 3) and *Reg. v. Stone* (14 L. T. Rep. 552; L. Rep. 1 Q. B. 529), are in our opinion authorities to show that requirement to give up possession is an essential condition of the right to claim an assessment of compensation under sect. 121. Applying this rule to the facts of this case, it appears that notice to treat having been given to the claimants on the 14th June 1899, the term on which they were then holding expired on the 25th Dec. 1899, that they held over upon conditions which are not agreed, but which, as the claimants claimed to be tenants from year to year, would, as we have already said, compel the justices to assess compensation on that basis; and in the month of March 1900 the claimants went out of occupation, merely retaining the key. Nothing further happened, as far as they were concerned, until the 22nd Feb. 1901, when the company having taken an assignment of the landlord's interest, pulled the house down. Under these circumstances we are of opinion that there was no evidence that the claimants were required by the company to give up possession of lands occupied by them before the expiration of their term or interest, and upon this ground the magistrate ought to have held that he could not assess any compensation. If the claimants have any claim against the company based upon the fact that when they went out of possession they retained the key, this would not, in our opinion, be matter for compensation under sect. 121, but if any claim could be founded thereon, as to which we express no opinion, it would have to be dealt with by action, as pointed out in the case of *Cranwell v. Mayor, &c., of London*, (*ubi sup.*), to which we have already referred. For the above reasons we are of opinion that our judgment must be for the appellants.

Appeal allowed. Judgment for the appellants.

Solicitors for the appellants, *Le Brasseur and Oakley*.

Solicitor for the respondent, *Matthew J. Jarvis*.

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Supreme Court of Judicature.

COURT OF APPEAL.

May 12, 13, 14, and 15.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

BRADSHAW v. WIDDRINGTON AND CUST.
WIDDRINGTON AND CUST v. BRADSHAW. (a)
APPEAL FROM THE CHANCERY DIVISION.

Limitation of action—Mortgage—Acknowledgment—Payment of interest "by the person by whom the same shall be payable or his agent"—Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), ss. 1, 8.

In 1879 the owner of a freehold estate mortgaged part thereof to certain trustees to secure a loan with interest at a specified rate. The mortgagor obtained the loan on behalf of and it was received by his son, who simultaneously with the execution of the mortgage executed a bond for a larger amount in favour of his father, conditioned to be void on payment by him to his father on demand of an amount which was precisely the same as the mortgage debt, with interest thereon at the same rate as was payable under the mortgage.

The son having thus become bound to indemnify his father and the mortgaged estate against the mortgage debt and interest, it was arranged that he should pay the interest to the mortgagees through his solicitors.

Accordingly the interest was duly paid in that way until 1892, when the son paid the amount of the mortgage debt to the solicitors, to be applied by them in repayment thereof. The solicitors misappropriated the money, although they continued to pay the interest until 1898. In the meantime—namely, in 1884—the mortgagor had conveyed the mortgaged estate to a purchaser for value "free from incumbrances." The mortgagor never paid any interest, and died in 1887. Until the solicitors failed in 1899 they had acted for all the parties; and on the position of affairs being discovered the mortgagees gave notice to the purchaser of the mortgaged estate to pay off the mortgage debt. Thereupon he brought an action for a declaration that, inasmuch as the mortgagor had paid no interest, the mortgage was barred by the Statutes of Limitations. The question was raised (inter alia) whether payment of interest by the mortgagor's son had kept the mortgage alive.

Held, that as between the father and the son the latter was bound to indemnify the former; that, although there was no contract between the son and the mortgagees, there was a contract between the son and the mortgagor to pay interest on the mortgage debt; and, that being so, that there had been a payment of interest, which prevented the Statutes of Limitations from running.

Decision of Buckley, J. affirmed.

APPEAL from a decision of Buckley, J. in an action brought by John Charles Bradshaw against Shallcross Fitzherbert Widdrington and Sir Reginald John Cust alleging by his statement of claim that he had not himself or by his

agent made any payment of principal or interest, or given any acknowledgment to John James Moss, or to the defendants or either of them or to the agent of any of them, in respect of a certain mortgage of the 1st Aug. 1879 on an estate called Fair Oak; and stating that he would contend that all moneys (if any) thereby secured had been duly paid and satisfied, and alternatively would rely on the Statutes of Limitations.

The plaintiff claimed a declaration that the right and title (if any existed) of the defendants as mortgagees under and by virtue of the mortgage of the 1st Aug. 1879 in the Fair Oak estate was extinguished, and that the charge (if any) created by the same was to be deemed satisfied; delivery to the plaintiff of the title deeds relating to the Fair Oak estate; and an injunction restraining the defendants, their solicitors, and agents from selling or offering or advertising for sale the Fair Oak estate or any part thereof, and from conveying away or otherwise dealing with the legal estate therein on the faith of the security (if any) created by the mortgage of the 1st Aug. 1879 being a subsisting security, and from parting with the title deeds relating to the same hereditaments.

The defendants counter-claimed, as against William Bradshaw, payment by him as surviving executor of James Edward Bradshaw, of the mortgage debt of 5171l. 14s. 6d., together with the interest due and to accrue due thereon; if necessary administration of the estate of James Edward Bradshaw; as against the plaintiff, that the mortgage of the 1st Aug. 1879 might be enforced by foreclosure or sale; and a receiver.

The facts appear sufficiently in the headnote and the following judgment of Buckley, J., delivered on the 6th July 1901:—

BUCKLEY, J.—The question to be determined in this action is whether a certain mortgage, dated the 1st Aug. 1879, executed by Mr James Edward Bradshaw in favour of the Rev. John James Moss to secure a sum of 5171l. 14s. 6d., is a subsisting security or not. The plaintiff in the action by par. 7, as amended, of the statement of claim states that he "will contend that all moneys (if any) thereby secured have been duly paid and satisfied"—which it is agreed they have not and that is gone—"and alternatively will rely on the Statutes of Limitations." The point which I have to decide is whether in the facts which I shall have to mention the mortgagee's claim is excluded by reason of the operation of the Statutes of Limitations. Now the facts are these: On the 1st Aug. 1879 Mr. James Edward Bradshaw, being seised in fee of the Fair Oak estate, executed in favour of the Rev. John James Moss the mortgage which I have mentioned. Mr. Moss was the surviving executor and trustee of the will of Sir Edward Cust, and the mortgage money was money belonging to that trust. Mr. Moss has since died. The defendants in the action are his representatives, and for the purpose of this judgment I shall call Mr. Moss or the present defendants "the Cust trustees." The result so far is therefore that in 1879 the Cust trustees became mortgagees for a sum of 5171l. 14s. 6d. In point of fact it appears that the amount of money which was advanced was 5250l. 1s. 2d., but that there was, why it is not at all plain, a concurrent repayment of 78l. 6s. 8d.,

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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and that the exact sum which I have mentioned is the difference between those two sums. Mr. Cartmell Harrison, a solicitor, was solicitor for the Cust trustees; he was also solicitor for Mr. James Edward Bradshaw; he was also solicitor for one William Bradshaw, the son of Mr. James Edward Bradshaw; and those three clients are the actors in the earlier part of this drama. Later there comes upon the scene a fourth client of Mr. Cartmell Harrison, and that is Col. John Charles Bradshaw, who is the plaintiff in this action. From the entries in Harrison's books it appears, and upon the facts proved before me I conclude that it is a fact, that Mr. James Edward Bradshaw, the father, borrowed this sum for Mr. William Bradshaw, the son, and that immediately upon the advance the money was handed over to Mr. William Bradshaw. On the same 1st Aug. 1879 which, as I have said, was the date of the mortgage, Mr. William Bradshaw executed in favour of his father a bond for 10,000*l.*, conditioned to be void upon payment of 517*l.* 14*s.* 6*d.* with interest thereon at 4 per cent.—that is to say, upon payment of the principal sum secured by the mortgage and of the rate of interest secured by the mortgage. It also appears by entries in Harrison's books that the costs of the mortgage were borne and paid by Mr. William Bradshaw. We have got from Harrison's books the account of Mr. James Edward Bradshaw, the father. The entries there are confined to an entry showing the receipt by the father from the Cust trustees of the mortgage money and the payment by the father to Mr. William Bradshaw, the son, of the like amount. In the father's account there are not charges of interest, and nothing showing that the father ever paid any interest at all, and it is plain that he never did. Then if you look at the solicitor's account against Mr. William Bradshaw you find both in the cash account and in the ledger that from 1879 to Aug. 1885 the son is treated as paying his father this interest, and also you find that the Cust trustees are treated as receiving the interest. But when you look into Mr. James Edward Bradshaw's account you do not find that he is treated as receiving it from his son—that is, skipped over. All that appears is that Mr. William Bradshaw is treated as paying it to Mr. James Edward Bradshaw, and the Cust trustees are treated as receiving it. From 1885 onwards that is altered, because in Mr. William Bradshaw's account he is treated as paying it direct to the Cust trustees, and that goes on down to 1892. In 1892 Mr. William Bradshaw, I am told, and so far as it appears it is the fact, did pay Harrison the mortgage money, 517*l.* 14*s.* 6*d.*, but Harrison never paid it to the Cust trustees; it simply appears as a credit in Mr. William Bradshaw's account. In the Cust trustees' account there is this extraordinary position of affairs; the Cust trustees are treated as having received the mortgage money, and ever thereafter they are treated as also receiving interest upon it. I suppose what in point of fact happened was that Mr. William Bradshaw did pay Harrison the money, Harrison misappropriated it, did not pay it to the Cust trustees, and of course had to continue paying them the interest. The interest in point of fact was paid to the Cust trustees or to the tenant for life under the Cust settlement to the proper hands down to 1898 or 1899. There is no question but that the

interest has been paid. Mr. William Bradshaw is a party to this action, and he has not been called before me to explain the transactions between himself and his father in 1879. Harrison is dead, Mr. James Edward Bradshaw is dead; Mr. William Bradshaw is the one person who could give an explanation. The plaintiff in the action has not thought proper to call him. His counsel have not thought proper to call him. I therefore have to arrive at the conclusion of fact as to what were the relations between the father and the son upon the materials which I have mentioned. Now, upon those materials I arrive at the conclusion that the father borrowed the money from the son, and that as between the father and the son the latter was the person liable to pay the interest. For that reason of course you never find the father paying interest or treated as liable for it. There was as between the father and the son an arrangement by which the son having had the money should as between himself and his father keep down the interest. That having taken place in 1879, the next material fact occurs in 1884, and now Harrison's fourth client comes on the scene. At that date Mr. James Edward Bradshaw expressed to convey to Colonel John Charles Bradshaw some part of this Fair Oak estate free from incumbrances. Of course the Cust mortgage was a subsisting incumbrance, and he could not convey free from incumbrances; but as between himself and Colonel Bradshaw he expressed himself to do so. How that came about it is a little difficult to explain. Of course as between the father and Colonel Bradshaw, the father no doubt had not the least idea that he was doing anything wrong. There is some trace of a mortgage which seems to have been prepared and was to have been executed by the father to Harrison the solicitor for the purpose of securing this 517*l.* 14*s.* 6*d.* upon part of the Fair Oak estate, and it may be that the father was persuaded that he had transferred the incumbrance from the entirety to that part which he was not going to convey, and thus was in a position to convey free from incumbrances. That is guess-work. The supposed mortgage on part of the estate has not been proved, and so far as I can see never existed. Harrison charged for its preparation and charged for its execution, but there is no deed so far as I know. However, it does not very much matter. The father expressed to convey part of the estate to Colonel Bradshaw free from incumbrances by a deed dated the 16th Dec. 1884. The deed in question was in point of fact an exchange; Colonel Bradshaw gave the father a certain reversion which he had in another estate, but that does not matter. For this purpose Colonel Bradshaw was a purchaser, and entitled to all the rights of a purchaser. At that point it resulted that as between the father and Colonel Bradshaw the father was bound to discharge the mortgage and keep down the interest on the mortgage to the indemnity of the purchaser; he purported to give the purchaser an estate free from incumbrances, and had not given it, and as between those two parties it rested upon the father to keep down the interest upon the mortgage and pay the principal. Before July 1885 Mr. William Bradshaw borrowed further sums from his father—two sums of 2000*l.*, and one of 6000*l.*—making a total sum of 10,000*l.*, and he thus became indebted to him in 15,171*l.* 14*s.* 6*d.*,

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and on the 17th July 1885 he executed a bond for that larger sum. As far as the present case is concerned that left the matter where it was. The 517l. 14s. 6d. was included in the larger sum. For the present purpose it is the same thing as if the bond of Aug. 1879 had remained. In Sept. 1887 the father died, and his executors were Harrison the solicitor and Mr. William Bradshaw the son. On the 19th Nov. 1887 Colonel Bradshaw became the purchaser from the father's executors of the rest of the Fair Oak estate, paying a sum of 5975l. for it, and that was expressed to be conveyed free from incumbrances. So after that date Colonel Bradshaw has been expressed to be the grantee of the whole of this estate free from incumbrances. Matters go on; the Cust trustees or beneficiaries received their interest without interruption down to 1899 or thereabouts, and in Nov. 1899 Harrison committed suicide. Upon that these matters seemed to have been looked into, and it turned out that this mortgage in favour of the Cust trustees was a subsisting mortgage. Colonel Bradshaw meanwhile had been in possession of the estate for many years, knowing nothing of any mortgage at all, and the question to be determined in this action is, as between two innocent parties—Colonel Bradshaw, who purchased this estate without any knowledge of this mortgage at all, and the Cust trustees, who advanced their money upon this mortgage, and had their interest down to 1898 or 1899—which is to suffer. Now the point thus to be determined between the parties turns, it seems to me, upon the proper effect of sect. 8 of the statute 37 & 38 Vict. c. 57. The question which I have to investigate is whether the interest that the Cust trustees have thus received through a period, of course, well within the twelve years limited by the statute, has been paid. I have to see whether the money which in point of fact reached the mortgagee was paid by the person by whom it was payable, or by the agent of the person by whom it was payable. The point which I have to determine I think really resolves itself into this: The whole basis and principle of all the Statutes of Limitations is that a payment to take a case out of the statute must be a payment by a person liable as an acknowledgment of right. The whole idea is that the payment is an admission of the right of the person to whom it is paid. And what I have to consider, I think, is whether the payment here has been made by a person bound to pay it; and whether by that expression "by a person bound to pay it," I must find that he is a person bound between himself and the mortgagee to pay it, or whether the proposition is satisfied if it be paid by a person who, as between himself and the mortgagor, is bound to pay it. Now, looking at the question upon principle, in the first instance apart from authority altogether, it seems to me that all principle and common sense lead one to the conclusion that the statute means a person who, as between himself and the mortgagor, is bound to pay. You have to see whether the mortgagor has made an admission. That is the basis of it all. If the mortgagor has himself paid, or whether he has called upon somebody else and bound somebody else towards him to pay it, and that person has paid, the mortgagor has equally, as it appears to me, made an admission. That is how I regard the question upon principle. Now, how does it stand as regards the authorities? When you

look at the authorities it appears to me that that really is their effect. Not that I have been able to put my hand upon a case in which that exact point has arisen. But I find that that is the language which learned judges have used in many cases. Take first the case of *Chinnery v. Evans* (11 H. of L. Cas. 115). There the payment was made by a receiver who has been appointed on a petition presented by the mortgagee—he was receiver of certain estates in Ireland—and (at p. 134) Lord Westbury in advising the House used this language as to the position of the receiver: "Upon that point I think no reasonable doubt can be entertained that under the statute the receiver in the receipt of the rents of the Limerick estate is, in point of fact, as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order is payment in law by the legal agent of the person liable to pay." He is not dealing with a case in which the person is not the agent of the mortgagor. He says he is the agent of the mortgagor, so that it is not a case directly in point upon the question which I have to determine here. But I find that this language is used by Lord Cranworth in the same case, and, as I am going to show when I come to *Harlock v. Ashberry* (46 L. T. Rep. 356; 19 Ch. Div. 539), this form of words is relied upon in the judgment in that case. Lord Cranworth, at p. 139 of 11 H. of L. Cas., says: "The payments in this case were not payments by a stranger; for though a receiver appointed under the Irish statute is an officer of the court, yet he is no stranger to the mortgagor, but a person paying for him, and on his account, what he is bound to pay." Now, the context in which that language occurs is this: If a mere stranger to the whole transaction, to both mortgagor and mortgagee, comes and pays, that is not an admission at all; if a mere outsider, a stranger to both, comes and pays, that is no admission; but if a person who is not a stranger to the mortgagor (that is what Lord Cranworth says) comes and pays, that will do for the purposes of the statute. Then I pass from *Chinnery v. Evans* (*ubi sup.*) to *Harlock v. Ashberry* (*ubi sup.*). The point there was that a mortgagee had obtained payment of rent from a tenant. Of course he was entitled to go into possession and take the rents if he liked adversely to the mortgagor and everybody, and he did so. The question there was whether money which he thus got from the tenant was a payment for the purpose of excluding the statute. The court held that it was not because the payment was not got from the mortgagor or any person bound towards the mortgagor to pay the mortgage, but from a tenant, and simply obtained by the mortgagee entering into possession of the property. That was the question which the court had to decide; but in delivering judgment upon that I find that Sir George Jessel (at p. 546 of 19 Ch. Div.) uses this language. After reading the passage from *Chinnery v. Evans* (*ubi sup.*) which I have just referred to, he goes on to say this: "Therefore, on principle and on authority I think that a payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money, and this is not such a payment." Now, what did Sir George Jessel there mean by "bound"? Did

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he mean "bound towards the mortgagee"? I think not, because he had just read language in which Lord Cranworth had commented upon the fact that the receiver was no stranger, not to the mortgagee, but to the mortgagor; and I think he meant a payment by a person who is bound as between himself and the mortgagor to pay the interest upon the mortgage money. Then when I pass on to the judgment of Brett, L.J., it seems that is the more plain. On p. 547 of 19 Ch. Div. Brett, L.J. says this: "Then the question arises whether payment of rent by a tenant to a mortgagee who has exercised the right to demand the rent is a payment of principal and interest within that section. I come to the conclusion that it is not for three reasons," and the third reason is this: "But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor, or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest to be a payment within this section must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery v. Evans* (*ubi sup.*). The question may be asked, Why must this payment be by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest on his behalf? It seems to me the reason is that in all Statutes of Limitations the principles on which they are founded is that in those cases in which a payment is allowed to take the case out of the operations of the Statute of Limitations, it must be such a payment as amounts to an acknowledgment of liability." Now, what did the Lord Justice mean there by "bound"? Bound, I conceive, as between that person and the mortgagor; bound, he says, to make a payment for the mortgagor; and, again, at p. 549 of 19 Ch. Div.: "On the ordinary rules of construction and on the authority of *Chinnery v. Evans* (*ubi sup.*) I feel bound to say that a payment to come within 1 Vict. c. 28 must be a payment by a person liable as mortgagor or some person on his behalf, or such a person as was the receiver—a person entitled to pay on his behalf." That is to say, he must be a person entitled by reason of the relations between that other person and the mortgagor to pay money on his behalf. It seems to me, therefore, that the whole of the language of those judgments is in favour of the view which I take upon the principle that the person bound to pay and whose payment is material for the purposes of the statute, is not a person bound as between himself and the mortgagee, but a person bound as between himself and the mortgagor. I need only add to those passages this from the case of *Levin v. Wilson* (55 L. T. Rep. 410; 11 App. Cas. 639), where Lord Hobhouse, in delivering the judgment of the Privy Council, uses (at p. 644 of 11 App. Cas.) this language after quoting *Chinnery v. Evans* (*ubi sup.*) and *Harlock v. Ashberry* (*ubi sup.*): "Their Lordships have not been referred to any case where it has been decided that payment made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his

agent," and there is no such authority to be found as far as I know. Here I agree the payment was not made by the mortgagor, Mr. James Edward Bradshaw. Whether it was made by his agent or not is another matter. For the present purpose I am assuming that Mr. William Bradshaw was not his agent. Assuming that he was not his agent, still it was made by Mr. William Bradshaw, who was, I think, as between himself and his father, the person who was bound to pay. Inasmuch as that was so, Mr. William Bradshaw's payment, made in pursuance of his contractual obligations towards his father, was, as it appears to me, his father's admission of liability. Another ground has been put forward which is very ingenious, and upon which I think I ought to say a word. Mr. James Edward Bradshaw, the mortgagor, died in Sept. 1887, and, as I have said, Mr. William Bradshaw and Harrison were his executors. As from 1887 Mr. William Bradshaw continued to pay the interest in this sense, that Harrison, as his solicitor, passing the accounts through his books, charged Mr. William Bradshaw with the interest which Harrison in fact was paying to the Cust trustees or the Cust beneficiaries. After 1887 Mr. William Bradshaw, the person thus making the payments, was the person liable to pay as mortgagor in the sense that he was legal personal representative of the mortgagor, and Harrison, the other person to whom Mr. William Bradshaw was making the payment, or who was making the payment for Mr. William Bradshaw, was the other executor. So that, if Mr. William Bradshaw had paid the money to Harrison, or rather to himself and Harrison as co-executors, and they had paid it on to the Cust trustees or beneficiaries, that was a payment by Mr. James Edward Bradshaw, the mortgagor. It appears to me that there is something in that contention. As from 1887 the persons liable as mortgagors to pay were Mr. William Bradshaw and another, and the persons paying were Mr. William Bradshaw and that other, inasmuch as Mr. William Bradshaw found the money and it passed through the hands of the other and the other paid, and Mr. James Edward Bradshaw by his legal personal representatives was paying from 1887 onwards. There is only one other thing which I ought to mention, I think, and that is this: It is quite plain that Colonel Bradshaw, for whom one feels some sympathy in this unfortunate state of affairs, in point of fact sustains the loss which I think he must sustain, and which must fall upon him for the reason that he had the misfortune to employ as his solicitor the person who had the deeds of this property, and who had them, and properly had them, whether the estate was free from incumbrances, or whether it was not free from incumbrances. If it was free from incumbrances the solicitor had them, and properly had them, for Mr. James Edward Bradshaw. If it was not free from incumbrances he had them, and properly had them, for the Cust trustees, the mortgagees, and when the father purported to convey free from incumbrances to Colonel Bradshaw Harrison would keep them, and properly keep them, because his client, Colonel Bradshaw, was entitled to them. If Colonel Bradshaw had employed another solicitor, and had asked for the deeds, of course the deeds would not have been forthcoming unless Harrison had committed a fraud, because he

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could not have handed the deeds which he held for the Cust trustees as mortgagees to a purchaser from the mortgagor, the owner of the equity of redemption, and the matter would have come out. Colonel Bradshaw, in fact, never got the deeds, and I do not think is to be blamed for want of prudence in the matter. He never saw the deeds, and the deeds remained with Harrison in some one of the many characters which he filled. Colonel Bradshaw, I think, is guilty of what in the eye of this court is negligence in the sense that he relied upon a solicitor who did not get the deeds as he ought to have got them on behalf of his client, and who, having regard to the multitudinous character of his agency as solicitor, would have had the deeds already in his possession for another client. I feel, therefore, less compunction in visiting the loss upon Colonel Bradshaw, because it appears to me that he must suffer from that unfortunate state of things. On this point arising under the Statutes of Limitations it seems to me there has been nothing which deprives the Cust trustees of the security which they hold. The result is that the action which asks for a declaration that that mortgage is gone and delivery of the deeds, and an injunction to restrain the mortgagees from selling, must be dismissed, and that upon the counter-claim (to which I should add Mr. William Bradshaw as the surviving legal personal representative of Mr. James Edward Bradshaw, the mortgagor, is joined as a defendant) the plaintiffs in that counter-claim are entitled to the relief which they ask, which is enforcement of the money debt against the estate of the mortgagor, and as against the land foreclosure or sale. There will be the common order against the executors of the mortgagor, and for foreclosure with delivery up of the deeds. And the mortgagees must be allowed to add their costs of this action and counter-claim to their security.

From that decision the plaintiff and William Bradshaw now appealed.

Henry Terrell, K.C. and *George Henderson* for the appellants.—The question is which of two innocent persons shall suffer by the fraud of another. The onus is upon the respondents to prove the payment of part of the principal or of interest within the period of twelve years in order to take the case out of the Statutes of Limitations. First, as to the claim against the estate, that depends upon sect. 1 of the Real Property Limitation Act 1874, which is a re-enactment of sect. 2 of the Act of 1833 (3 & 4 Will. 4. c. 27), and is supplemented by sect. 1 of 7 Will. 4. & 1 Vict. c. 28. Then, with regard to the right to recover under the personal covenant, that depends upon sect. 8 of the Act of 1874. That is a re-enactment of sect. 40 of the Act of 1833. [*Astbury*, K.C.—I admit that the onus was upon the respondents in the first instance, but that onus is shifted to the appellants because of the entries in the accounts kept by Cartmell Harrison. The onus of proof is therefore upon the persons who say that the mortgage has ceased to exist.] Then arises the question as to the admissibility in evidence of those accounts. The only evidence of payment of interest is in the accounts delivered by Cartmell Harrison, and we submit that they are not admissible. We rely upon the statement by Lord Campbell in the case of

Bright v. Legerton (2 De G. F. & J. 606) as to whether a letter written by a deceased solicitor is receivable in evidence, and also whether bills of costs are similarly admissible. That, we submit, covers the exact point here, and has been followed in subsequent cases. The statement of Lord Campbell appears in Taylor's Law of Evidence, 9th edit., p. 460, pl. 708; p. 455, pl. 700, citing also *Hope v. Hope*, No. 2 (1893) W. N. 20). See, further,

Smith v. Blakey, L. Rep. 2 Q. B. 326, at p. 333;

Massey v. Allen, 41 L. T. Rep. 788; 13 Ch. Div. 558, at p. 563.

[*STIRLING*, L.J. referred to *Taylor v. Witham* (3 Ch. Div. 605).] The decision of Lord Blackburn in *Smith v. Blakey* (*ubi sup.*) was not cited in *Taylor v. Witham* (*ubi sup.*). [*COZENS-HARDY*, L.J.—The leading case on this point is *Higham v. Ridgway* (10 East, 109; 2 Sm. L. Cas. 608).] As to the question arising upon the Statutes of Limitations, the present case is very similar to

Newbould v. Smith, 53 L. T. Rep. 137; 29 Ch. Div. 882; 55 L. T. Rep. 194; 33 Ch. Div. 127.

Other cases on that question are

Harlock v. Ashberry, 46 L. T. Rep. 356; 19 Ch. Div. 539;

Astbury v. Astbury, 78 L. T. Rep. 494; (1898) 2 Ch. Div. 111;

Levin v. Wilson, 55 L. T. Rep. 410; 11 App. Cas. 639.

[*COZENS-HARDY*, L.J. referred to *Chinnery v. Evans* (11 H. of L. Cas. 115).] On the authorities our submission is, therefore, that if the court accepts all these accounts as evidence, they merely show that the payments of interest were made by William Bradshaw, and therefore were not payments by the mortgagor or by his agent or by a person having any privity of estate; and that consequently they were payments by a stranger. Another point is this: James Edward Bradshaw, who died in 1887, appointed William Bradshaw and Cartmell Harrison his executors. It appears from the accounts that after 1887 William Bradshaw paid the interest. He became one of the executors of James Edward Bradshaw; it is said that he paid the interest as executor, and that that takes the case out of the Statutes of Limitations. [*Astbury*, K.C.—The mortgagees knew nothing about these accounts; they received the money from Cartmell Harrison apart altogether from the accounts.] The mortgagees received the interest from the firm of solicitors of which Cartmell Harrison was a partner, and according to the accounts they received it on behalf of William Bradshaw. The mortgagees must therefore ask the court to assume that the payments by him were made in his character of executor, and not in his individual capacity. An act done, however, in one capacity by a person who fills two characters is not an act done in his other capacity. That was clearly brought out in

Astbury v. Astbury (*ubi sup.*).

A case similar in some respects upon this point to the present is

Brown v. Gordon, 16 Beav. 302.

There it was held that where a man fills two characters he may do an act which may affect him in one but not in the other character; and that therefore, payment of interest on a debt by sur-

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viving partners, one of whom was the executor of a deceased partner, had no reference to the executorial character. The payments of interest by William Bradshaw cannot therefore be treated as payments by him in his character of executor. A further point is this: In 1892 the principal sum was paid by William Bradshaw to Cartmell Harrison, and so it appears in the accounts—not only in William Bradshaw's accounts, but in the Cust trustees' accounts, and the mortgage debt was consequently discharged.

Asbury, K.C. (with him *Bryan Farrer*) for the respondents.—In *Newbould v. Smith* (*ubi sup.*), which was the case relied upon in the court below, the sale by the mortgagor was made subject to incumbrances. That was the whole point in that case, and it is distinguishable from the present on that ground. Here James Edward Bradshaw purported to convey the Fair Oak estate to John Charles Bradshaw free from incumbrances, and it is therefore exactly the opposite of what occurred in *Newbould v. Smith*. That case went to the House of Lords, but this point was not dealt with, and the case was decided on a by-point. Another authority on this point is

Doe v. Eyre, 17 Q. B. 366.

That case was considered in this court, and held to be rightly decided in

Ludbrook v. Ludbrook, 84 L. T. Rep. 485; (1901) 2 K. B. 96.

This point is therefore not open to argument. It is not a case of the father making the son his agent. The son was bound in law to keep down the interest. He had a right and an obligation to keep it down. In that way he paid the interest on behalf of his father, and as his father's duly authorised agent. [COLLINS, M.R.—It does not matter how the agent is appointed so long as in law he is the agent of the person liable to pay the interest.] There was not only agency but principal and suretyship. [COLLINS, M.R.—If there was a subsisting contract between the father and the son that the latter should pay the interest the contract would survive, and the interest would continue to be payable by the son after the death of the father.] Yes, the obligation would survive in favour of the father's estate, and the payment of interest would still have to be made. Buckley, J. treated that as the point in the case, and so decided it. As to the admissibility of the accounts as evidence, the present case is governed by *Higham v. Ridgway* (*ubi sup.*), which was a decision as to the books kept by a deceased person—a solicitor—in the course of his duty to his client. Taking the best case that the appellants cited—viz., *Hope v. Hope* (*ubi sup.*)—all that was held there was that a solicitor's diary was not evidence at all; but that decision does not apply to books of account. *Hope v. Hope* (*ubi sup.*) was limited to a solicitor's diary. That is on a totally different footing, and that case has nothing to do with the present. None of the other cases cited touches the point I am now on. The law is summed up in Taylor's Law of Evidence, 9th edit., p. 460, as to payments in the course of duty, and in the ordinary routine of business. As to entries against interest as regards the two sides of an account, see

Taylor's Law of Evidence, 9th edit., p. 438.

Henry Terrell, K.C., in reply, referred to

Taylor's Law of Evidence, 9th edit., p. 495, pl. 755.

COLLINS, M.R. — The question of law that arises upon the facts of this case is whether a payment which was made within twelve years before action was made under such circumstances as to be a payment by the mortgagor within the meaning of the 8th section of the statute 37 & 38 Vict. c. 57, coupled as a claim for foreclosure with the statute 7 Will. 4 & 1 Vict. c. 28. That question involves an examination of the circumstances under which this mortgage came into existence. A difficulty arises by reason of the fact that all the parties that I have now mentioned had a common solicitor, Mr. Harrison, of the firm of Ingram and Harrison, who is now dead. A very great discussion was opened before us by Mr. Terrell, as to whether or not certain accounts kept by Mr. Harrison in his capacity as solicitor between the parties were or were not admissible in evidence. Those accounts were between him and the father Mr. James Edward Bradshaw, and between him and the son Mr. William Bradshaw, and then there were also the accounts kept with the Cust trustees. But there are certain facts that are capable of proof either by admissions, or which stand proved quite apart from those documents kept by the solicitor, and I think that they may be shortly stated thus: There is no doubt that Mr. William Bradshaw was heavily indebted at the time. There is no doubt that he was desirous of raising a loan of 5000*l.* odd, and that the machinery by which that loan was obtained was by his father raising the sum by mortgaging his estate of Fair Oak to the Cust trustees, and by handing the money so received to his son. There is also no doubt that the mortgage was effected, and that interest continued to be paid upon it right down to 1892. I need not carry it beyond that. It was paid by Mr. Harrison who, it is admitted, was the agent or the solicitor acting for the mortgagor Mr. James Edward Bradshaw, down to his death, and who continued to act as solicitor for his executors—of whom he was one—after the death of the mortgagor. Those facts are admitted. But it is said that, admitting those facts, there is no evidence of a payment by the mortgagor which would keep alive the obligation of the mortgagor under the Statutes of Limitations. The section primarily in question is the 8th section of the Act 37 & 38 Vict. c. 57, which I have just referred to. It is in these terms: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given." The section of the Act 7 Will. 4 & 1 Vict.—the whole Act consists of one section—is as follows: After reciting that doubts had been

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entertained as to the effect of the statute 3 & 4 Will. 4, c. 27, so far as the same related to mortgages, and that it was expedient that such doubts should be removed, it enacts that "It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding." Dealing first with what I have called the uncontested facts, how does the matter stand? You have a mortgage created; you have interest paid upon it right up to a period within the Statutes of Limitations by a person who is admitted to have been the solicitor for the mortgagor himself and afterwards for his executors; and you have the payment admittedly received as and for a payment under this mortgage by the mortgagees. Why are the mortgagees, starting at that *prima facie* case, not entitled to succeed? It seems to me that the evidence alone is sufficient to justify the mortgagees here in saying: "There has been a payment made within the statutory period of this mortgage. We accept it that, as against a person who has been in possession, as the plaintiff has here, for something more than twenty years, the onus is upon us to show as against him that that mortgage is alive. But accepting it, we prove by admissions or *aliunde*"—and the facts which I have mentioned are uncontested—"a continuous payment of interest by a person who *prima facie* is the proper person to pay it to persons who have received it under the mortgage." It seems to me that that has thrown the onus of proof on the persons who say that the mortgage has ceased to exist. That is on the plaintiff here. The question then would be whether he has discharged that onus which has been thrown back upon him, and displaced these statements by showing that the payments were made under such circumstances as not to be payments by the mortgagor within the meaning of the section which I have read. If the case rested there, and if Mr. Terrell succeeded in the very vehement argument which he has addressed to us with a view to excluding the accounts kept by the solicitor, it seems to me that Mr. Terrell would have no answer to this case at all, because he elected not to call the person now living who knows most about this matter, namely, Mr. William Bradshaw. He deliberately elected not to do that, and having elected not to do that he comes before us and objects strenuously to the admission of the accounts kept by Mr. Harrison which purport to show the whole history of the financial dealings between these parties, the father Mr. James Edward Bradshaw, and the son Mr. William Bradshaw, and himself. It seems to me that Mr. Terrell cannot really advance a step in this case without going into those accounts. Therefore I think that though this decision might be rested, and firmly rested, upon facts quite apart from anything in those accounts which were specially dealt with by the learned judge in the court below, yet as Mr.

Terrell, while trying to keep them out, has himself relied upon some of the facts which appear in them, I think that it will be better on the whole to deal with them. Dealing with them involves a consideration—but I think that a cursory consideration will be enough—of the question how far those accounts really are admissible. With respect to that question, it seems to me that Mr. Terrell is really not in a position to contest before us, as a matter of strict law, whether those accounts are admissible or not, because at the trial Mr. Astbury was there with the evidence which would have told us the precise conditions under which those accounts came into existence. Owing to what passed at the time between him and Mr. Terrell in the presence of the judge in the court below, that evidence was not called. Having regard also to the nature of the admissions interchanged and Mr. Terrell's very pronounced admissions to us as to what was in his own mind at the time, and to the attitude of the judge, and having regard further to the complete absence of any reference to this point or concerning any objection either in the note handed to us or in his Lordship's judgment, which is a very careful judgment, it is obvious to me that the explanation of what took place before the learned judge was this: Mr. Terrell had not in his mind at the time the technical difficulties which arose as to the admissibility of entries in accounts made by a deceased person, but he was of opinion that those entries were really *res inter alios acta*, and did not bear directly upon his position, and were not admissible in evidence as between the parties. He had that in his mind. I do not think that there were present to his mind the technical grounds upon which admissions made by a deceased person are or are not capable of being received at all in evidence. I think that his view was that if those accounts were allowed they really were not evidence against his clients and that they were irrelevant. He certainly did bring it to the learned judge's mind—indeed I understood him to admit that very fact himself—that he thought that there were technical objections as to the reading of those accounts at all. If those objections had been pressed, Mr. Astbury had witnesses who were prepared to deal with them. And I do not think that we should be justified now in excluding that evidence on the ground that those technical objections had not been made good if it were possible that they could have been made good by Mr. Astbury's calling witnesses. One objection pressed upon us by Mr. Terrell was that as to the class of entries, of which it was asserted that as they were entries made in the course of the discharge of duty they must not only be made in course of duty but they must be made at the time. Mr. Astbury's witnesses could have described how they came into existence and when they were made. He certainly could not deal with an objection based on this ground where the witness after discussion was not put into the box because he was not wanted. But there is a further observation to be made upon that. If this case had been seriously argued on the ground which Mr. Terrell argued it upon before us, and if the learned judge in the court below had been disposed to take Mr. Terrell's view of it, it was competent for Mr. Astbury there and then to call from the hostile camp the gentleman who knows most about it—

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but who I have no doubt for very good reasons thought it desirable not to go into the box—and that is Mr. William Bradshaw. We cannot put Mr. Astbury's clients back into the position in which they were at the time, and Mr. Terrell cannot rely on the technical objections that might be urged as to those accounts, though I must say, after hearing the arguments, that I am not disposed to attach very great weight to them. Still, I do not think that the question is now open to us any more than it was to the learned judge before whom it was never made, and whose opinion upon it we have not got. Having said that much, I propose now to refer to one document at all events which is outside any of the principles urged by Mr. Terrell, that is the extract from the bill book kept by Mr. Harrison, which bears an entry, "Received on account costs of loan, 24 Nov. 1879, 150*l*." That is a clear entry against interest as to which I do not think it can be contended that it did not make this bill admissible in evidence. But when you get this bill in evidence it really tells the whole transaction out of which this mortgage arose. It shows what the object of raising the money was. Mr. James Edward Bradshaw, the father, became the nominal debtor. The mortgage was actually between him and the Cust trustees. But between him and his son, as he was raising the money for his son, the son undertook the obligation and the right of paying the interest upon the mortgage. I need not go through the entries in detail; but that is to me the fair and inevitable inference to be drawn from them. The money was borrowed for the purpose of the son, and was borrowed by the machinery of the father giving a mortgage upon his own property. We know—in fact it is admitted—that the payment of interest was made by Mr. Harrison throughout and by the executors of Mr. James Edward Bradshaw, Mr. Harrison, and Mr. William Bradshaw, after the death of their testator. If that money was paid by the person—Mr. William Bradshaw—who had come under the obligation which is evidenced by that bill, how can that be said to be a payment not by the mortgagor? It is a payment which was made under an obligation imposed by the bargain between the parties that Mr. William Bradshaw should pay. Mr. James Edward Bradshaw was responsible directly and personally to the Cust trustees; but as between himself and his son William, William was the real debtor and the father was a surety. If you look to the origin of this, the inference drawn from a payment and its effect in keeping the security alive, it is necessary that it must be a payment by the mortgagor—that is to say, it must be such a payment as raises the inference that the mortgagor acknowledges the security as a still subsisting security. That is the meaning of saying that the statute only runs from the time of payment. It does not say in terms in the Act that it is to be a payment by the mortgagor. But the Act obviously implies that it must be a payment—and the cases have established it—as will operate as an acknowledgment by the party to the contract, the mortgagor, of the subsistence of the security. After such a payment he cannot say that at the time of the payment the mortgage did not exist. You get that acknowledgment just as much where you have an arrangement between the mortgagor and somebody else—either by a con-

tract or by a mere mandate—that that other person shall pay the interest for him. Whether that person who pays has the obligation imposed upon him by law as a legal agent without his assent, but still having all the rights as though he had the assent of the mortgagor, or whether you have him appointed under some arrangement with the mortgagor himself, so long as he pays with the assent, expressed or implied or imposed, of the mortgagor, that seems to me to be a payment that keeps alive the liability of the mortgagor, being in point of law an admission by him of the still subsistence of the security. It seems to me that you have that element exactly in this case if it is inferred as a fact, as I have no hesitation in inferring, and as Buckley, J. did infer, that the arrangement at the inception of this mortgage was that the money was borrowed for the purpose of the son, and that as between the father and the son, the son was the real principal debtor and the father the surety. To follow out this transaction, and looking at these entries as admitted in evidence, we do find that the interest was continued to be paid by the son, and was in the books apparently paid to the father's account down to 1886. From that time onwards it was paid direct to the trustees, so far as appears from the entries in Mr. Harrison's books. The father died in Sept. 1887. From that date onwards, as I have said, the two executors, Mr. Harrison and Mr. William Bradshaw, continued up to 1892, at all events, to pay interest in the same way as it had been paid before. The payment relied upon as taking this case out of the Statutes of Limitations must be a payment made before 1892. I think that 1889 would be the last date. That is to say, it must be a payment made after the death of the father. It was very strenuously contended by Mr. Terrell, for more than one reason, that that is not a payment which would be a payment by the mortgagor within the meaning of the section. The first point that he takes is that, examining the accounts which I am now treating as admitted in evidence—I think that they are in for the benefit of Mr. Terrell, who contested them, rather than for the benefit of Mr. Astbury—you find in 1884 and 1885 a transaction which would seem to show that the mortgage of 5000*l*. odd was, in point of fact, paid off. Though interest was continued to be paid in the same way by Mr. William Bradshaw right on, and though Mr. Terrell admits that the mortgage was not in point of fact paid off, still this entry, Mr. Terrell says, taking it at the highest against him, indicates some transaction between the father and Mr. Harrison whereby the father understood that either the mortgage had been paid off, or that arrangements were being made to pay it off, which justified him in thinking that he might, as he did, convey the estate or a part of it, which was subject to this mortgage, free from incumbrances to the plaintiff. Unquestionably he did convey part of it in 1884, and then the executors afterwards conveyed the residue to the plaintiff free from incumbrances. Though there is some difficulty as to those entries, it seems to me that it is only a *prima facie* difficulty, and that though those entries are admissible they are, like every other evidence, to be simply taken for what they are worth, and they do not become absolutely unimpeachable because they are admitted in evidence. Knowing as we

know now, that Mr. Harrison terminated his career abruptly by suicide, and had for some period before his death obviously been falsifying his books, we look with suspicion at those entries. Where they accord with the facts they would be *aliunde* confirmed; but where they are inconsistent with facts that cannot be disputed we must accept the inference that they are not to be relied upon. Mr. Terrell contends that if we accept those accounts at all we are bound to accept them absolutely and for all purposes, and without qualification. I do not agree to that at all. They are only evidence and they are to be weighed as every other evidence is weighed, according to the probabilities and according to the admitted facts. Where they do not agree with those, or where some particular entry does not agree with them, they or it must be rejected. If you take this particular entry it does not accord with the facts because on the very date at which it is asserted that this mortgage was paid off we find that Mr. William Bradshaw gave a bond for a sum which embraces this very sum—that is to say, for the sum of 15,171*l.*, being the 5171*l.* plus the 10,000*l.* fresh loan. That is absolutely inconsistent with the notion that Mr. James Edward Bradshaw supposed that that mortgage had been paid off. The interest was continued to be paid in the same way, as I have said, right down to 1892. Therefore, it seems to me, that that piece of evidence is displaced. It is quite probable that there was some suggestion made that something of the kind should be done, and it may even be possible that Mr. James Edward Bradshaw thought that it was going to be done, at all events to such an extent as to justify him in making a conveyance to the plaintiff on the footing that these incumbrances would be paid off. But when he conveyed this estate free from incumbrances he did not deny the incumbrances. He simply as between himself and his purchaser left the obligation upon him to keep the interest down. Though he may have supposed it was going to be paid off so as to justify him in making the conveyance, that does not in the least carry the paper entry beyond this fact—that it is a paper entry which does not accord with the fact. Then Mr. Terrell says, in relying on the payment by Mr. William Bradshaw as taking this case out of the statute, that you can only use it for that purpose upon the inference that what was done was done with the assent of the mortgagor. He says that if the mortgagor is under the impression that the mortgage is paid off, that at any rate gets rid of any implied assent on his part or admission on his part that the security is still subsisting. He says that Mr. James Edward Bradshaw regarded the mortgage as at an end, and that you cannot draw from the fact that Mr. William Bradshaw paid interest an inference that his father assented to the security being thereby kept alive. But it seems to me that that point cannot be maintained if once you assent to the view which I take, and which Buckley, J. took of the original arrangement for the mortgage loan. You get to this—that Mr. William Bradshaw came under a liability to his father to pay the interest and the principal upon that mortgage as long as it subsisted. That obligation continued upon him and that right continued upon him as long as the mortgage subsisted, whether the father thought it subsisted or not. And the payment by

him under those circumstances pursuant to the contract with his father would, it seems to me, by virtue of that contract be a payment which would enure as a payment in relief of the mortgage, and a payment which would be taken to be made with the father's assent and by his authority under the contract. That contract would survive although the mortgagor were dead. Therefore it would be possible—and it was indeed obligatory still upon Mr. William Bradshaw as between himself and the estate after the death of the mortgagor—to keep alive the mortgage and to pay the interest, as he did pay it. Although his father might for some time—I do not know that the impression continued, if it ever existed; I do not think that it could have continued for some years afterwards—have been under the impression at one time that the mortgage had been paid off, yet that obligation to pay remained. Therefore it seems to me that you get a payment which has all the essentials to make it an admission by the mortgagor that the mortgage still subsisted. Then Mr. Terrell takes another point. He says: "Whether these points that I have so far taken are right or wrong, here you have a payment by a person after the death of his father. It is a payment by a person who, although he was executor, still continued to be what he was before"—the person who, as we think, was the person for whom the money really was borrowed, retained his position such as it was before the death after the death, notwithstanding that he has become an executor—"and no payment made by him can have any more force or effect than if he had not been executor at all." That requires some little analysis. No doubt after the father's death the position was changed to this extent, that the father was not there to be personally and ostensibly bound by and taken to make the admission involved in a payment made by his son of the interest from time to time. But there were his representatives, the executors, of whom the one was the son and Mr. Harrison the other, who would be just as much bound as the father would be if he had been alive. They were persons who could make the admission, and who could make the payment. *A fortiori* if they were bound by the contract made by their testator as his representatives they were bound by that to assent to whatever was done in carrying out that contract by the other party to it. The other difficulty arises from the fact that the other party to the contract, Mr. William Bradshaw, was himself executor. But it was perfectly competent, it seems to me, for Mr. William Bradshaw and Mr. Harrison, as executors, to stand in the shoes of the testator and to approve of that which had been done by one of them—by Mr. William Bradshaw, the debtor—in implementing the bargain of the original loan. Therefore it seems to me that the payment by Mr. William Bradshaw when he was executor afterwards is exactly on the same footing as the payment by him before his father died, and has exactly the same consequences, and that therefore that was a good payment to take the case out of the statutes. I do not think that it is necessary to travel into any of the numerous cases that have been discussed, because I think that on the broad principle that I have stated this bargain clearly brings the payment within the limits that have been put by the cases upon the right to say

that a payment made by another person is a payment made by the mortgagor. There is the case in the Privy Council of *Lewin v. Wilson* (55 L. T. Rep. 410; 11 App. Cas. 639), which clearly covers the position which I find as a fact was the position of these two parties, the father and the son, in relation to this mortgage. For these reasons I think that Buckley, J., who has delivered a most admirable judgment, in which he has discussed all the authorities, is absolutely right. And really, if it had not been for the vigorous and interesting argument which was addressed to us here by Mr. Terrell I should have thought it sufficient to say that I entirely agreed with Buckley, J. both in his reasons and in his conclusions. I think therefore that this appeal must be dismissed. With regard to the costs, there will be an order against the appellants for costs, with liberty to me to add such costs as the respondents may not get to their security. That was the order that was made in the court below.

STIRLING, L.J.—I am of the same opinion, and I do not wish to add anything to what the Master of the Rolls has said.

COZENS-HARDY, L.J.—I am of the same opinion. I only desire to say a few words. The real point seems to me to be, What was the arrangement actually come to? Buckley, J. has arrived at the conclusion that the father borrowed money for William the son, and, as between the father and William the son, William was the person liable to pay the interest. Apart from anything else it seems to me that the bill of costs to which the Master of the Rolls has alluded contains abundant evidence to satisfy that. I find there that it is a bill paid by the son. I find "Instructions for bond from you to your father to secure the amount." I find again on a later date, "Attended you on your calling when you executed bond to your father for the amount raised by him on mortgage." Putting together the fact that the mortgage was for an odd sum, a peculiar sum, that the bond of the same date was for a larger sum, and that the rate of interest was the same, and that there are these entries in the bill of costs, quite apart from other disputed documents, I think that it is abundantly clear that as between the father and the son, the son was bound to indemnify the father against this mortgage obligation. That being so, although there was no contract between the mortgagees and the son, it is quite sufficient, in my view, that there was a contract between the mortgagor and the son which as between these parties bound and entitled the son to make the payments of interest to the mortgagees. That being so, there has been a payment of interest, which suffices to prevent the statute from running. Any other conclusion than that which has been arrived at by Buckley, J. would, I think, have placed mortgagees in a position of extreme danger. Mortgagees advance money on a mortgage; they take security; interest is paid for a very long period regularly to them and received as and for interest, and it is received by them from a solicitor who is admitted to have been solicitor for the mortgagor and for his executors after his death. It does seem to me that mortgagees under those circumstances are not bound to inquire into the precise relations

between the solicitors and their clients, but that they are entitled to assume that the solicitors are doing that which is in the ordinary course of business as solicitors under those circumstances—namely, to pay for their clients the interest due on the mortgage for which those clients are liable. For all these reasons I think that the appeal fails and ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Hunter and Haynes.*

Solicitors for the respondents, *Nicholl, Manisty, and Co.*

Monday, June 9.

(Before WILLIAMS and STIRLING, L.JJ.)

RIPLEY v. ARTHUR AND Co. (a)

APPEAL FROM THE CHANCERY DIVISION.

Fraud—Passing off goods as plaintiff's—Action for injunction—Injunction in default of defence—Subsequent alleged breach—Absence of direct evidence—Res judicata—Admissions.

The plaintiff brought an action against the defendant firm, of which S. was the sole partner, for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of the plaintiff's manufacture.

S. made default in pleading, and the injunction was granted in due course.

Later it appeared that similar goods to those complained of were being put upon the market by N., for whom S. was acting as agent for sale. Thereupon a motion was made for attachment of S. for breach of the injunction. No direct evidence was forthcoming, but the case was rested on admissions by S. (which the court held to be insufficient) and on the fact that he, having allowed judgment to go against him by default, was estopped from denying that the goods complained of were an imitation of those of the plaintiff's manufacture.

It was decided by Farwell, J. (ante, p. 495) that in these circumstances an attachment could not issue.

The plaintiff appealed.

Held (dissentiente Williams, L.J.), that the decision of Farwell, J. was right, and that the appeal failed.

APPEAL by the plaintiff from a decision of Farwell, J. (ante, p. 495).

Butcher, K.C. and Waggett for the appellant.

Upjohn, K.C. and Whinney for the respondent.

WILLIAMS, L.J.—I am sorry to say that my brother Stirling and I are not quite agreed as to the conclusion at which we ought to arrive in this matter. But I may as well state at once that as the conclusion of Stirling, L.J. agrees with that of Farwell, J., the ultimate result will be that this appeal will fail. But Stirling, L.J. and I both think that, inasmuch as the difference between us is a difference as to the inferences of fact that ought to be drawn from the affidavits, looking at the surrounding circumstances, it is not worth while for us to reserve our judgments, and that we may just as well deliver our judgments at once. Now, I should like to state at once what my view of this case is. I am happy

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

to say that as to the main part of it there is no difference between Stirling, L.J. and myself as I understand. Now, what is the question that has to be settled in this action? It is a motion to attach for disobedience to and disregard of an injunction. That the injunction was granted is quite plain. Now, to my mind the question is, is there any sufficient evidence of a breach of the injunction? That is to say, is there any sufficient evidence that the packets of laundry blue now admittedly sold by the defendant on behalf of Mr. Nixey are so got up, or arranged for sale, as to induce the belief or enable others to represent that the laundry blue so sold or offered for sale is of the plaintiff's manufacture, or in any manner representing any blue not of the plaintiff's manufacture, to be "Oval Blue," or blue of the plaintiff's manufacture. Mr. Butcher here wanted us to say that there was some admission on the pleadings—something constituting *res judicata*—some judgment which determined this question as between these parties. I do not agree with that. Of course the question is not quite nowadays what it used to be in days gone by. In days gone by, at all events at common law, when you only pleaded—whether you were plaintiff or defendant—legal results, there was very little difficulty in saying whether a matter was concluded as *res judicata* or not, because, subject to certain evidence of identity of subject-matter, you could always arrive at a conclusion by looking at the record. Now, when you tell a long story in your pleadings, whether it is a statement of claim or statement of defence, it is very difficult to say how much is evidence and how much is part of the statement of claim, or defence, as the case may be. But be that as it may, in my judgment an admission by default in pleading never admits anything beyond a minimum which is necessary to carry the judgment. If you have got a statement of claim which covers several subjects of complaint, and you have got judgment for the plaintiff, the result of the rule that I have just mentioned, of the admission not covering more than a minimum, is that you necessarily may have to go to evidence to identify what was in truth and in fact the subject-matter in respect of which the plaintiff succeeded. When you have once arrived at what that subject-matter was, it is not true to say that it limits in any way or defines in any way that judgment. What is true is that when you have brought forward evidence to prove what question really was disposed of as between the parties, neither of them afterwards can seek to reopen the question of fact which is thus shown to have been determined. Just let us see how the matter stands in the present case. I take it that there is no *res judicata*; but you have got here several things. You have got, first, the affidavit of the plaintiff, par. 3, which is as follows: The packet or bag blue complained of in the said action was in the form of the exhibit. The said exhibit is, in fact, a packet which was in my possession or in the care of my solicitors at the time of the issue of the writ in this action." I may say in passing that the defendant confirms that view of the plaintiff. Now, in that state of things, let us see how the evidence goes on. Both parties are agreed that this was part of the subject-matter of complaint. Both parties are agreed that at the time of action brought, the plaintiff was making his packets up in the form

and shape appearing by that exhibit. Then the next thing one has to ask oneself is: What is said on one side, or the other, as to what the defendant was doing at the time of the action being brought? The defendant has produced two packets with blue lettering on them. One in truth is the packet that the plaintiff has referred to as being the packet which he complained of, and the other is the packet which the defendant says that he is now manufacturing. Under those circumstances let us see what the defendant says about what he was doing and what he is doing. Before I read his affidavit, a portion of which I propose to read in a minute or two, I will first call attention to the admission which the defendant made to a Mr. Thornton as to which, although there is an attempt to qualify it afterwards, the attempt is so really weak and general that I pay no attention to it. He says that: "He"—that is, the defendant—"further stated that he was then engaged as traveller to the person who purchased his said business for a term of three years (of which six months had already expired), and that he had been, and was still, selling a blue which he referred to as 'Bobby Blue' in his district, which included the whole of Lancashire." In reply to a question whether this "Bobby Blue" was the same as the blue in respect of which Mr. Ripley obtained an injunction against him, he answered "Yes." So there, at all events, is a point-blank statement—which is to be relied upon—by the defendant, that the blue that he is now making was in fact the blue in respect of which Mr. Ripley obtained the injunction. That is only an admission made to the witness Mr. Thornton; but the defendant comes to tell his own story, and to tell his own story at length. In par. 2 he says, "I took great care to prevent all possibility of confusion between the blue as got up by me for sale"—he is speaking of what he did before the action—"and the blue as got up by the plaintiff. I adopted a distinctive label which I placed on top of the packet, and on this label I placed the words 'Bobby Blue' in very distinct and clear white letters in the middle of a square blue ground with an outer white border, and on the blue which I sold in a calico wrapper I also placed on the label which was wrapped round the packet, in two places, in equally distinct and clear white letters, the words 'Bobby Blue' upon a blue ground, together with certain other words different altogether from those placed by the plaintiff upon his packets, and also containing my firm's name. Representations of the packets, both of those wrapped in paper and those in calico, then sold by me, and of the calico wrapped packet then sold by the plaintiff, are now produced and shown to me . . . and the two makes of blue are perfectly clearly distinct and distinguishable in all respects except as regards the general shape of the packet which, as before stated, is a form open to the trade as the plaintiff well knew, the point having been decided against him in an action" which he mentions. The view of the defendant, therefore, although he allowed the injunction to go, was that if he had fought it out he would have had a good defence. Then he refers to the matter again in par. 10, and he says: "As I had no further funds to fight the action, and knew that I had never passed off my goods as the plaintiff's, I did not see any objection to an injunction being granted against me as

asked by the plaintiff. But I was certainly under the impression that the injunction as asked would not prevent my continuing to sell my own blue under the name of 'Bobby Blue' in the shape in which I then sold it with the special precautions taken by me to prevent its being mistaken for the plaintiff's, and accordingly I did not appear on the hearing of the action, and judgment was, as I have been informed and believe, obtained against me in default." Mr. Whinney admitted, and I think could not have done otherwise, that those words as to make up and shape cover all the forms in which the defendant has manufactured or sold his blue. Then in par. 11 the defendant says: "Shortly after the judgment was obtained I called upon the plaintiff's solicitors, and told them that I considered and believed that the injunction did not prevent my continuing to sell my blue under the name of 'Bobby Blue,' and in the shape and manner in which I had previously sold it." Then it is alleged the plaintiff's solicitor said that if he did that he should not pay his costs. "I honestly believed that the order as drawn up did not prevent my continuing to manufacture and sell laundry blue under the name of 'Bobby Blue,' even although the packets were got up in any oval shape, provided they were made sufficiently distinctive in the manner in which I had previously distinguished them." The question is, what inference ought one to draw from that statement which the defendant made to Mr. Thornton, and from these paragraphs in his affidavit? I draw the inference from that evidence that one of the issues raised and tried between these parties was whether or not these packets as made up, and in this shape, did amount to such a holding out of the goods therein as to induce the public to think that they were the plaintiff's goods. It seems to me that the moment you have reached that point, it is impossible for either party to get away from the conclusion that the packets made up by the defendant at the moment of the trial and the granting of the injunction were packets of such a character and so resembling the packets made up by the plaintiff as to induce the public to think that the one was the other. In that sense I think that the matter very nearly approaches to an estoppel. At all events, in the face of that evidence, it seems to me that the inference one may legitimately draw from the defendant's own statements is that that issue was raised between the parties, and that it was intended by both parties that that issue should be concluded by the injunction. Under those circumstances, I think that the judgment here ought to have been a judgment for the plaintiff. And I think that, although the general form of the injunction unfortunately left at large which of these matters was determined as between the parties on that evidence and on the defendant's own admission, this particular matter about the resemblance of the two packets—the packet then made by the plaintiff and the packet then made by the defendant at the time of the action—was concluded between them. If you start from that point it is quite plain, to my mind, that the difference between the packet made by the defendant at the moment of the injunction and the packet now made by the defendant is really nothing. The conclusion I draw is that under those circumstances one ought to hold that the packet which is substantially the same as the former packet is really as much a breach

of the injunction as if it had been identical with the old packet. I only wish to add that I entirely agree with what Farwell, J. says as to the injunction not being controlled or limited by the statement of claim. I think that, as here there is a difference of opinion between my brother Stirling and myself, there should be no order as to costs, although it is true that the result is in favour of the defendant so far as the hearing here is concerned.

STIRLING, L.J.—I regret to say that on one point I differ from the judgment which has just been delivered. The greater part of it I entirely agree with. But the point on which I have the misfortune to be at variance with my brother is as regards the inference which he draws from the defendant's own affidavit. The motion is that an attachment may issue against the defendant for breach of an injunction contained in a judgment of the court given simply on the statement of claim, a defence which had been put in having been struck out. The injunction is in the most general terms. It is to restrain the defendant from selling or offering for sale any laundry blue not being of the plaintiff's manufacture so got up or arranged for sale as to induce the belief or enable others to represent that the laundry blue so sold or offered for sale is of the plaintiff's manufacture or in any manner representing blue not of the plaintiff's manufacture to be "Oval Blue" or blue of the plaintiff's manufacture. What the defendant has done since the injunction is to offer for sale not on his own behalf, but as agent for another, blue not the manufacture of the plaintiff, which is got up in a very similar make as regards the packets to that in which the blue which he sold at the date of the judgment was got up as regards those same packets. Now, there is no affidavit by anybody that the blue which has been sold by the defendant since the judgment was given is so got up or arranged for sale as to induce the belief or enable others to represent that the laundry blue which is so sold or offered for sale is of the plaintiff's manufacture. Not a single affidavit is there to that effect. A comparison of the mode in which the plaintiff's blue is got up and that in which the blue has been sold by the defendant does not enable me to say that the blue which has been offered for sale by the defendant is so got up or arranged for sale as to violate the judgment of the court. I mean that by a mere comparison of the two it is not possible for me to arrive at that conclusion. Then how is the case made out? It is for the plaintiff coming here seeking for an attachment to issue against the defendant to prove his case and to prove it strictly. This is one of the class of cases in which the court rightly insists that the case shall be proved with the utmost strictness. Now, what have we got here? We have, first of all, a reliance placed upon the pleadings. The judgment, according to the rule of the court, the defendant not appearing and there being no defence, must be such as the plaintiff was entitled to upon the statement of claim; and we find that the statement of claim alleges two things: First, that the plaintiff had made up his goods—namely, laundry blue—in oval cakes wrapped up in a special manner either in thin white paper or in white calico tied with a string. He alleges that he also had acquired a title to a

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trade mark called "Oval Blue," and that the use of the description "Oval Blue" or the representation—whether by name, shape, or general get-up—that the laundry blue in question is Oval Blue in effect, a guarantee that the blue described, or the subject of representation, is the special blue of the plaintiff's manufacture. Then he goes on to state that these cakes or blocks were also sold in boxes, and he alleges that the boxes in which the plaintiff's goods are sold over the counter have been made up of "certain special sizes and covered with tinfoil, and except the defendant firm no other firm or person beside the plaintiff has ever sold or attempted to sell laundry blue in boxes so got up." Then he goes on, in par. 11, to allege that the defendant was selling and offering for sale blue "made up in oval cakes and blocks of size and shape identical with those of the plaintiff's said goods. Such cakes or blocks are wrapped sometimes in thin white paper and sometimes in white calico tied with a string, as in the case with the plaintiff's goods, and are sold in boxes corresponding in shape and size and in covering with the said boxes in which the plaintiff's goods are sold, except only that on the boxes issued by the defendant firm there is placed on one side a blue label bearing a representation of an oval form and the words 'Bobby Blue.'" Then he alleges that "The defendant firm has designed the aforesaid arrangements in the make and get-up of its said laundry blue for the purpose of enabling its said blue to be passed off and sold as Oval Blue, and as and for the goods of the plaintiff. The laundry blue of the defendant company under the aforesaid get-up has, in fact, been supplied in the retail trade in response to orders from the plaintiff's said laundry blue under the term 'Oval Blue.'" Then par. 14 is as follows: "If the defendant firm continues (as it intends to do) to send out and sell, or offer for sale, its laundry blue in the shape and under the get-up herein complained of, retail dealers will be enabled to pass off the laundry blue of the defendant firm as being the said laundry blue of the plaintiff's manufacture." Now, that alleges that the blue of the defendant firm was got up or arranged for sale in such a way as to induce the belief that the laundry blue which the defendant was offering for sale was of the plaintiff's manufacture. The belief might be attributable either to the shape and get up of the packets, or to the boxes in which they were sold, or it might be to the combination of both. The defendant, I think, must be taken to have admitted that by selling as he did packets of this shape, and so got up and packed in boxes, he was violating the plaintiff's rights, and that an injunction was properly granted against him from continuing such a course of conduct. But I do not think that he can be taken to admit that by getting up his blue in the form in which he actually did, and no more he was violating the plaintiff's right. So much for the statement of claim. Then is there anything on the affidavits which enables the court to say that he has made an admission of that kind? The matter which was most relied on against him is what he has said in his own affidavit, and particularly in pars. 2, 3, 10, and 11 of his first affidavit. Now I confess that I cannot read them in the same way that my learned brother does, and here is the point at which we differ. It seems to me that he is explaining how it was that he

came to submit to an injunction. He says that he did not do so because he had any doubt that he was violating the plaintiff's rights merely as regards the shape and get up of the packets, but that he believed, notwithstanding that the injunction had been granted, that he might continue to sell the blue so manufactured in packets of that shape and of the like get up. He points out, not indeed in that affidavit, but in a subsequent affidavit, that he was no longer using the boxes which resembled those of the plaintiff, but that he had got entirely distinctive boxes. I confess that I cannot come to the conclusion that he has made an admission that the injunction was granted in respect of these packets alone, without reference to the boxes. In the result I entirely agree with what was decided by Farwell, J., and in my judgment the appeal fails.

Appeal dismissed.

Solicitors for the appellant, *Chester and Co.*, agents for *Nicholson and Pemberton*, Liverpool.

Solicitors for the respondent, *Monro, Slack, and Co.*

Wednesday, Feb. 26.

(Before COLLINS, M.R., ROMEE and MATHEW, L.J.J.)

NEAVEYSON v. PETERBOROUGH RURAL DISTRICT COUNCIL. (a)

APPEAL FROM THE CHANCERY DIVISION.

Inclosure—Roads—Pasturage of roads—Pasturage limited to sheep—More extensive user long continued—Presumption of lost grant—Inclosure Act for purpose of drainage and inclosure—Act for public benefit.

An *Inclosure Act*, passed in 1812, provided for the inclosure of certain commons, and also for their drainage as part of a much larger district, and contained provisions for the subsequent appointment of drainage commissioners to preserve the system of drainage. The herbage on the roads to be set out by the award was to belong to the persons to whom the award should award the same; and the award was to contain orders and regulations for maintaining the inclosure and the system of drainage. The award, which was made in 1822, provided that the herbage on a certain road thereby set out, adjoining a water-course which was part of the system of drainage, should belong to the surveyor of highways, and be let for depasturing sound and healthy sheep only, but no other cattle or stock.

The surveyor of highways, ever since 1846, had habitually let the herbage for depasturing cattle and horses as well as sheep. The owner of an inclosure adjoining the road brought this action to restrain the defendants from pasturing cattle and horses on the road.

Held (reversing the judgment of Cozens-Hardy, J.), that the restriction on the use of the herbage of the road was intended to be a permanent provision for the protection of the system of drainage for the public benefit, and that it was therefore impossible to presume any lost grant by which that restriction had been released.

THIS was an appeal by the plaintiff from the judgment of Cozens-Hardy, J. at the trial of the action.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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The plaintiff brought this action for damages, and for an injunction to restrain the defendants from depasturing horses, cattle, or stock, other than healthy sheep, in or upon a private road called Moor-road.

The plaintiff was the occupier of a farm abutting on Moor-road.

The defendants were the rural district council, sued in their capacity of surveyor of highways, and T. H. Vergette, their tenant of the pasturage of Moor-road.

In 1812 "An Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton; and for forming the same into a parish to be called Newborough; and for building and endowing a church for the said parish," was passed (52 Geo. 3. c. cxliii.).

By that Act commissioners were appointed for draining, and for dividing and allotting, the commons, which were situate in a fen country.

The Act provided that the commissioners should, until the execution of their award, drain the lands and protect them from floods, and for that purpose maintain and provide drains, &c., over a much larger district than the said commons.

Sect. 21 of the Act provided that the commissioners should set out public carriage, bridle, and drift roads and footpaths, and that "the herbage of the public and private roads shall belong to and be the property of the person or persons to whom the commissioners shall allot and award the same."

By sect. 57 it was provided that, after the commissioners had completed the divisions and allotments and completed all the works of drainage, they should make their award, which should contain

Such other orders, regulations, and determinations to be observed and followed by the several proprietors as shall be necessary or proper to be inserted in the said award, conformably with the tenor and purport of this Act and the said recited Act, or for the completing and maintaining the said divisions, drainage, and inclosure.

The Act further provided for the appointment of commissioners for the future drainage and preservation of the said lands; and these drainage commissioners were directed to preserve, repair, and make all drains, &c., in the larger district used or necessary for the drainage and preservation of the said lands.

Penalties were imposed by the Act upon any person who should maliciously injure any of the mills, banks, and hedges made for the purposes of the Act, or should wilfully stop, dam up, or damage any drains, watercourses, dams, or other works made for the purposes of the Act.

The award under the Act was made in 1822, and provided that the herbage on Moor-road, which was a private road thereby set out, should belong to and be the property of the surveyor of highways for the time being to be appointed for the common and waste lands, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever.

One of the watercourses, which formed part of the system of drainage which was established by the commissioners, ran along the side of Moor-road.

Ever since the year 1846 the surveyor of highways for the time being had habitually let the herbage on Moor-road for grazing a limited number of cattle and horses, as well as sheep; and the defendant council, when they became the highway authority for the district, let the herbage in the same way to the defendant Vergette.

The action was tried before Cozens-Hardy, J. The learned judge held that a lost grant ought to be presumed by which the right of pasturage on the road was enlarged, and accordingly gave judgment in favour of the defendants (83 L. T. Rep. 496).

The plaintiff appealed.

Rawlins, K.C. and Percival for the appellant.

—The judgment of the learned judge was wrong because it was impossible to presume a lost grant in the circumstances of this case. A lost grant can only be presumed if it can be presumed to have been made by parties who could legally have made it. In the present case no one could legally have made a grant which would remove the restrictions placed by statute upon the user of this road. Upon a consideration of the whole of the provisions of the Inclosure Act and of the award, it is clear that the user of this road for pasturage was restricted to sheep, with the object of preventing any damage to the drainage of the district, and that the restriction was intended to be permanent, inasmuch as the system of drainage was intended to be permanent. It was probably thought that, if cattle and horses were allowed to pasture on the road, they would tread down the banks of the drains and ditches and cause the flow of water to be obstructed, whereas sheep were not likely to do damage of that kind. There was no person who could legally make any grant which would release that restriction. The allottees of the land could not do so, for it was not imposed for their benefit alone; the parishioners could do so, for the system of drainage was for the benefit of a much larger district, and the restriction was imposed for the public benefit. Again, there was no person who could be the grantee of the suggested lost grant. The surveyor of highways was not a corporation to whom the grant could be made; and the grant could not be made to the parishioners generally. They cited

Hendy v. Stephenson, 10 East, 55;

Halliday v. Phillips, 23 Q. B. Div. 48;

Johnson v. Hodgson, 8 East, 38;

Goodtitle v. Baldwin, 11 East, 488; 11 R. R. 249;

Bochdale Canal Company v. Radcliffe, 18 Q. B. 287.

Eve, K.C. and Schiller for the respondents.—It was not impossible for the learned judge to presume a lost grant in this case. The proper inference is that the provisions restricting the pasturage on this road were intended to be temporary only, and not permanent. Provisions of that kind are ordinary and usual provisions in Inclosure Acts and awards. This being fen land, the boundaries between the allotments and roads were ditches and not hedges, and this restriction was imposed for the protection of those ditches as boundaries, and to prevent horses and cattle, which would be likely to go through ditches, from damaging the adjoining allotments and from damaging the ditches themselves when they were new. Therefore this restriction was intended to be temporary

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only, and a grant could be made which would release the restriction :

Haigh v. West, 69 L. T. Rep. 165; (1893); 2 Q. B. 19.

This restriction being for the benefit of the owners of the adjoining land, for the protection of their land and the preventing of an increase in the burden of maintaining the ditches, they could legally make a grant which would release the restriction. They could together join in a grant to the surveyor of highways, and such a grant ought to be presumed from the long-continued user; or the grant could have been made to trustees for the surveyor of highways for the time being. They cited

Campbell v. Wilson, 3 East, 294; 7 B. R. 462;
Great Eastern Railway Company v. Goldmid, 52 L. T. Rep. 270; 9 App. Cas. 927.

Bawline, K.C. replied.

COLLINS, M.R.—This is an appeal from the decision of Cozens-Hardy, J., who gave judgment in favour of the defendants in an action brought by the plaintiff for damages and an injunction. The defendants are the rural district council, who are the successors of the surveyor of highways named in the Inclosure Act and award. The plaintiff is the occupier of an allotment adjoining the road called Moor-road. The defence set up by the defendants, which was accepted by the learned judge, was that Moor-road was a private road, and that the herbage thereon by virtue of the Inclosure Act and award became the property of the surveyor of highways for the time being, and that the defendants, as successors to the surveyor of highways, have by themselves or their tenants enjoyed the right to depasture on the said herbage sheep, horses, and cattle of all kinds for a period of sixty years, or alternatively for a period of over twenty years. That has been explained as meaning that there had been a grant by someone to the surveyor of highways, and that under and by virtue of that grant the pasturage of the road could be let without any restriction to sheep only. The question whether there could be any such grant must be determined by a consideration of the Inclosure Act and award. The nature of the provisions of the Inclosure Act is shortly as follows: It provides for the drainage of a particular district, and contains provisions which prohibit the pasturing of any stock, except sheep, on roads set out in a particular part of the district called the Foreland, adjoining a dyke called Carr Dyke. There was also a provision in the Act that the property in the herbage of all the other roads should be given to the person or persons to whom the inclosure commissioners should award and allot the same; and the award provided that the herbage upon all private roads should be the property of the surveyor of highways, to be by him let annually for depasturing sound and healthy sheep, but no other stock or cattle whatever. The question then arises whether, in view of the provisions of the Act and of the award, it could be possible for anyone to grant to the surveyor of highways the right to do that which is forbidden by the award, and to let the herbage for pasturing horses and cattle. There was evidence of a long user by the surveyor of highways of letting the herbage not for the purpose of depasturing sheep exclusively. The question is whether the proof of that fact

is evidence of a grant, which could have a legal origin, of the right to let the herbage for the more extended purpose. If such a grant could not have a legal origin, we cannot presume that there was a grant. If a legal origin were possible, we ought to presume the grant. It may be more easy to presume a grant in some circumstances than in others. If the alleged grant would affect the rights of a large number of persons, and would be one of which it would be natural to suppose that there would be some public record, if it really existed, and the period of user was comparatively short, it would be more difficult to presume the grant than in the case of an alleged grant by an individual who was competent to make it, in which case a short period of user would be sufficient. In this case an Act was passed, intitled "An Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton; and for forming the same into a parish to be called Newborough; and for building a church for such parish." The recitals of that Act show that it was not, like an ordinary Inclosure Act, providing only for private interests. It provided for a much larger scheme—that is, for the drainage of this fen district which was to be inclosed, and also for the drainage of a much larger area of a similar character. There is a recital in the Act that by an Act of 27 Geo. 2 the fen lands, called the North Level, and other lands near thereto, were divided into five districts, within the boundaries of which Borough Fen Common and the Four Hundred Acre Common were included and were declared to be part of the First District of the North Level, and that the commissioners under that Act had power to assess and rate the lands in the First District, except certain lands which included Borough Fen Common and the Four Hundred Acre Common, to certain general rates and district rates, and were required to expend the same in cleansing, widening, and deepening certain drains, rivers, and other works of drainage which were essentially necessary to the drainage and protection of Borough Fen Common and the Four Hundred Acre Common. Then there is a recital that, notwithstanding that exemption from rates, the proprietors interested in Borough Fen Common and the Four Hundred Acre Common were entitled to have the same protected from upland floods and to have the waters thereof drained to the sea in like manner as the lands chargeable with those rates, and that therefore it was reasonable and expedient that Borough Fen Common and the Four Hundred Acre Common should contribute towards the general works and district works provided and required to be made for the protection and drainage of the North Level, in manner and proportion and on the conditions thereafter contained. There is a further recital that the said common and waste lands were in their then state incapable of much improvement, and, for want of proper and effectual drainage and protection from land floods, were of little benefit to the persons having a right of common thereon or interested therein, and that it would be of great benefit and advantage to the persons interested in the said common and waste lands and of public utility if the same were drained, inclosed, and allotted among the persons interested therein according to and

in proportion to their respective rights and interests. The Act then proceeds to appoint commissioners for draining Borough Fen Common and the Four Hundred Acre Common, and for dividing and allotting the same among the persons interested therein. The Act provided that the commissioners should from time to time, until the making of their award, effectually protect from upland water and drain and preserve the said commons, and for that purpose repair and widen all such ditches, drains, watercourses, &c., and other requisites in, over, and upon the lands within the said First District as were then used for those purposes, as they might think necessary, and make such new and other mills, ditches, drains, watercourses, &c., as well upon, through, in, and over the said lands as upon, in, through, and over any ancient inclosures or other lands within the said First District, as they should think fit. Then sect. 17 provides that the commissioners shall, within two years after the passing of the Act, scour out an ancient drain or watercourse called Carr Dyke, and heighten and strengthen its banks for the purpose of receiving the waters running from the high lands into the same, and conveying them to the river Welland, and preventing them from overflowing or injuring the said common and waste lands and other lands in the said North Level. Sect. 18 provided that the commissioners should allot, out of the Borough Fen Common, a foreland on the whole of the east side of Carr Dyke, and set out all such roads and ways across and along that foreland as should be requisite for the necessary occupation of the old inclosures adjoining Carr Dyke and the allotments in respect thereof; but that it should not be lawful for any person to permit any stock, except sheep, to pasture thereon, and that all cattle, except sheep, found pasturing thereon should be deemed to be trespassing. Sect. 20 provided that the banks of Carr Dyke and the said foreland should be preserved by the said commissioners or by the drainage commissioners thereafter mentioned as pasture land, and that the grass and herbage of the said banks and foreland should be let by the commissioners in every year, for the best rent obtainable, under such regulations and subject to such restrictions as they might think necessary, and apply the rents for the general purposes of the Act. After providing for the setting out of public and private roads and paths and of allotments to the surveyors of highways for gravel pits, the Act, by sect. 21, provided that the herbage of the public and private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. Then sect. 57 provided that, as soon as the commissioners should have completed the allotments and executed all the works of drainage provided for, and done all the other things they were empowered by the Act to do, they should make an award which should describe all the public roads and ways, and all mills, drains, ditches, watercourses, &c., and other works which had been made or repaired by them pursuant to the Act, or might be deemed necessary by them for the preservation and drainage of the said common and waste lands, and contain all such regulations to be observed and kept by the proprietors as should be necessary and proper for completing and maintaining the divisions, drain-

age, and inclosures. Sect. 61 provided for the appointment of a body of persons as commissioners for the future drainage and preservation of the said lands and grounds. By sect. 74 the drainage commissioners were required from time to time to repair and work all such mills and engines as were then erected or should be erected by the inclosure commissioners, and to scour out, widen, strengthen, and repair all such drains, ditches, watercourses, &c., as might be used for the drainage and preservation of the said lands, and also to make such new and other mills, drains, ditches, watercourses, &c., within the said First District as might in their discretion be necessary and proper for the drainage and preservation of the said lands. Sect. 79 provided that the drainage commissioners should from time to time, when necessary, assess all the lands and grounds directed to be inclosed and drained with such an annual tax as might be necessary to defray the expenses of the works necessary for the future drainage and preservation of the said lands. Sect. 89 provided that any person maliciously cutting, breaking down, burning, or destroying any mills, banks, or hedges made, or to be made, for the purposes of the Act, should be liable to punishment as a felon, and that any person wilfully stopping, damming up, or damaging any rivers, drains, watercourses, dams, or other works made or to be made for the purposes of the Act, should be liable to a penalty. Those sections show that this Act of Parliament did not provide for a mere temporary scheme, but did provide for a permanent scheme for the drainage of this area as part of a much larger area, which was to be not merely for the benefit of the owners and occupiers on this particular fen. To return to the provisions of sect. 21, that section directs that the herbage of the public and private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. The Act was passed in 1812, and the award was made in 1822. The award set out a large number of public and private roads, and provided that all the herbage which should from time to time grow and arise upon all the private roads set out and thereinbefore awarded should belong to and be the property of the surveyor for the time being of the highways, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at and for the best rent or rents that could be reasonably obtained for the same. The road now in question, called Moor-road, was set out by the award, and the allotment of the plaintiff was set out adjoining that road. The obligation was imposed upon the owners of allotments to keep up the fences which had already been made. Therefore on the face of the Act of Parliament it appears that the systematic and essential object of the Act was not merely the benefit of the allottees. Parts of the land were to be depastured by sheep only, and it was provided that the herbage of the roads should be the property of the persons to whom the commissioners should allot the same. Then, in the award, which had the same effect as the Act of Parliament, there was the provision vesting the herbage of the private roads in the surveyor of highways with the limitation that it was to be depastured by sheep only. Why was that provision introduced? The obvious reason was that

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cattle and horses might trespass on to the dykes and be a serious nuisance to the maintenance of the drains, and cause public mischief by interfering with the free working of the drains. In my opinion that was not a mere temporary provision, but was a permanent object of the Act. It was not a temporary provision for the interval between the passing of the Act and the making of the award. The fences had been made before the award, and the declaration of the award as to the depasturing of the herbage of the roads was made after the fences had been made. I think that that provision was made as ancillary to the main purpose of the Act with respect to drainage. If the right could be given to the surveyor of highways to allow horses and cattle to be put to pasture upon the roads, that would be contrary to the main purpose of the Act of Parliament. The owners of the allotments could not have agreed that the roads should be so used and have granted the right to use them in that way; a grant of that kind would not have been a good grant, because the Act and the award made it unlawful to depasture horses and cattle upon the roads, which would have the probable effect of injuriously affecting the drainage. It has been contended for the respondents that, looking at the provisions of the Act and the award, they were really intended to be either only for the benefit of the adjoining owners in respect of their obligation to keep the fences in repair, or else mere temporary provisions for the period during which the allotments were being got into working order and the fences were growing and for no longer time, and that therefore there was nothing in the Act and the award to prevent horses and cattle being depastured on the roads afterwards. It seems to me that it cannot be said that the provision which prohibits the depasturing of horses and cattle on the roads was made for the benefit of the allottees only; that provision was a part of a complete scheme of drainage which was to continue permanently. The drain along this road is an important drain in that scheme. It has been argued that this provision was for temporary purposes only, chiefly upon the authority of *Haigh v. West* (69 L. T. Rep. 165; (1893) 2 Q. B. 19). In that case the Act of Parliament and the award were of a very special character, and were passed and made quite *ad hoc* from the Act and award in the present case. The land in that case was not in the fens at all, and the provisions of the Act and award there in question were construed by the court as being limited to the period before the main provisions of the Act came into force—that is, while the fences were growing. In the present case the provision in question came into force after all the preliminary arrangements had been made, ten years after the Act was passed. It is impossible to infer that the maintenance of the drains in proper working order, and the exclusion of cattle and horses from the roads, was only a temporary purpose. Who could be the grantor and who the grantee in a presumed grant? It was difficult for the respondents to answer that question. We cannot infer an illegal origin when we are seeking for a legal origin to justify a long-continued practice. A grant cannot be presumed which would permit a thing to be done contrary to statutory duties or prohibitions: (*Manchester Ship Canal Company v. Rochdale Canal Company*, 81

L. T. Rep. 472; 85 L. T. Rep. 585). If the scheme of this Act of Parliament and award is that which I have stated, the suggested grant would be contrary to the Act of Parliament. A grant must be from some person to some other person. It is said that the suggested grant could have been made to the surveyor of highways; but he was not a corporation. That difficulty, however, might perhaps be got over. Then it is said that the grant might have been made by the owners of the soil releasing the surveyor of highways from the restriction upon his power of letting the pasturage of the roads. If the object of the Act and award was that which I have stated it to be, the owners could not waive that restriction and grant to the surveyor of highways an enlarged right of pasturage, contrary to the provisions of the Act and award. It was suggested that the grant might have been made by all the inhabitants of the parish; but the general scheme was not for their benefit alone, and therefore they could not release the surveyor of highways from the restriction. This was, indeed, a public Act passed for public purposes, the public being larger than the inhabitants of this particular area. It seems to me that, if we are to presume anything, we must presume an Act of Parliament. It is, however, impossible to presume that a public Act of Parliament has been passed since 1822, considering the way in which Acts of Parliament are now recorded. Therefore that presumption is impossible. It is said that the plaintiff is under a personal incapacity to bring this action because he himself had been a party to letting the herbage of this road for the purpose of depasturing horses and cattle, and had also hired it himself for that purpose. When he so acted, however, he did not know of the provisions of the Act and the award; and he did not take any part in the letting which is now complained of. I think that these facts do not affect the question. They are not within any of the conditions laid down by Fry, L.J. in *Russell v. Watts* (50 L. T. Rep. 673; 25 Ch. Div. 559, 586) as being necessary to bar a man from asserting his legal rights; there has been no misleading or alteration of the position of anyone. The plaintiff is not suing in respect of anything done during the time when he concurred in the extended user of the pasturage, but complains of acts done afterwards, and after he had objected and protested. For these reasons I am of opinion that we cannot agree with the decision of Cozens-Hardy, J., and that this appeal must be allowed.

ROMER, L.J.—I have come to the same conclusion. In the first place, on consideration of the Act of Parliament in question, I think that it is clear that the duties of the inclosure commissioners and drainage commissioners were not limited to merely draining and dividing up this fen and common. In my opinion more than that was to be done—that is, the making and preserving of a permanent system of drainage, not merely such drainage as might be required for the separate allotments, but a general scheme of drainage, so that the water might flow freely away to the sea. The owners of the allotments to be made under the Act of Parliament were not the sole persons interested. There were other rights. I think that the inclosure commissioners in their award had in view rights of a public

character as to drainage, and therefore when their award was made they made permanent provisions for drainage. I think that those provisions were of a public character so that, even if all the allottees agreed together, they could not abrogate those provisions. They had no right to destroy the watercourses and ditches provided for by the award as an important part of the drainage. If they could deal with any of those watercourses as being unnecessary they might proceed by degrees and gradually do away with the whole system of drainage and cause the land to revert to the same condition as that in which it was before. In my opinion the allottees, if they all agreed together, could not take up that position in face of the Act of Parliament and the award. Still less could some only of the allottees interfere with the watercourses and drainage adjoining their own allotments. In my opinion all the provisions of the Act of Parliament and the award of a permanent character for the drainage of the district are such that the allottees cannot disregard, or release, or grant away the right to enforce them. That brings us to the consideration of the Act of Parliament and the award. It is conceded that the provisions of the award as to pasturage were valid. Why were those provisions inserted? I think that they were inserted for the purpose of assisting in the carrying out of the general purpose of the Act of Parliament, including the preservation of the drainage, and not merely for the protection of the adjoining owners, and that the restriction as to pasturing with sheep only was therefore intended to be permanent. This case is quite distinct from the case of *Haigh v. West* (*ubi sup.*), which turned upon the particular circumstances and the provisions of the particular Act of Parliament there in question. The pasturing of heavy cattle and horses on roads with drains, ditches, and banks by the sides would tend to destroy those drains, ditches, and banks. We can see, therefore, why the inclosure commissioners would take care to limit the pasturage as they did. As to the provision for depasturing "sound and healthy sheep," I think that that was provided not solely for the benefit of the adjoining owners; the waters from these watercourses would flow on towards the sea, and if the water was infected by unhealthy sheep that might tend to the public injury. That particular provision, I think, was inserted in the general interests. In certain cases the inclosure commissioners did grant unlimited rights of pasturage to the allottees of the land adjacent to the roads, but that was in cases where the land did not adjoin any through drain and it would be safe to allow unlimited pasturage. It follows, in my opinion, that these provisions were for the public purpose of preserving the drainage, and therefore could not be disregarded or made the subject of a grant or release by the adjoining owners, or by the inhabitants, or even by the drainage commissioners themselves. Certainly, in these circumstances, I do not see how the court can presume a lawful lost grant which would permanently free the surveyor of highways from regarding the careful limitation of the right of pasturage which was provided by the award. The defendants' case, therefore, clearly fails. The plaintiff cannot be said to have lost his rights. Acquiescence cannot deprive him of the right to

say that this was an illegal act. The plaintiff's right is a legal right, which cannot be taken away unless he has so acted that it would be fraudulent conduct on his part to seek to enforce the right. There is no case of that kind made out here. Therefore the plaintiff is entitled to sue and to recover damages because it is admitted that, failing a lost grant, or the loss by the plaintiff of his right to sue, the plaintiff has been specially injured and has a cause of action. The plaintiff therefore is entitled to damages, but an injunction is not required. This appeal must, therefore, be allowed.

MATHEW, L.J.—I think that it is necessary to add but little to the reasons which have been given for allowing this appeal. I could have understood the argument of the respondents if the allotments had been made by agreement between the persons interested. This, however, was a totally different transaction. It is impossible to read the provisions of the Act of Parliament and the award without seeing that the particular object was to convert a fen into dry land. The general scheme and the main purpose of the Act was to carry out that object. The Act of Parliament provides for commissioners being appointed to drain the land and to execute all works necessary for that purpose and, when the works were executed, to make an award. Then the functions of the inclosure commissioners were to cease, and they were to be succeeded by drainage commissioners, whose paramount duty it would be to protect the drainage system which had been established. It has been contended that this Act of Parliament and award can be got rid of by presuming a lost grant by the persons to whom this Act of Parliament applied. The Act was not, however, passed in their interests only, but in the interests of the public. The provisions of the Act and of the award were not intended to be temporary. Everything in them shows that it was intended that the drainage commissioners were to maintain the system of drainage permanently. It was argued that the presumed lost grant could be a grant by the owners of the adjoining allotments to the surveyor of highways. But the drainage commissioners could not be bound by a grant of that kind. The drainage commissioners could not be bound by it, because it would violate the provisions of the Act of Parliament and award. No lawful origin for such a grant is possible, and therefore it cannot be presumed. The conduct of the plaintiff cannot deprive him of his legal rights. What would be the extent of the suggested lost grant? Would it permit the surveyor of highways to allow persons to depasture as many cattle and horses upon the roads as they chose? That could not be. I agree, therefore, that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Clarke, Rawlins, and Co.*, for *Percival and Son*, Peterborough.

Solicitor for the respondents, *J. Matthew Voss*, for *J. W. Buckle*, Peterborough.

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CHAPMAN v. BROWNE.

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Feb. 27, 28, March 4 and 26.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

CHAPMAN v. BROWNE. (a).

APPEAL FROM THE CHANCERY DIVISION.

Trustee—Breach of trust—Investment—Power to invest on mortgage in Ireland—Second mortgage—Improper investment—Relief under Judicial Trustees Act 1896 (59 & 60 Vict. c. 35), s. 3.

The trustees of a marriage settlement were empowered to invest (inter alia) on real securities in Ireland, and to vary investments with the consent of the husband and wife. Without the consent of the wife, the trustees sold stock for 5000l. and invested the sum of 5000l. on a third sub-mortgage of a mortgage for 12,150l. on lands in Ireland; the lands were subject to two prior mortgages for 4700l. and 2460l., and the mortgage for 12,150l. was subject to two prior sub-mortgages for 4000l. and 2153l. The trustees took no legal advice as to the propriety of the investment. At the time of the investment the greater part of the lands was in the possession of the mortgagor, who let the same for grazing purposes. A great fall in the value of the lands having taken place, the trustees were unable to realise the investment or to recover the sum of 5000l.

Held (affirming the judgment of Cozens-Hardy, J.), that the investment was a breach of trust, and that relief ought not to be granted under sect. 3 of the Judicial Trustees Act 1896.

THIS was an appeal by the defendant from the judgment of Cozens-Hardy, J. at the trial of the action.

The plaintiffs, who were husband and wife, were the beneficiaries under a settlement made upon their marriage, and they brought this action against the defendant, who was the surviving trustee of the settlement, claiming a declaration that he was liable to make good an alleged breach of trust in respect of an investment of a sum of 5000l.

The settlement was made on the 20th Sept. 1866, and was executed in Ireland, the parties thereto being Irish. The husband, however, was the incumbent of a benefice in Lancashire.

By the terms of the settlement the trustees were directed to invest the trust funds "in any of the public stocks, or funds, or Government securities of the United Kingdom or India, or any colony or dependency of the United Kingdom, or upon freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland," and certain other securities, with power to vary the investments from time to time with the consent of the plaintiffs, or the survivor of them, and after their deaths at the discretion of the trustees.

The trustees received the sum of 5000l., which the father of the wife had covenanted to pay to them. They invested that sum in India Stock, but subsequently sold that stock and invested the money on the security of a mortgage of lands in Ireland belonging to one Verschoyle.

In 1864 the lands in question, upon which there were then two mortgages for 4700l. and 2460l., were purchased by and conveyed to Verschoyle subject to the two mortgages.

By a deed made on the 15th Aug. 1864 Verschoyle conveyed the said lands to one Olpherts by way of mortgage to secure the sum of 17,900l. subject to the said two mortgages.

On the 23rd Aug. 1864 Olpherts assigned the said sum of 17,900l. and conveyed the said lands to Lee and Barlow by way of sub-mortgage to secure the sum of 4000l. advanced by them to him.

The sum of 17,900l. due upon the mortgage of the 15th Aug. 1864 was subsequently reduced to the sum of 12,150l. by payments made by Verschoyle to Olpherts with the consent of Lee and Barlow.

By a deed dated the 23rd Feb. 1867 Olpherts assigned the balance due upon the mortgage of the 15th Aug. 1864 and conveyed the said lands to Lee and Barlow to secure the repayment of a further sum of 2153l. advanced by them to him.

By a deed dated the 1st Dec. 1869 Olpherts assigned the balance due upon the mortgage of the 15th Aug. 1864 and conveyed the said lands to Fitzmayer to secure the repayment of 5000l. advanced by Fitzmayer to Olpherts.

By a deed dated the 12th Aug. 1871, to which Verschoyle, Fitzmayer, Olpherts, and the defendant and his co-trustees were parties, being a transfer of the sub-mortgage of the 1st Dec. 1869, it was recited that Verschoyle desired to pay Fitzmayer the said sum of 5000l., and had applied to the defendant and his co-trustees to advance the same.

In consideration of 5000l. paid by the defendant and his co-trustees, at the request of Verschoyle and Olpherts, to Fitzmayer, Fitzmayer, at the request of Olpherts, assigned to the defendant and his co-trustees the 5000l. due to him upon the sub-mortgage of the 1st Dec. 1869, with the benefit of all securities for the same.

By a deed dated the 31st Aug. 1871 Verschoyle conveyed the said lands to the defendant and his co-trustees by way of mortgage to secure the said sum of 5000l., and covenanted to pay the same; and it was provided that, if Verschoyle regularly paid the interest thereon and performed all the covenants, the defendant and his co-trustees would not call in the said sum of 5000l., or any part thereof, before the 14th Aug. 1875. The trustees did not obtain either the legal estate or the title deeds.

The consent of Mrs. Chapman had not been obtained to the sale of the India Stock and the investment of the sum of 5000l. as above stated.

The defendant and his co-trustees had employed a solicitor, who also acted as solicitor for Verschoyle, to carry out the transaction, and counsel had advised them as to the form in which the security should be taken; but they had not taken any legal advice as to the propriety of the investment. They obtained the opinion of an expert that the property was worth 33,000l.

At the time when the investment was made, Verschoyle was in the occupation of the greater part of the lands, which he let for grazing purposes.

No interest was paid on the 5000l. after 1888.

In 1894 the mortgaged land was offered for sale by order of the Land Judge, but a purchaser could not be found.

The defendant and his co-trustees recovered judgment against Verschoyle upon his covenant

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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to pay, but only recovered 233*l.* under that judgment, of which a balance of 75*l.* remained after deduction of costs and expenses.

Cozens-Hardy, J. held that the investment of the 5000*l.* was a breach of trust, and made a declaration accordingly; he refused to grant relief to the defendant under the Judicial Trustees Act 1896; and he ordered him to pay into court the sum of 4925*l.*

The defendant appealed.

Eve, K.C. and *S. Ronan, K.C.* (of the Irish Bar) for the appellant.—In Ireland the law is not the same as in England, and, if trustees are authorised to invest on real securities in Ireland, it is not a breach of trust to invest upon a second mortgage if the security is otherwise a proper one:

Smithwick v. Smithwick, 12 Ir. Ch. Rep. 181;

Crampton v. Walker, 31 L. Rep. Ir. 437.

The parties to this settlement were all Irish and it was executed in Ireland, and it ought to be inferred that the Irish law was to be applied. There are not, in the case of a second mortgage on land in Ireland, any of the objections which exist in the case of a second mortgage on land in England. A second mortgagee in Ireland does not run the risk of a foreclosure if he cannot redeem; and the Registration Acts in Ireland prevent a first mortgagee from tacking to the prejudice of a second mortgagee. In Ireland a second mortgagee can always apply to the court for a sale of the land, and the proceeds of sale are applied by the court in payment of the incumbrances according to their priorities:

Re Nison, Ir. Rep. 9 Eq. 7;

Re Colclough, 8 Ir. Ch. Rep. 330;

Re Buswell, 5 L. Rep. Ir. 349.

The Registration Acts in Ireland make the position of a second mortgagee in Ireland as safe as, or safer than, that of a first mortgagee in England, and registration of a second mortgage prevents any tacking by the first mortgagee:

Re Burke, 9 L. Rep. Ir. 24;

Drew v. Earl of Norbury, 3 J. & L. 267.

This investment would not have been held to be improper in an Irish court, and, in the case of this settlement, it ought not to be held in an English court to be an improper investment because the trustee happens to have come within the jurisdiction of the English courts. The evidence shows that at the time of the investment the value of the land left an ample margin. The loss has really been caused by the great fall in the value of land in Ireland. The plaintiffs cannot say there was a breach of trust because the consent of the wife to the change of investment was not obtained; the income of this investment was received for years by the husband, and the wife had the benefit of it and must have known of it. The court can and ought, even if there were a breach of trust in investing on a second mortgage, to grant relief under sect. 3 (1) of the Judicial Trustees Act 1896.

Macnaghten, K.C. and *O. Leigh Clare* for the respondents.—This was an English settlement, and must be governed by English law. The husband was domiciled in England, and the law of that domicile governs the settlement:

Duncan v. Cannon, 18 Beav. 128; 7 De G.

M. & G. 78;

Corbet v. Waddell, 7 Ct. of Sess. Cas. 200, 4th series;

Chamberlain v. Napier, 15 Ch. Div. 614;

Collias v. Hector, 32 L. T. Rep. 223; L. Rep. 19 Eq. 334;

Lloyd v. Guibert, 13 L. T. Rep. 602; L. Rep. 1 Q. B. 115.

If the English law is applied to this settlement, then the investment clause must be construed as giving power to invest on first mortgages only, and not on second mortgages in Ireland. The Irish cases which have been cited, as to investment on second mortgages in Ireland, are not any authority that trustees of an English settlement with power to invest on mortgage of land in Ireland may invest on second mortgages in Ireland. According to English law trustees cannot invest on second mortgages:

Norris v. Wright, 14 Beav. 291;

Drosier v. Brereton, 15 Beav. 221;

Swaffield v. Nelson (1876) W. N. 255.

This was not, in any case, a proper trust investment. The trustees would not have any control over the property, and could not control the sale of it. It would be extremely difficult to sell or realise, and for that reason would be an improper investment even according to Irish law:

Waring v. Waring, 3 Ir. Ch. Rep. 331.

A second mortgage is an improper investment for trustees because it may be necessary for them to redeem prior incumbrances and they may have no funds for that purpose. In the present case the trustees could not possibly have redeemed the prior incumbrances. The first mortgagee might enter into possession and there might be no surplus income to pay the interest on the subsequent mortgages. The large amount of the prior incumbrances made this an obviously improper investment, for any serious fall in the value of land would destroy any margin in value so far as this charge was concerned:

Learoyd v. Whiteley, 58 L. T. Rep. 93; 12 App. Cas. 727.

The trustees did not take any proper legal advice with respect to this investment; and the consent of the wife was not obtained. This is not a case in which relief ought to be granted under sect. 3 of the Judicial Trustees Act 1896; relief ought not to be granted in the case of an active breach of trust like this:

Re Stuart, 77 L. T. Rep. 128; (1897) 2 Ch. 583;

Re Grindey, 79 L. T. Rep. 105; (1898) 2 Ch. 593;

Re Roberts, 76 L. T. Rep. 479;

Speight v. Gaunt, 50 L. T. Rep. 330; 9 App. Cas. 1;

Learoyd v. Whiteley (*ubi sup.*).

If this was an Irish settlement, that Act does not apply.

Ronan, K.C.—These proceedings being taken in an English court, sect. 3 of the Judicial Trustees Act 1896 is applicable. If trustees have acted fairly and honestly, relief may be given under sect. 3 in any case:

Re Turner, 76 L. T. Rep. 116; (1897) 1 Ch. 536.

Cur. adv. vult.

March 26.—The judgment of the court was read by

ROMEE, L.J.—It is not necessary to decide the question which was argued before us whether the marriage settlement is to be regarded as an Irish settlement, or whether it is to be regarded as an

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English one. On the question whether the defendant has committed a breach of trust there is no difference between the law of Ireland and the law of England. In an Irish settlement, as in an English one, if trustees have power to invest trust funds on the security of land in England the laws of the two countries as to whether a particular investment on English land is or is not a breach of trust are the same. So, if the trustees have power to invest on the security of land in Ireland, the laws of the two countries as to whether a particular investment on Irish land is or is not a breach of trust are the same. Nor is it necessary to decide whether the settlement in this case is Irish or English for the purpose of the question whether the benefit of the Judicial Trustees Act 1896 can be claimed by the defendant; for, assuming, as I shall do, that the defendant is entitled to claim the benefit of that Act, he is, in my opinion, for the reasons hereafter given, not thereby exonerated from liability if the investment impeached in the action was a breach of trust on his part. The main question in this action is whether that investment, which was on the security of Irish land subject to prior mortgages, was a breach of trust. Now it is clear that, if a corresponding security had been taken on land in England, it would have been a breach of trust. But it is said that owing to the registration laws affecting incumbrances on lands in Ireland at the time the investment was made, and to the powers of the Irish courts with regard to the sale of incumbered estates, and to the practice not to decree foreclosure in actions concerning mortgages, the security was a safe and proper one for trustees to take. Now undoubtedly the laws and practice to which I have referred do in several respects render a puisne mortgage on land in Ireland a less dangerous or undesirable security than a puisne mortgage on land in England; and it has been decided in Ireland that a loan of trust funds on a second mortgage of land in Ireland is not of itself, and in the absence of other circumstances, a breach of trust. See *Smithwick v. Smithwick* (12 Ir. Ch. Rep. 181) and *Crompton v. Walker* (31 L. Rep. Ir. 437), where that view was applied in favour of trustees in respect of securities which, I am bound to say, appear to me on their face to be somewhat undesirable ones for trustees to take. Now those decisions are not binding upon this court, but I need scarcely say that they ought to be received with the greatest respect and consideration, and are of great weight, especially so far as they decide a question of principle, though the applications of that principle to the special facts before those courts in the cases in question are not so important. The judges who decided those cases were naturally more familiar than we can be with the Irish Registration Acts and their effect, and with the powers and practice of the Irish courts; and this must of course be borne in mind by us. But we are fortunate in the assistance rendered to us by Mr. Ronan, who was one of the appellant's counsel. He is familiar with the Irish law and practice, and called our attention to the distinctions between English land and Irish land as security, so far as those distinctions are important for the purposes of this appeal, and he referred us to the decisions of the Irish courts bearing on the points we have to decide. Under these circumstances I

find myself able to come to a decision with regard to the investment we have to consider in this case. It does not appear to me necessary to determine as an abstract question whether or not a second mortgage on land in Ireland is in itself, apart from other considerations, of necessity a bad security for trustees to take for their trust funds. But I think I ought to say this. The judges in Ireland in the cases I have referred to appear to a great extent to base their judgment as to the difference as a security between second mortgages of land in England and second mortgages of land in Ireland on the fact that in Ireland there can be no tacking and no foreclosure. But the objections to second mortgages of land in England are not based solely on the risk of tacking and the liability to foreclosure. There are other objections, and some of these appear to me to apply to, at any rate, some second mortgages of land in Ireland, including the mortgage in question in this action. I shall refer to these hereafter when I point out the grounds on which I think the mortgage now in question was an improper security for the defendant to take for the trust money he advanced upon it. The nature of the mortgage, which was effected in 1871, will be seen from the following short statement, which is substantially correct, although the exact details are not perfectly clear. The land was subject, in the first place, to two mortgages for 4700*l.* and 2460*l.* respectively. Then came a mortgage for a sum which was originally 17,900*l.*, but which may be taken as reduced at the time of the defendant's investment to 12,150*l.*, or thereabouts. This last-mentioned mortgage was sub-mortgaged—first for a sum of 4000*l.* and then for a sum of 2153*l.*, and then came a sub-mortgage for 5000*l.*, and it was this last sub-mortgage which was substantially the security taken by the defendant and his co-trustees. The 5000*l.* was secured collaterally by a covenant by the owner of the land for the payment of the 5000*l.* and interest, and by a charge on the land created by the owner, but this last-mentioned charge would of course rank after the full charge for 12,150*l.* The trustees obtained with their security neither the legal estate nor the title deeds. If for any reason they wished to redeem the prior mortgages they had no trust funds available for the purpose. The sums secured by the prior mortgages were clearly considerable. So long as these prior mortgages existed the trustees had no control over them. The prior mortgagee, who had the legal estate, could at any time have taken possession, but the trustees, not having the legal estate, could not, under ordinary circumstances, take possession. They could only apply, if their interest was in arrear or other circumstances justified the application, for a receiver, and that subject to the rights of the prior mortgagees; and, as hereafter is pointed out, it is no sufficient answer for the trustees to say that they might have applied to the court in Ireland for an order for the sale of the estate and for the appointment of a receiver; and as an additional fact to be mentioned, not wholly without importance, I notice that in the mortgage of the 31st Aug. 1871 it was provided that, so long as the mortgagor paid interest on his mortgage debt and performed his covenants, the principal sum of 5000*l.* was not to be called in by the mortgagees for a period of nearly four years; and I must

further point out that as third sub-mortgagees the trustees would have had no control over the rights and powers conferred by the mortgage for 12,150l. The first sub-mortgagee, being the assignee of the debt and security, would have had the control over them, although no doubt the third sub-mortgage would be considered as an incumbrance for the purposes of the Landed Estates Court (Ireland) Act 1858 (21 & 22 Vict. c. 72). Further, I must point out that the owners of the prior mortgages might, relying on their position as prior incumbrancers, have let the interest on their debts accumulate to a considerable extent, and the trustees might have known nothing about the matter until they discovered too late that the charges in front of theirs were enormously increased. Again, the prior mortgages might have exercised powers of sale before the trustees could take proceedings to stop the sale. If the prior mortgagee having the legal estate went into possession of the mortgaged property, the whole of the income might have been stopped, and there might have been nothing forthcoming to pay the interest on the trust security. If the trustees took proceedings in the Incumbered Estates Court or elsewhere to obtain a sale of the estate, some time might elapse before even a binding order of the court for a sale could be obtained, and even after such an order was obtained there might be a considerable lapse of time before a sale could be effected. Indeed in this case a sale was ordered as far back as 1894 or thereabouts, and no sale has been effected up to the present time, although this particular delay is no doubt largely due to comparatively recent circumstances. But in any case, pending a satisfactory sale being effected under the order, the trustees might receive no income from the mortgaged property. The prior mortgagees would be entitled to receive the income if in possession, and even when a receiver was appointed by the court he would have to apply the income in the first place for the benefit of the prior mortgagees. Our courts have always considered it a matter of importance to be borne in mind by a trustee contemplating an advance of trust money on security of realty under the provisions of settlements of an ordinary kind like this marriage settlement that the security should be one which, in case of the mortgagor not being able to pay, could readily be made available to yield income to pay the interest which might be required by a tenant for life or possibly for the maintenance of some infant *cestui que trust*. In a case like the present all income might be stopped for years, as, indeed, has happened. The right of an incumbrancer to apply under sect. 43 of the Act 21 & 22 Vict. c. 72 for a sale of the land affords no sufficient remedy to a trustee who is only a puisne incumbrancer, for the reasons I have already pointed out; and in addition to those reasons I may add that under sect. 53 of the last-mentioned Act the judge has a discretion as to ordering a sale, and an incumbrancer might possibly not be able to obtain an order, especially if no interest was actually in arrear and all the other incumbrancers opposed a sale. Again, in the present case a considerable part of the mortgaged land was in hand at the time of the mortgage. That might at the time have been even of advantage, when there was a resident owner to manage the estate. But if bad times

came—and a prudent investor ought to contemplate the possibility of that happening—and the resident owner was no longer there to manage, considerable risk might be involved in the management of such an estate by a mortgagee in possession or by a receiver. Moreover, on a question of title, notwithstanding the provisions of the Irish Registration Act to which I have referred, a puisne mortgagee, who has not the deeds or the legal estate, has to run a risk. An equitable mortgagee by deposit of deeds without writing may obtain a perfectly good charge as against a subsequent registered mortgage: (see *Re Burke's Estate*, 9 L. Rep. Ir. 24). It is said on behalf of the defendant that this only necessitates careful inquiry on behalf of an intending puisne mortgagee as to where the deeds are, and on what account they are held; but the inquirer might be misled, and why should a trustee run any unnecessary risk? A trustee is not obliged to lend trust money on a puisne mortgage. In the present case the defendant would have had no difficulty in obtaining as security a first mortgage on lands in England or Ireland, assuming even that he had been obliged to invest on some mortgage. And I may here refer to the fact that in the present case, so far as I can see, no inquiry as to the title deeds was made at all. Looking at all those circumstances, I cannot bring myself to think that the defendant was justified as trustee in taking the security in question. This renders it unnecessary for me to consider the question as to the true value of the estate at the time the advance was made, upon which, also, Cozens-Hardy, J. came to a conclusion adverse to the defendant. This brings me to a consideration of the last question, whether, assuming that the Judicial Trustees Act 1896 applies, the defendant is protected by the provisions of sect. 3. Now, that the defendant acted "honestly" is clear. But I regret to say that, desirous as I am of giving to trustees the benefit of the section and of not unduly curtailing the application of its provisions. I do not see my way to hold in the circumstances of this case that the defendant has acted "reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach." It does not appear to me that the defendant ever really considered the question whether the security he took was one which in its nature it was prudent and right for him as a trustee to take. He took no advice on the point. Counsel was employed to settle the form of the security taken, but was not asked to advise and did not advise the trustees as to whether such a security one that, under all the circumstances of the case, could prudently and properly be taken by them. A solicitor was employed, but he was acting for the mortgagor also, and clearly was not a proper person to be employed by the trustees for the purpose of advising them on the point in question; and, indeed, on the evidence as a whole, I cannot say that it satisfies me that the solicitor ever did advise them on the point. All that the defendant can say on the subject in his evidence is that he saw the solicitor (Mr. Wade) five or six times about the particulars of the property, and that Mr. Wade satisfied him particularly about the investment and that it would come within the four corners of the

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marriage settlement. This is not satisfactory, and Mr. Wade is dead; but his entries of charges against the trustees are forthcoming and have been put in evidence, and there is no entry showing any advice given by him to them on the point in question. The evidence of Mr. Wade's clerk, so far as it goes, also tends to negative the idea of any such advice having been given. And Cozens-Hardy, J. holds that the trustees did not act reasonably, and he points out that they, or one of them, suggested the advance and accepted the security on the unsupported statement of the particulars of the estate furnished by or on behalf of the mortgagor. It is said on behalf of the defendant that he ought to escape liability because it is suggested that if, before accepting the security, he had taken the advice of counsel in Ireland he would have been advised that the security was a proper one for him as trustee to accept; and it is further said that, even if he had brought the matter before an Irish court for directions, that court would have sanctioned the advance on the security in question. But it is difficult to determine what might have happened in the hypothetical case of the defendant's having taken steps which he never did take; and I cannot assume that, if those steps had been taken and the facts as to the security had been properly stated to counsel or to the court, the trustees would have been advised or authorised to make the advance. There is another consideration which appears to me fatal to this argument on behalf of the defendant. If counsel had been asked to advise or the court to sanction the security, the first thing that would have been required by counsel or by the court is the consent to the proposed investment of the plaintiff, Mrs. Chapman, which was necessary under the settlement, and was not, in fact, obtained by the defendant; and I cannot assume as against her, if her consent had been asked after a proper explanation of the nature and circumstances of the proposed security, that she would assuredly have consented to the change of investment. It appears to me, therefore, that I cannot hold that the defendant has brought himself within the provisions of sect. 3. I ought, perhaps, to say a word on the argument on behalf of the defendant that he ought not to be held liable on the ground that the loss to the trust estate has occurred, not from any defect in title or from the nature of the security taken, but solely from the unforeseen depreciation in value of the lands mortgaged. But the answer is obvious. If the trustee had acted as he should have done, and not invested on the security in question, the loss would not have occurred to the trust estate. In my opinion, the appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Iliffe, Henley, and Sweet*.

Solicitor for the respondent, *Francis H. Sweet*, for *Forshaw and Parker*, Preston.

May 29 and 31.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

MORRIS v. NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Appeal—County Court—Order made under sect. 5 of Workmen's Compensation Act 1897—Appeal to High Court—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 120.

An appeal from an order made by a County Court judge under sect. 5 of the Workmen's Compensation Act 1897 lies to the High Court under sect. 120 of the County Courts Act 1888.

THIS was an appeal by the plaintiff from an order of the Divisional Court (Lord Alverstone, C.J., Darling and Channell, JJ.) setting aside the order of the County Court judge.

The plaintiff was injured by accident arising out of and in the course of his employment by the Darcy Lever Coal Company in a colliery, and took proceedings for compensation under the Workmen's Compensation Act 1897.

On the 8th May 1901 the County Court judge made an award in favour of the plaintiff for the payment of a weekly sum of 14s. 9d. during incapacity.

The Darcy Lever Coal Company was being wound-up, and no payments were made to the plaintiff under the award.

The plaintiff then applied to the County Court judge for an order against the Northern Employers' Mutual Indemnity Company, under sect. 5 of the Workmen's Compensation Act 1897, alleging that the Darcy Lever Coal Company were entitled to the amount of the weekly payments from the insurance company.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

Sect. 5 (1). Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt . . . or, if the employer is a company, of the company having commenced to be wound-up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the County Court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the first schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

The County Court judge, on the 4th Dec. 1901, made an order under sect. 5 against the insurance company in favour of the plaintiff.

The insurance company appealed to the King's Bench Division, and it was objected on behalf of the plaintiff that there was no right of appeal to the High Court from any order made under sect. 5 of the Workmen's Compensation Act 1897.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides:

Sect. 120. If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission

(a) Reported by J. H. WILLIAMS Esq., Barrister-at-Law.

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or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court.

The Divisional Court (Lord Alverstone, C.J., Darling and Channell, JJ.) held, following their decision in the previous case of *Kniveton v. Northern Employers' Mutual Indemnity Company* (1902) 1 K. B. 880, that the appeal would lie, and allowed the appeal.

The plaintiff appealed, with leave.

Ruegg, K.C. and *Chester Jones* for the appellant.—The decision of the Divisional Court, that an appeal would lie to the King's Bench Division from an order of a County Court judge under sect. 5 of the Act, was wrong, and that court had no jurisdiction to entertain the appeal. In *Leech v. Life and Health Assurance Association* (84 L. T. Rep. 414; (1901) 1 K. B. 707) it was held that an appeal could not be brought to this court in respect of orders made under sect. 5, because an application under that section was not one of the matters included in clause 4 of the 2nd schedule to the Act, which alone gave a right of appeal to the Court of Appeal. Every proceeding under the Act is an arbitration, and there is no right of appeal at all except that which is expressly given by the Act. This is not one of the matters in respect of which a right of appeal is given by the Act, and therefore there is no right of appeal to any court. A proceeding under sect. 5 is in effect merely process in aid of execution to enforce the payment of compensation given by the Act—see rules 51 *et seq.* of the rules under the Act—and there can be no appeal in such a matter. This jurisdiction is created and conferred entirely by the Act. The Act is a code complete in itself, and expressly provides for a restricted right of appeal, which by inference negatives any other right of appeal. The effect of the decision of the Divisional Court may be to give a right of appeal to the King's Bench Division in all interlocutory matters arising under the Act, and that could never have been intended. Sect. 120 of the County Courts Act does not apply to matters under the Workmen's Compensation Act.

Haldane, K.C. and *F. E. Smith*, for the respondents, were not called upon to argue this point.

COLLINS, M.R.—This is an appeal from the judgment of the Divisional Court upon a question arising under sect. 5 of the Workmen's Compensation Act 1897. For the purpose of the present question it is enough to say that sect. 5 deals with the case where a workman has been injured by accident and has acquired a right to compensation from the employer under the Act, and the employer is insured against that liability, and that it gives the workman the right to follow the insurance money into the hands of the insurers, if the employer becomes bankrupt or, being a company, is being wound-up. In this case the workman obtained an award for the payment of compensation by his employers, who were a company; the company went into liquidation, and the payments under the award were not made. The workman alleged that his employers were entitled to receive the amount of the compensation

from an insurance company, the present respondents, and he made an application to the County Court judge, under sect. 5 of the Act, for an order making the insurance money available for the payment of the compensation payable to him under the award. The County Court judge made an order in favour of the plaintiff. The insurance company gave notice of appeal to this court; but we had held, in *Leech v. Life and Health Assurance Association* (84 L. T. Rep. 414; (1901) 1 K. B. 707), that there was no right of appeal to the Court of Appeal from an order made by a County Court judge upon an application by a workman against his employers under the above section. The insurance company accordingly appealed to the King's Bench Division. In the Divisional Court the objection was taken that an appeal would not lie to that court. The court, however, held that the appeal would lie, and reversed the decision of the County Court judge. Two points arise on this appeal. The first point is whether the Divisional Court had any jurisdiction to entertain the appeal. That point can, I think, be dealt with in a very few words. The court below felt no difficulty upon the question of jurisdiction. We have held in this court that an appeal in a matter of this kind, which is not an incident of the special jurisdiction to award compensation conferred upon the County Court judge by the Workmen's Compensation Act 1897, is not one of that particular class of matters specially allocated to this court by the Act, and that, not being within those categories, no appeal would lie to this court. We did not, however, hold that there was no right of appeal at all. Therefore the position is that the County Court judge, acting in a matter within his jurisdiction, has made an order, and that therefore the case comes directly within the words of sect. 120 of the County Courts Act 1888, which provides that, "if any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal to the High Court. . . ." That word "matter" relates to matters other than actions and the decisions therein, and is a most comprehensive term. Therefore, *prima facie*, there was clearly jurisdiction in the Divisional Court to entertain the appeal against an order in a matter with which the County Court judge dealt in the course of his jurisdiction. The jurisdiction to entertain the appeal clearly exists unless there is something in the Workmen's Compensation Act itself to take away that *prima facie* jurisdiction of the Divisional Court. The appellant's counsel have been unable to point out anything in the Workmen's Compensation Act which would take away the *prima facie* right of appeal to the King's Bench Division. "Matter" is a general term which has been used by the Legislature to include everything besides an action which comes within the jurisdiction of a County Court judge. In my opinion, therefore, the Divisional Court had jurisdiction to entertain the appeal, and were right in so holding.

MATHEW, L.J.—I am of the same opinion.

COZENS-HARDY, L.J.—I am of the same opinion. On the question of jurisdiction I desire to add but a few words. It seems to me to be perfectly clear that the word "matter" in sect. 120 of the County

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Courts Act gives a right of appeal to the Divisional Court from an order made by a County Court judge under sect. 5 of the Workmen's Compensation Act. The court below, therefore, had jurisdiction, and rightly entertained the appeal.

Appeal dismissed.

Solicitors for the appellant, *Chester, Broome, and Griffiths*, for *Fielding and Fernihough*, Bolton.

Solicitors for the respondents, *Rowcliffes, Rawle, and Co.*, for *Peace and Ellis*, Wigan.

May 27 and June 2.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.).

WIGHTWICK v. POPE AND OTHERS. (a)

ORIGINAL APPLICATION.

Practice—Court of Appeal—Security for costs—Application for a new trial—Supreme Court of Judicature Act 1890 (53 & 54 Vict. c. 44), s. 1—Order LVIII., r. 15.

The general rule of practice, laid down by the Court of Appeal in Heckscher v. Crosley (1891) 1 Q. B. 224, not to order security for costs of a motion for a new trial will no longer be treated as binding, and the court will exercise the same discretion as to security for costs in the case of an application for a new trial as in the case of any other appeal.

THIS was an application by the plaintiff for an order that the defendants should give security for costs of the appeal.

The action was tried before Lord Alverstone, C.J. with a jury, and the jury having found a verdict for the plaintiff, judgment was entered for the plaintiff.

The defendants duly gave notice of motion by way of appeal, asking for judgment or for a new trial, and the motion was set down in the new trial paper in the Court of Appeal.

The plaintiff then applied for an order for security for costs of the appeal.

The rules of the Supreme Court, Order LVIII., provide:

Rule 15. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

F. D. Mackinnon for the plaintiff.—The appellants have no means to pay the costs of the appeal if they are unsuccessful, and therefore they ought to be ordered to give security for the costs. In *Re Harwood and Abrahams* (84 L. T. Rep. 857; (1901) 2 K. B. 304) it was said by this court that the rule, that security for the costs of a motion for a new trial would not be ordered, was anomalous, and ought not to be extended. In this case the appellants really ask for judgment, and not for a new trial.

G. A. Scott for the defendants.—This is a motion for a new trial, and the rule is well established and has always been acted upon that this court will not order security for the costs of a motion for a new trial:

Heckscher v. Crosley, (1891) 1 Q. B. 224;
Walklin v. Johns, 7 Times L. Rep. 181.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

When there has been a trial with a jury, the only appeal to this court which is a final appeal and not a motion for a new trial is when the appellant accepts the findings of the jury, but asks for judgment on those findings. Here the appellants attack the finding of the jury.

Mackinnon replied.

The Master of the Rolls intimated that they would consult the other members of the Court of Appeal before giving their decision.

Cur. adv. vult.

June 2.—The judgment of the court was read by

COLLINS, M.R.—This was an application made by the respondent in a motion set down in the new trial paper for security for costs of the motion. The case raised no points of any difficulty, and we were all of opinion that in the ordinary discretion of the court security should have been ordered in this case, had it been technically a final appeal; but, having regard to the general rule of practice laid down in *Heckscher v. Crosley* (1891) 1 Q. B. 224, and since acted upon, not to grant security for costs in the case of new trial motions, we took time to consult the other members of the court, as to whether the time has not come when that practice should be altered. It has been more than once treated as anomalous (see *Re Harwood and Abrahams*, 84 L. T. Rep. 857; (1901) 2 K. B. 304); and when analysed it does not seem to rest on any logical basis. In former days judgment was never given by the judge at Nisi Prius, who has been described as the mere instrument of the court to try issues (see *Wells v. Abrahams*, 26 L. T. Rep. 433; L. Rep. 7 Q. B. 554); and when leave to move was reserved the matter was suspended till the rule nisi could be moved for. Nowadays the judge has complete control of the cause and can enter judgment as he thinks right. Hence there is now, unless the learned judge has declined to give judgment, a collateral or alternative application in every motion for a new trial, asking the court to deal with the judgment accordingly. There seems, therefore, no reason in principle why the court should refuse to exercise its discretion in this class of appeals rather than in others, and now that this court has equal jurisdiction in all, it appears undesirable to act upon a hard and fast rule applicable to one class only, and laid down when the jurisdiction was first assumed. The forming of separate lists is a matter of convenience only, and the rights of the parties to security for costs ought not to depend upon the list in which the case appears. All the Lords Justices concur in thinking that we ought not any longer to treat ourselves as bound by the rule laid down in *Heckscher v. Crosley* (*ubi sup.*). Security to the extent of 25l. must be given.

Application granted.

Solicitors for the plaintiff, *Nicol, Son, and Jones*.

Solicitors for the defendants, *Wontner and Sons*.

Thursday, June 5.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

DUNHAM v. CLARE. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Death—Cause of death—Result of accident—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 1 (1).

A workman received an injury to his foot by accident arising out of and in the course of his employment, and after an interval of more than a fortnight erysipelas supervened and caused his death.

The County Court judge held that his widow was not entitled to compensation under the Workmen's Compensation Act 1897, because death was not the natural and probable consequence of the injury and therefore did not result from the injury.

Held (allowing the appeal), that death might "result from the injury" although it was not a natural and probable consequence of the injury, and that, if death did in fact result from the injury, compensation was payable.

THIS was an appeal by the plaintiff from the award of the County Court judge at Walsall in proceedings for compensation under the Workmen's Compensation Act 1897.

The plaintiff was the widow and administratrix of a workman who was injured by accident arising out of and in the course of his employment by the defendant in an employment to which the Workmen's Compensation Act 1897 applied.

On the 2nd Sept. 1901 the workman was engaged in carrying a heavy pipe up some steps when the pipe fell upon his foot and injured one of his toes.

The workman attended a hospital as an out-patient until the 16th Sept., when erysipelas supervened and he was ordered to bed by his doctor, and he died on the 27th Sept.

The doctor who attended the deceased workman gave evidence on behalf of the plaintiff and stated that erysipelas started from the wound in the foot; that it was phlegminous erysipelas, which was an uncommon form; that the cause of death was blood poisoning caused by erysipelas in the wound; that erysipelas was not a necessary result of a wound of that kind, but was very unusual; that erysipelas is due to germs which enter from without; that, with a wound properly dressed and kept, erysipelas would be theoretically impossible; that, in case of a wound not being kept open, he would expect erysipelas in less than ten days, if at all; that, if erysipelas started more than fifteen days from the date of a wound, he would expect that the wound had been reopened.

A doctor, who gave evidence on behalf of the defendant, stated that erysipelas was a very unusual consequence of a wound such as that received by the deceased workman; that erysipelas was caused by the introduction of germs only; that, if the germs were introduced when the wound was caused, he would expect erysipelas to come out in six days at the most.

The defendant contended that the death was not the result of the injury by the accident, but that the erysipelas must have been caused by some subsequent conduct on the part of the deceased; that the injury by accident was not the proximate cause of the death; and that the death was not the natural and probable consequence of the injury by the accident.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

Sect. 1 (1). If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act.

First Schedule.—Clause 1. The amount of compensation under this Act shall be—(a) Where death results from the injury.

The County Court judge stated his decision as follows: "I find and award that applicant is not entitled to compensation on ground that death not result of accident—i.e., not natural or probable consequence."

The plaintiff appealed.

Buegg, K.C. and R. J. Lawrence for the appellant.—The learned County Court judge was wrong in holding that the death did not result from the injury because it was not the natural and probable consequence of the injury. Under the Act compensation is payable if death "results" from the injury by accident. In this case there was an injury by accident, and erysipelas supervening upon the wound caused the death. The death, therefore, was the result of the injury by accident:

Lloyd v. Sugg and Co., 81 L. T. Rep. 768; (1900) 1 Q. B. 481.

Death may result from the injury by accident although it may not be the natural and probable consequence of that injury. It is sufficient if death does in fact result from the injury. The County Court judge, therefore, clearly misdirected himself upon a question of law in holding that death does not result from the injury, within the meaning of the Act, unless it is the natural and probable consequence of the injury. In *Thompson v. Ashington Coal Company* (84 L. T. Rep. 412) a workman who was employed in a colliery got a small piece of coal into his knee with the result that blood poisoning set in and he died, and it was held that his death was the result of an injury by accident, and that compensation was payable under the Act.

Disturnal for the respondent.—The learned County Court judge properly directed himself as to the law, and there was evidence before him to justify his finding. The case of *Lloyd v. Sugg and Co.* (*ubi sup.*) has no application to the present case. The decision in that case was that an injury caused by some fortuitous and unexpected event is caused by accident although it may be aggravated by the physical condition of the workman at the time of the accident. The evidence of the doctors showed that the erysipelas was not the result of the injury received by accident, but must have been set up by some new intervening cause, probably some careless conduct on the part of the workman. The injury by accident was not, therefore, the proximate

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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cause of the death. The decision of the County Court judge, that the death must be the natural and probable consequence of the injury by accident, was right, and he was clearly right in his finding that in this case it was not the natural and probable consequence:

Clark v. Chambers, 38 L. T. Rep. 454; 3 Q. B. Div. 327;

Sharp v. Powell, 26 L. T. Rep. 436; L. Rep. 7 C. P. 253;

Pink v. Fleming, 63 L. T. Rep. 413; 25 Q. B. Div. 396;

Winspear v. Accident Insurance Company, 43 L. T. Rep. 459; 6 Q. B. Div. 42.

Under this Act the proximate cause of the injury, in respect of which compensation is claimed, is alone to be considered, and the employer is to be liable to pay compensation only if the accident is the proximate cause of that injury.

Ruegg, K.C. replied.

COLLINS, M.R.—I am not satisfied that in this case the County Court judge did not misdirect himself as to the law. In his award he says: "I find and award that applicant is not entitled to compensation on ground that death not result of accident—i.e., not natural or probable consequence." Accepting the view of the County Court judge that at the time of the accident it would have been unreasonable and unnatural to expect that erysipelas and death would follow, the question arises whether that is the right standard to apply in measuring the liability of an employer under the Workmen's Compensation Act. To answer that question it is necessary to consider the terms of the Act (*ubi sup.*). Now, it is not denied that the workman was injured by an accident arising out of and in the course of his employment. It is incumbent upon the applicant for compensation to show that there was an accident which caused injury, and that death resulted from that injury. When the applicant has shown that, he has done all that is necessary to establish the claim to compensation. It is a question of fact for the County Court judge whether in fact the death did result from the injury caused by the accident. If it did, then it does not matter how improbable or unnatural it might have appeared that death should result. The only material question is whether there has been any break in the chain of causation, whether any new act has intervened between the injury by accident and the subsequent death. It therefore seems to me that, in dealing with the obligation to pay compensation under the Act, we must not treat the case as being the same as a case of breach of contract, or of ordinary tort. This Act of Parliament has imposed a liability to pay compensation quite independent of any question of contract or negligence. The employer is liable for injury by accident. If there is an accident, the only question is whether the alleged injury is the result of the accident. In my opinion the County Court judge has, in the present case, laid down the wrong standard, that the death must be the natural and probable consequence of the accident. Although death might not be a natural and probable consequence of the accident, yet it might be caused by the accident without any new act intervening to break the chain of causation. The County Court judge misdirected himself, and

therefore this case must go back to him to be heard again. This appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. The employer contended that the death was not the result of the injury by accident, but was due to a wholly independent cause. He alleged that the workman behaved in a wholly unreasonable manner after he had been injured by the accident, and thereby aggravated the consequences of that injury and brought about his own death. We cannot say, upon the evidence, that the workman acted unreasonably at all in the matter. That cannot be made out upon the evidence before us. I agree that the County Court judge misdirected himself, because the death may well have been the result of the injury by accident although it was not a natural and probable consequence of the accident. This appeal must, therefore, be allowed, and the matter must go back to the County Court judge to be reheard.

COZENS-HARDY, L.J.—I agree. Although it might be most improbable that death resulted from the accident, yet it might in fact have been the consequence of the accident. The question under the Act is, From what did death in fact result? That is not to be ascertained simply by considering what might reasonably and naturally be expected to result from the accident, but from what in fact happened.

Appeal allowed.

Solicitors for the appellant, *Rowclifes, Baile, and Co.*, for J. F. Addison, Walsall.

Solicitors for the respondent, *Robinson and Bradley*, for C. A. Loxton and Newman, Walsall.

June 5 and 6.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

MARSHALL v. RUDEFORTH. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Employment—Building being repaired—"Scaffolding"—Ladder—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 7 (1).

A building exceeding 30ft. in height was being repaired by means of a ladder, the lower end of which rested on the ground and the upper end against the parapet of the building.

A workman employed on the work fell from the ladder and was injured.

The County Court judge held that the building was not being repaired "by means of a scaffolding," and that the workman was not entitled to compensation under the Workmen's Compensation Act 1897.

Held (dismissing the appeal), that the County Court judge had properly found that the building was not being repaired "by means of a scaffolding," within the meaning of sect. 7 (1) of the Workmen's Compensation Act 1897.

THIS was an appeal by the plaintiff from the award of the County Court judge at Scarborough in proceedings for compensation under the Workmen's Compensation Act 1897.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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The plaintiff was employed by the defendant upon the repair of the roof of a building over 30ft. in height.

The plaintiff was a slater's labourer; he was ascending a ladder with slates for the slater, who was repairing the roof and was working on the roof of the building without any ladder, crawling board, or other contrivance to assist him in his work.

The lower end of the ladder, which was more than 30ft. long, rested on the ground and the upper end against the parapet of the building.

While the plaintiff was ascending the ladder it slipped and he fell and was injured.

The County Court judge said that it appeared to him to be impossible to hold that a ladder used only as a means of access to a roof which was being repaired was a scaffolding within the meaning of the Act, and he accordingly found as a fact that the building was not being repaired by means of a scaffolding, and held that the plaintiff was not entitled to compensation under the Act.

The plaintiff appealed.

A. P. Longstaffe for the appellant.—The County Court judge ought to have held, as a matter of law, that the ladder which was used in this case could be and was a "scaffolding" within the meaning of the Act. In *Wood v. Walsh* (80 L. T. Rep. 345; (1899) 1 Q. B. 1009) it was held in this court that a building which was being repaired by means of a ladder was not being repaired "by means of a scaffolding," within the meaning of the Act. The effect of that decision, however, has been much modified by the decision of the House of Lords in *Hoddinott v. Newton, Chambers, and Co.* (84 L. T. Rep. 1; (1901) A. C. 49), and by the decision of this court in *Veasey v. Chattle* (85 L. T. Rep. 574; (1902) 1 K. B. 494). In *Maude v. Brook* (82 L. T. Rep. 39; (1900) 1 Q. B. 575) Rigby, L.J. said: "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything, whether usual or unusual, that can properly be called scaffolding is within the Act." It was held in the House of Lords, in *Hoddinott v. Newton, Chambers, and Co.* (*ubi sup.*), that it is a mixed question of law and fact whether a particular arrangement is or is not a "scaffolding." In the present case the County Court judge misdirected himself, for he said that it was impossible to hold that this ladder was a "scaffolding." A ladder is merely a ready-made combination of pieces of wood, and it is a contrivance for use in work upon buildings which may be just as much a "scaffolding" as any of the other combinations of pieces of wood which have been held to be scaffoldings. When a ladder is being used for the construction or repair of a building in the way in which the ladder was being used in this case, it is a "scaffolding" within the meaning of the Act.

Ruegg, K.C., for the respondent, was not called upon to argue.

COLLINS, M.R.—In this case the learned County Court judge has held that a ladder was not a scaffolding. The facts of this case were admitted. The workman was employed in carrying slates up a ladder for the repair of the roof of a house which exceeded 30ft. in height. The ladder was over 30ft. long, and the lower end rested on the ground and the upper end against the house. The County

Court judge has found as a fact that the ladder was not a scaffolding within the meaning of the Act. Unless we can say that as a matter of law the ladder must under these circumstances be a scaffolding, we cannot interfere with the decision of the County Court judge. Looking at the various decisions upon this question, I am not now able to give any definition of a scaffolding, but we cannot say that as a matter of law a ladder is a scaffolding, and therefore we cannot say that the learned County Court judge might not find that it was not a scaffolding without misdirecting himself. Therefore we cannot interfere with the finding of the County Court judge, and this appeal must be dismissed.

MATHEW, L.J.—I agree. I fail to see any ground for saying that, as a matter of law, a ladder must be a scaffolding within the meaning of the Act.

COZENS-HARDY, L.J.—I think that it is impossible to hold that a ladder must be a scaffolding, which would be the logical result of the argument on behalf of the appellant.

Appeal dismissed.

Solicitors for the appellant, *Cliffe, Henley, and Sweet*, for *T. Hart*, Scarborough.

Solicitors for the respondent, *Radford and Frankland*, for *John Whitfield*, Scarborough.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 25 and 28.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, J.J.).

REX v. KENNEDY, a Metropolitan Magistrate. (a).
Justices—Application for summons—Offence under the Roman Catholic Relief Act 1829—Discretion of magistrate to refuse summons—Roman Catholic Relief Act 1829 (10 Geo. 4, c. 7), s. 34.

Upon a rule nisi for a mandamus to command a metropolitan magistrate to hear and determine an application for a summons for an offence under sect. 34 of the Roman Catholic Relief Act 1829:

Held, that though the information disclosed a prima facie case that the offence was committed, nevertheless the magistrate was entitled in the exercise of his discretion to refuse to issue a summons, and, if he did so, the court had no jurisdiction to compel him to review his decision unless the discretion was exercised on improper and extraneous grounds.

Held, further, that, in prosecutions under sect. 34 of the Roman Catholic Relief Act 1829, the fact that there had never been any prosecutions under the section, and that the magistrate was of opinion that if any prosecutions under it were now to be commenced they should be commenced by the Crown, were not improper and extraneous grounds in considering an application by a private person for a summons under sect. 34.

Held, further, that there is nothing in that Act to prevent private persons from commencing prosecutions under sect. 34.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law

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RULE *nisi* for a *mandamus* commanding a metropolitan magistrate to hear and determine the matter of an application by one the Rev. C. Stirling for three several summonses against the Rev. Sydney Smith, the Rev. Herbert Thurston, and the Rev. John Gerard respectively, charging them with having been admitted and become Jesuits within the United Kingdom since 1829, contrary to sect. 34 of the Roman Catholic Relief Act 1829.

Roman Catholic Relief Act 1829 (10 Geo. 4. c. 7):

Sect. 34. In case any person shall after the commencement of this Act within any part of this United Kingdom be admitted or become a Jesuit or brother or member of any other such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanour, and being thereof lawfully convicted shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

The application for the summonses was heard by the learned magistrate on the 17th Jan. The information on which it was based merely stated that the gentlemen against whom the applicant desired to proceed had within the United Kingdom become Jesuits since 1829, without giving any particulars as to the place or time of their becoming Jesuits.

On the 24th Jan. the magistrate gave judgment refusing the summonses.

In the affidavits on which the rule *nisi* for a *mandamus* had been obtained it was alleged that the magistrate refused the summonses on two grounds—namely, (1) that the sections of the Roman Catholic Relief Act 1829 under which the application was made was practically obsolete; and (2) that under it proceedings could only be taken by information to be filed by the Attorney-General. The learned magistrate, however, put in an affidavit to show that this was a mistaken view of his decision.

From the magistrate's affidavit it appeared that he in giving judgment, after referring to sects. 28 to 36 of the Roman Catholic Relief Act 1829, proceeded as follows:

Now, it may be observed, first of all, that all those sections are practically obsolete and no records of any proceedings under them are accessible, and, in the words of the late Sir James Stephen in his History of the Criminal Law, "these provisions ever since they have been passed have been treated as a dead letter." It would seem to be gathered from them that membership of this religious order is not a criminal condition in itself, and is only made so under certain circumstances. It must be more, in my view, than a mere matter of policy, especially when such serious consequences as banishment for life and transportation are involved; and there are, moreover, provisions which, in my opinion, should be enforced by the Crown and not by a private informer. The confirmation of this view is, I think, to be found in sect. 38 of the Act, which says that all penalties imposed by this Act shall and may be recovered as a debt due to His Majesty, by information to be filed in the name of His Majesty's Attorney-General. It may be said that banishment, which is the penalty enacted by sects. 29, 31, and 34, is not one of the penalties which is indicated in sect. 38, but the provisions are so far allied to the common subject-matter that the procedure to enforce any of them should be by way of information from the Crown Office itself. Therefore, in my judgment, the application should be refused upon the ground that it is wrongly instituted. The

third ground arises on the initiation of the proceedings themselves on the words of sect. 34, because it says that after the passing of the Act one of the gentlemen was admitted and became a Jesuit, contrary to the provisions of sect. 34 of the Act. Now, I think that information is too scanty and too bare a statement, and insufficient to support an application for a criminal process. Therefore, in the exercise of the discretion which is conferred upon me by the Indictable Offences Act, I dismiss the information.

After this judgment was delivered, *Avory*, K.C., for the applicant, asked the magistrate whether it would be of any avail to present an amended information giving further particulars, or whether he might take it that the learned magistrate refused it on all the grounds stated in the judgment.

The learned magistrate replied that *Avory* might take it that he should refuse the application because the second ground—namely, that the Crown should be the informer—would still stand.

Avory then said:

That objection would still stand, and would, I understand from you, apply to any amended information.

The magistrate replied that it would apply to any amended information.

Avory then asked if the first ground would stand too—that in the magistrate's view the statute was obsolete?

The magistrate replied:

With regard to that, I used the words "practically obsolete" because it is not actually obsolete. I do not put it as a ground. I put that rather as influencing my discretion.

The rule *nisi* for a *mandamus* was now argued on the assumption that the information was so amended as to give sufficient particulars to support a criminal charge.

Sir Edward Clarke, K.C. and Hugo Young, K.C. (*Dennis O'Connor* with them) showed cause.—We submit that the magistrate was right in holding that proceedings under these penal sections of the Roman Catholic Relief Act can only be taken by the Crown. The whole scheme of these sections shows that they were to be enforced, if enforced at all, at the discretion of the executive, and that the penalties they prescribe are such as could be made effective only by executive action. The words of the sections are not apt to proceedings by a private informer. Thus all the fines are to go to the Crown, the Crown can license breaches of the Act, and the punishment for some, at any rate, of the breaches is banishment—a punishment which the court has no machinery to enforce. The effect of the sentence of the court merely is that the King may "lawfully cause" his deportation. That, we submit, gives the King a discretion in the matter, and, if the King does not choose to deport him, then the Jesuit would, even after conviction, be legally here. [*DARLING*, J.—Surely that merely means this, that if the banished Jesuit does not leave the country the King may deport him, or if he comes back, in an aggravated case, may transport him.] We submit that, on such a reading, "lawfully cause" has no meaning. However, assuming the magistrate was wrong in thinking that prosecutions under these sections could be initiated only by the Crown, we submit that he has exercised his

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discretion in this application; that the grounds on which he has exercised it are that as a matter of expediency he thinks any proceedings should be initiated by the Crown, and that the statute is practically obsolete and has never been enforced, though to the Government's knowledge Jesuits have been long established and admitted in the country; and, lastly, that these are good grounds for exercising such discretion:

Ex parte Lewis, 59 L. T. Rep. 338; 21 Q. B. Div. 191;

Rez v. Bros, 85 L. T. Rep. 581;

Reg. v. Byrde, 60 L. J. 17, M. C.;

Reg. v. Cotham, 78 L. T. Rep. 468; (1898) 1 Q. B. 802.

H. Sutton, for the learned magistrate, referred to

Stephen's History of Criminal Law, vol. 2, p. 493;

Holliday's Life of Lord Mansfield, at p. 176.

[Lord ALVERSTONE, C.J.—Mr. Avory, we are all agreed that a private person is entitled to initiate proceedings under these sections. You may confine your argument to the question of discretion.]

Avory, K.C. (*Biron* with him) in support of the rule.—In that case I submit that in purporting to exercise his discretion the learned magistrate has in fact declined jurisdiction. The law gives private persons a right to commence proceedings for criminal offences, and the magistrate says that because he thinks the Crown alone is entitled to initiate them in this case, and because in any event the statute is old and practically obsolete, he will refuse to permit private persons to begin proceedings. That surely is doing what the Legislature is alone competent to do—altering the rule of law that a private person may prosecute, and altering it too on grounds which as a matter of fact are both mistaken. The Crown is not alone entitled to prosecute. The penal sections of the statute are not practically obsolete. Returns were made under them of the Jesuits residing in England for many years. Their validity and force have been recognised quite recently in other Acts of Parliament, as, for example, in the Promissory Oaths Act 1871. And so late as 1898 Parliament refused to repeal them. Counsel also referred to

Reg. v. Adamson, 33 L. T. Rep. 840; 1 Q. B. Div. 201;

Reg. v. Ingham, 14 Q. B. 396;

Reg. v. Boteler, 8 L. T. Rep. 514; 4 B. & S. 959;

Ex parte Wason, L. Rep. 4 Q. B. 302;

Stephen's History of the Criminal Law, vol. 1, at p. 495.

Hugo Young, K.C. in reply.

Lord ALVERSTONE, C.J.—This case certainly presents very considerable difficulty, and it is one which has given us very anxious consideration. I do not think the principles of law which have to be applied are at all difficult of statement, but of course when you come to apply them very different and more difficult considerations arise. If an inferior tribunal has declined jurisdiction or thought that it has no jurisdiction through wrongly construing an Act of Parliament, there is no doubt that under ordinary circumstances the *mandamus* will go to order the magistrate or the inferior tribunal to exercise its jurisdiction. If, on the other hand, a magistrate not misunderstanding the law, and not improperly applying the law in the matter of his jurisdiction, exer-

cises a discretion that he will or will not allow the process of the court, then, at any rate in cases under the Indictable Offences Act (11 & 12 Vict. c. 42), which is the Act we have to consider, his discretion cannot be inquired into. It is not necessary to go through all the cases, but I think it desirable to call attention to one or two of the cases which illustrate the law before I proceed to apply that law to the facts of this case; and I think it is the more necessary, because it has been suggested by Mr. Avory, in his able argument in support of the rule, that the case of *Reg. v. Ingham* (*sup.*), which was decided in the year 1849, and has been recognised as good law in recent cases, could only be supported on some different principle to that which I referred to in the course of the argument. In the case of *Reg. v. Ingham* (*sup.*) it was decided that "when an information is laid before justices of the peace for an indictable misdemeanour, it is in the discretion of the justices to hear it, or refuse to hear and leave the complaining party to originate his prosecution before a grand jury." The case was an attempt to indict a person for perjury. It cannot be said that there was doubt as to there being *prima facie* evidence of the offence. The magistrate had declined to allow the case to go on, on the ground of the pending of some proceedings in the Ecclesiastical Court; the court declined to interfere with that discretion; and Coleridge, J. at the end of the trial, and I think it is important in reference to this case, says: "The refusal of this rule does not prevent a trial if the prosecutor chooses to go before a grand jury. We only say that we will not oblige the justices to hear an information." In the case of *Reg. v. Adamson* (*sup.*), which was a case in which the court did make the rule absolute, the rule laid down by Cockburn, C.J. was that "the court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of magistrates who have once heard a case and decided it, in a matter within their jurisdiction. If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the court could not act upon the matter further, or send the case back." Then the Chief Justice went on to point out that he came to the conclusion that the magistrates in that case acted on extraneous and extra-judicial matter, and that they were influenced by their distaste for the views and doctrines promulgated at a certain meeting which was the subject of, and which led to, the proceedings. Blackburn, J., who concurred with the Chief Justice's judgment in that case, practically said that they could not interfere with the discretion; they could interfere, and should interfere, if the justices had declined to exercise their jurisdiction on an improper ground. That case and the case of *Reg. v. Ingham* (*sup.*) were referred to in the judgment in *Reg. v. Byrde* (*sup.*), and I will read one passage from the considered judgment of Williams and Stephen, J.J., who, having referred to the principle to which I have made short reference, said this: "This seems to be the outcome of the decisions, and in particular of *Reg. v. Adamson* (*sup.*) and *Ex parte Lewis* (*sup.*). Blackburn, J. in his judgment in the former case, points out that the words in 11 & 12 Vict. c. 42, s. 9, 'if they shall think fit'—which are the words in this section also, it being under the

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same Act—"show that the justices have a discretion—and the *mandamus* in that case was granted expressly on the ground that the justices had not exercised their discretion. The justices may, however, it would seem, in the exercise of their discretion, refuse to issue a summons even though there is evidence before them of an alleged indictable misdemeanour, if they consider that the issue of the summons would be vexatious or improper." These cases seem to me to be illustrations of the rule which I endeavoured to state for myself at the beginning of my judgment. Now, when the rule was moved before us—and I make no complaint against anybody, because one can understand how it arose—all that was stated in the affidavit was that the learned magistrate had refused to grant the summons upon the following grounds: That the statute of 10 Geo. 4, c. 7, was practically obsolete, and that proceedings under sect. 34 of the Act could only be taken according to the provisions of the Act at the instance of the Crown by information at the Crown Office or otherwise, and could not be initiated by a private individual. That was supplemented by a statement made perfectly accurately by Mr. Avory that, after the decision of the magistrate upon the point, the information before him stating no more than that three gentlemen had, after the year 1829, been admitted and become Jesuits within the United Kingdom, the learned magistrate being asked whether any alteration in the form of the information would remove his objection or lead him to entertain it, said No; and I am deciding this case from the point of view of assuming that Mr. Avory had stated in greater detail in his information anything which could be cured as a statement of fact, although I must not be supposed to say that even if I had taken a different view to that which I take in this case, there might not be a duty to exercise a discretion, or a right to exercise a discretion, arising upon the particular circumstances which were brought before the magistrate in any particular case. Now, that being so, I have done my best to see if I could get at what was the real decision of the magistrate. I will read the passage of the learned magistrate's judgment which seems to me to show that in reality he dealt with this case as a question of discretion, and did not deal with the case upon the ground either that the Act was obsolete or that the Act could not be put in force by a private individual. He says: "It would seem to be gathered from them that membership of this religious order is not a criminal condition in itself, and is only made so under certain circumstances. It must be more in my view than a mere matter of policy, especially when such serious consequences as banishment for life and transportation are involved, and they are moreover provisions which in my opinion should be enforced by the Crown, and not by a private informer. The confirmation of this view is, I think, to be found in sect. 38 of the Act, which says: 'That all penalties imposed by this Act shall and may be recoverable as a debt due to His Majesty by information filed in the name of His Majesty's Attorney-General.' It may be said that banishment, which is the penalty enacted by sects. 29, 30, and 34, is not one of the penalties that is indicated in sect. 28, but the provisions are so far allied to the common subject-matter that the procedure to enforce any of them should, I

think, be by way of information from the Crown Office itself. Therefore, in my judgment, this application should be refused upon the ground that it is wrongly initiated. The third ground arises on the initiation of the proceedings themselves on the words of sect. 34, because it says that after the passing of the Act one of the gentlemen was admitted and became a Jesuit contrary to the provisions of sect. 34 of the Act. Now, I think that information is too scanty and too bare a statement, and insufficient to support an application for a criminal process. Therefore, in exercise of the discretion which is conferred upon me by the Indictable Offences Act, I dismiss the information." Mr. Avory then asks him as to "whether it would be of any avail to present an amended information giving further particulars, or whether we may take it that you refuse it on all the grounds which you have stated? The magistrate: I think you may take it that I should refuse the application because the first ground—namely, that the Crown should be the informer—would still stand. Mr. Avory: That objection would still stand, and that would, I understand from you, apply to any amended information. The magistrate: Yes, that would apply to any amended information. Mr. Avory: Also, I presume, the ground which you first stated—that in your view the statute was obsolete. The magistrate: With regard to that, I used the words 'practically obsolete' because it is not actually obsolete. I do not put that as a ground. I put that rather as influencing my discretion. Mr. Avory: I thought it right to ask you that, because if you intended to base your decision upon that ground, I ought to tell you that I have since discovered that as late as 1898 a Bill was introduced into Parliament for the purpose of repealing these sections, and Parliament refused to do so. The magistrate: I am much obliged to you; I had not found that out. It is a question of discretion. I do not put that as the ground of my decision at all. Mr. Avory: That leaves it open, of course, to test the question in a superior court. The magistrate: Yes; there may be other remedies open to the applicants to proceed in a different way no doubt." Reading that fairly, I think that is a statement that upon the circumstances of the case before him the magistrate came to the conclusion that he ought not to issue a summons. Now, that I may not be thought to be merely covering the matter up with what I call general observations, I should like to state what I understand from the earlier part of the magistrate's judgment to have been the matters he took into his consideration. He took into his consideration, first, that the Act had never been put in force. I mean by the Act never having been put in force that these sections of the Act had never been put in force. Having gone through these sections of the Act he comes to the conclusion, which I think was the right conclusion, that the Act was for the purpose of getting the Jesuits out of the country, and not for punishing criminally, if I may use the expression, the individual Jesuit. I think all the sections show that. He further took the view that it was not an Act, or at any rate, these sections of the Act were not provisions that a private person ought to institute proceedings in respect of, but that those proceedings should be taken by the Crown or by repre-

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representatives of the Crown. Now, it seems to me that all those three matters were matters that he was entitled to take into his consideration in exercising his discretion. I do not want to repeat anything that I have said in the course of the argument, but I think that some of the cases that I put to Mr. Avory would indicate that it is impossible to say that there is no discretion simply because there is *prima facie* evidence that an indictable offence has been committed, and the authorities to which I have referred in my opinion negative any such proposition. I must also say, for myself, that I think the fact that proceedings were not within the Vexatious Indictment Act has a very material bearing upon this Act. I quite agree with Mr. Avory that under ordinary circumstances it is not convenient that there should be an ordinary criminal prosecution without the preliminary proceedings by summons, and by committal for trial; but, upon the other hand, when you have such cases as this I think the magistrate, as was pointed out in *Reg. v. Ingham (sup.)*, is entitled to take into his consideration the fact that his decision is not final, but that a bill can be preferred by any person, and that a private person can present that bill of indictment, if he is disposed to do so. The fact is that this in any point of view is a very special Act of Parliament. Its provisions are, of course, unique, and we have no practice under it, which can be said to be any contemporaneous exposition or interpretation of it, and therefore the discretion which a magistrate should apply to such a case must be of necessity different to that which he should apply to ordinary crimes and ordinary criminal offences. For myself I wish to say that I by no means suggest that it is any legal bar to proceedings in the case that they are taken by a private individual. If the magistrate had proceeded upon the view that the Crown, and the Crown only, could take proceedings, I think he would have been wrong, and I think he would have been declining jurisdiction, but, on the other hand, I think he was perfectly entitled to take into consideration, having regard to the provisions of the Act, that this was not a proceeding in which he was bound to issue a summons at the instance of an ordinary informer. I mention that because I am as anxious as anyone can be that the provisions of the criminal law should be put in force, and that magistrates should not be tempted to say that they refuse to entertain proceedings by any outside considerations or any distaste or dislike for any Act of Parliament. That is not what, in my opinion, arises in this case. I have said already that the fact that they had never been put in force, the fact that its provisions point to persons being got out of the country, and not to what I may call ordinary offences against private individuals, are circumstances which the magistrate could take into his consideration, and also he could take into his consideration that this was a summons taken out by a private individual, and that was one of the circumstances upon which he might exercise his discretion. In coming to the conclusion as I do that the real substance of this is that the magistrate exercised his discretion, and declined to grant the summons in the exercise of his discretion, I think we ought not to interfere with it, and that therefore this rule must be discharged.

DARLING, J.—I am of the same opinion, but I think the magistrate really affected here to do two things. I think he did understand, and I think he did express in one part of his judgment the opinion that proceedings could not under this Act of Parliament be initiated at the instance of a private person, but only by the Attorney-General acting as such. In that I desire to say I think he was wrong. If he held that opinion, and I think he did, and I think in one place he expressed it, I think he was wrong. To my mind it is clear that the Act is open to enforcement by a private individual, and I make this observation for this reason, that it may be that upon an application for a summons under this Act made to some other magistrate, another magistrate might take the view if this were not said very plainly, that this court understood the magistrate to be right when he expressed that opinion that only the Crown acting by the Attorney-General, could put the Act in force. I do not think any other magistrate could take that view. It seems to me a private person may be entitled to a summons, and a magistrate in proper circumstances might lawfully and properly grant one, and the case might be heard. But I think here in this case the magistrate did exercise his discretion upon matters as to which he was entitled to exercise it. The kind of discretion that a magistrate should exercise, and the kind that he is not entitled to exercise, has so often been laid down, and I do not think really there is a much better example of it to be found than is given in the quotation from Lord Coke, which is in the Rep. 3, at p. 203, where he says: "For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections, for as one saith, *Talis discretio discretionem confundit*." If the magistrate here had acted simply upon his own will or private liking for an Act of Parliament, or dislike for an Act of Parliament, he would then not have exercised his discretion in a proper way. But here I think, having regard to all the matters which he had regard to, and to which my Lord has specially directed attention, he did exercise his discretion in the sense in which a magistrate may lawfully exercise the discretion of a judge, and not of a mere private individual. I desire, however, to go a little further. I desire expressly to say this, that I think a magistrate may claim and may exercise a wider discretion in the case of proceedings under such statutes as this one is, statutes banishing people for their opinions, than any other statutes that I am acquainted with which appear on the statute books. Whatever may be the reason why they were passed, they were statutes which persecute opinion, and Acts that are, to my mind, against the genius and spirit of this age. For example, here is a statute which says: "The Jesuit shall not exist in this country—that the Jesuit is to be banished. At the same time a Catholic school may earn a grant of public money, and, so far as I know, a Jesuit may teach in a Catholic school and may help to earn that grant. All these things I think the magistrate may fairly bear in mind when he is asked to grant a summons in such a case as that. Now, the words of Lord Mansfield have been referred to,

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and I think there is justification for the kind of thing he said in what Lord Mansfield said. Lord Mansfield was one of the greatest judges who ever sat in this court—he is described, and properly described, in his epitaph in Westminster Abbey, as his country's pride. What did he say? Here in this book are two instances given of his laying down the law upon penal statutes—statutes persecuting opinion. One is in the case of a statute directed against the Quakers, the other is in the case of a statute directed against the Roman Catholics; and in each case it is perfectly plain that Lord Mansfield had regard to the enforcement of this law not only by laws and statutes in the books, but having regard to the circumstances of the time in which he was called upon to enforce it, and he says he does not dispute the necessity for these laws against the Catholic religion. The case was Payne's case, where Payne sued for a penalty as a common informer, and Lord Mansfield goes through the statutes and says: "There are statutes against priests—the first is that of Elizabeth," and so on. "There was another made after enacting that if a priest was convicted of saying mass he was to forfeit two hundred marks and suffer one year's imprisonment, but neither does Payne go upon this statute, for here there is no reward for the informer. The third was made in King William's reign, (11 & 12 Will. c. 4), soon after the revolution. This is the statute Payne aims at, because here is one hundred pounds the country is to pay him if he can convict the defendant." Lord Mansfield draws attention there to the fact that that statute was made soon after the revolution. It may have been very necessary to make it, and it may have been very reasonable to make it; but how does he go on? He says as to the Jesuits and so on: "Neither was it ever the design of Legislatures to have these laws enforced by every common informer, but only at proper times and seasons," such as immediately after the revolution, obviously, "when they saw the necessity for it, and by proper persons appointed by themselves for that purpose"; and then he concludes with these very remarkable words: "And yet, more properly speaking, they were never designed to be enforced at all, but were made *in terrorem*." If Lord Mansfield might have regard to all that, it seems to me, looking at the statutes of this peculiar character, so may I, and so might the learned magistrate; and I do think that he was justified, having regard to the kind of statute under which he was asked to issue a summons, having regard to the circumstances which are a matter of history, and which he must know, of how the statute came to be passed, having regard to the fact that the Crown had never attempted to put it in force, and that since it was passed people had been allowed to take part in public life and public opinion in this country holding the opinions that these people are charged with holding—I think having regard to all this, and having regard to all the circumstances to which my Lord has specially directed attention, that he was justified in exercising his discretion, and that he did not exercise it simply according to his own will or caprice, but that he exercised it for good reasons which can be given, and that he was entitled especially to do so when he was asked to enforce such a statute, and a statute of such a class as the class to which this statute belongs. I am therefore of opinion that there is no danger

in holding—and that was the only thing I was anxious about in this case—as we hold to-day, that the law upon other statutes may be strained to allow magistrates to refuse proceedings which they ought to allow to be properly initiated.

CHANNELL, J.—I agree in the judgment of the court. I prefer to base my judgment upon the grounds stated by the Lord Chief Justice, and upon those alone. With reference to those which my brother Darling has just laid down, the matters were not brought before us in the argument, and I prefer to express no opinion upon those matters except that in my view this statute is not a statute merely directed against opinions, nor do I think that Lord Mansfield, in the passages that have been quoted to us from his life, was laying down the law in a way that we ought to recognise. The opinions of an eminent man, as he was, of course deserve our respect; but so far as I understand it, the views that he laid down to this jury have never got into the Law Reports, and have never been treated as a statement of the law. He was not trying, as I understand it, a criminal case, but an action brought by a common informer to recover and put into his own pocket a penalty; an action which has never met with a great amount of favour, and has seldom, I suppose, succeeded in recent years—at any rate unless the judge summed up in a very different way from that in which Lord Mansfield seems to have summed up in this case. One is not surprised that the jury found for the defendant in that case. But the matters which we have to consider in this case seem to me to be very different indeed from that, but I do think that these were matters that this magistrate, in the exercise of his discretion, was entitled to take into consideration. I should content myself entirely with a statement that I agree with the judgment of the Lord Chief Justice, if it were not that matters had been introduced in argument in this case as to which I think it is extremely desirable that there should be no mistake hereafter as to what it is that we do in fact lay down. Now, these clauses in this statute appear to have been passed, as the preamble to sect. 28 states, for the purpose of the gradual suppression and final prohibition of these religious orders, and one sees that the object is to get all members of those orders gradually expelled from this country. Persons who were resident here at the time, whether natural born subjects or foreigners, and who were members of any of these religious orders, were to be allowed to stay here conditionally upon their registering themselves. Natural born subjects who were at the time members of the order were entitled to come here and to get the same protection as if they had happened to be here at the time of the passing of the Act, provided that within a certain time after their coming here they registered themselves. All those persons in the course of time would die, and the persons to whom the special privileges of staying here were given by the Act of Parliament would in the course of a great number of years disappear: and these provisions were made that no persons being admitted to these religious orders elsewhere should come here, or that they should be admitted here and be here. The effect of those would be, as stated in the preamble, to effect the gradual suppression

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and final prohibition of these religious orders, and it seems to me it would have been done, not because of their opinions, but because they were supposed at that time, rightly or wrongly, to be mischievous persons; to be persons whom it was desirable not to have in this country; and the mode in which this was done was to say that their being here should be a misdemeanour, and that upon their being lawfully convicted they were to be sentenced and ordered to be banished. That is a peculiar sentence, not punishing them for being members of these religious orders, but directing that they, being members of these religious orders, and not coming within the privilege of persons who were here at the time of the passing of the Act of Parliament, they should be told to leave the country. Now, it is put in the form of a criminal offence, and as it is put in the form of a criminal offence, it appears to me that a private individual is entitled to prosecute for it. As Mr. Avory said, it is an important constitutional principle that a private individual may set the criminal law in motion—at his own risk in certain cases, of course, but that he may do so. To hold the contrary appears, to use an illustration of which one is reminded by the special subject of this kind of prosecution, is very like reviving—if that is the proper expression for something which I suppose on the best authority never existed—reviving the dispensing power of the Crown that was the subject of so much trouble in the days gone by. I think it is an important principle to hold that except where the special terms of the Act of Parliament direct the contrary (of which there are some instances) a private individual may institute criminal prosecutions, and if this magistrate held, and I think he did express his opinion to the contrary of that as regards this Act of Parliament—if he had proceeded upon that alone I should think we ought to direct the *mandamus* to go. But in my view, although he expressed that opinion and stated it as one of the grounds of his decision, he stated it only as one of the grounds, and he went on as it were to say: Even if I am wrong in saying that a private individual cannot initiate these proceedings, at any rate I am entitled to take it into account as one of the matters to be dealt with when I come to consider whether I should exercise my discretion. In that view I think he was right, and taking that into account, and taking into account the fact that proceedings had not in fact been taken during the seventy odd years since the Act of Parliament was passed, he was entitled to take into consideration those matters, and to say: "I will not issue this summons. If I were preventing you from taking these proceedings and raising the question at all, possibly I might, but I am not doing so. You are entitled to present a bill to the grand jury, and if the bill is presented there will be a direction of the learned judge to the grand jury upon the law applicable to this matter, as to which my opinion is what I have expressed, but as to which I agree there may be doubts, and in the exercise of my discretion I think that is the better way of dealing with the matter." If he has said that, I think it is impossible for us to say that he is wrong, and that if we were to issue a *mandamus*, we should be doing that which the court never does upon *mandamus*—namely, directing a man how to do his duty. The function of a *mandamus* is to direct

the person to whom it is addressed, whether a magistrate or anyone else, to do his duty, but not to direct him to do his duty in any particular mode. The *mandamus* which we should issue, if we issued one here, would be to hear and determine this application for a summons. In my view he has heard it and determined it, because he has taken into consideration matters which he was entitled to take into consideration, and, having taken them into consideration, he has decided not to issue the summons.

Rule discharged.

Solicitor for the prosecutor, *John Othen.*

Solicitors for the respondents, *Witham, Roskell, Munster, and Weld.*

Solicitor for the magistrate, *The Solicitor of the Treasury.*

April 28 and 29.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MAERS AND OTHERS v. THOMPSON. (a)

Company—Illegality—Unregistered association of more than twenty members—Right to maintain action—Companies Act 1862, s. 4—Friendly Societies Act 1896.

The trustees of an unregistered association of more than twenty persons formed for mutual insurance against death and accident sued the late treasurer for moneys of the society which he had converted to his own use.

Held, that the society was not rendered illegal by the Companies Act 1862 for want of registration, and that the plaintiffs were not precluded from maintaining the action by reason of non-registration under that Act or the Friendly Societies Act 1896.

APPEAL by the defendant from a judgment given for the plaintiff for 20*l.* 15*s.* 2*d.* by the judge of the Newcastle-upon-Tyne County Court.

The plaintiffs were the trustees of a society of 291 members who were all workmen at the Emma Colliery. The society was for the purpose of mutual insurance against death and accident, and was called the Emma Colliery Accident Fund.

The trustees brought the action on behalf of themselves and the other members against Edward Thompson, the former treasurer of the society, under the following circumstances:—

The society was formed in 1890, but was not registered under the Companies Act 1862 nor under the Friendly Societies Acts then in force.

On the 10th Jan. 1901 a minute was passed at a meeting of the society that the treasurer should keep no more than 10*l.* in hand, and it then became the duty of the treasurer to report when he had more than 10*l.* The defendant was at that time the treasurer, and he was paid 3*l.* a year for his services.

On a subsequent date he reported to the society that his house had been broken into during the previous night and that some money of the society had been taken, and he paid over the sum of 2*l.* 9*s.* 7*d.*, which he said had been in a drawer that the burglar had not got at. His book showed in addition a balance of 20*l.* 15*s.* 2*d.* The defendant had never reported that he had 20*l.* odd

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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in hand. He was asked to refund the money, and, on his failing to do so, he was removed from office, and the trustees brought the action against him to recover 20l. 15s. 2d. as money had and received by the defendant on behalf of the plaintiffs.

The defence raised was (1) that the money had been stolen, and (2) that as the society consisted of more than twenty members it was prohibited by the Companies Act 1862.

Companies Act 1862 (25 & 26 Vict.), c. 89:

Sect. 4. No company, association, or partnership consisting of more than ten persons, shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

The County Court judge held that, assuming the society represented by the plaintiffs to be an illegal society by reason of sect. 4 of the Companies Act 1862, yet the action was not in furtherance of the objects of the society and could be maintained, and he found as a fact that no burglary had been committed, and he gave judgment for the plaintiffs for the amount claimed.

The defendant appealed on the following grounds: (1) That the society of which the plaintiffs were trustees was prohibited by sect. 4 of the Companies Act 1862, and that the plaintiffs, suing as the trustees thereof or on its behalf, were not entitled to maintain the action, and that the learned judge was wrong in law in not so holding. (2) That the action, being an action brought for the purpose of enabling the business of a society prohibited as aforesaid to be carried on, the learned judge was wrong in law in holding that the same was maintainable. (3) That the action was not in law maintainable. (4) That the plaintiffs, suing as trustees of such a society as aforesaid, were not entitled to any relief in any court either at law or in equity. (5) That there was no evidence to support the plaintiffs' claim or to show any title in them to the money or any cause of action.

C. F. Lowenthal for the defendant.—The society is one prohibited by the Companies Act 1862, s. 4, as it is unregistered and consists of more than twenty members, and is for the purposes of gain to the members in the sense that they are indemnified against loss by death or accident:

Re Padstow Total Loss Association, 45 L. T. Rep. 774; 20 Ch. Div. 137;

Re Arthur Average Association, 34 L. T. Rep. 942; L. Rep. 10 Ch. App. 542.

It would have been sufficient to have registered the society under the Friendly Societies Act 1875 (38 & 39 Vict. c. 60), s. 11. It is desirable that these associations should be registered, because there is no control over them if they are not. It is sufficient to say that the individual members gain, because on the happening of a loss they are

indemnified against that loss. If the society is prohibited by law, the action will not lie:

Ex parte Day, 33 L. T. Rep. 867; 1 Ch. Div. 699;

Lindley on Companies, 5th edit., p. 141;

Shaw v. Benson, 69 L. T. Rep. 651; 11 Q. B. Div. 563;

Booth v. Hodgson, 6 Term Rep. 405.

[Lord ALVERSTONE, C.J. referred to *Jennings v. Hammond* (9 Q. B. Div. 225)]. The courts cannot come to the aid of a company unless it is registered. [Lord ALVERSTONE, C.J.—The question is whether that applies to the custody of money.] A person not a party to the illegality may be sued for money had and received, but one of the parties to the illegality cannot sue:

Nicholson v. Gooch, 5 El. & Bl. 999;

McGregor v. Lowe, E. & M. 57.

L. Sanderson for the plaintiffs.—This is not an illegal association. The fallacy of my friend's argument lies in the fact that the objects with which these people have combined are not illegal. Even if it is an illegal association, the plaintiffs can recover:

Reg. v. Tapkard, 70 L. T. Rep. 42; (1894) 1 Q. B. 548;

Reg. v. Stainer, 21 L. T. Rep. 758; L. Rep. 1 C. C. R. 230.

In *Re Padstow Total Loss Association (sup.)* the court, if it was going to give relief at all, had to recognise the existence of the association. So also in *Shaw v. Benson (sup.)*. The court need not look at the rules of the society in the present case. It is sufficient for the plaintiffs to show that the defendant held the money for the members, and that he has converted it to his own use. With regard to the first point, this society does not come within sect. 4 of the Companies Act 1862. That section only points to ordinary trading associations:

Re Padstow Total Loss Association (sup.).

This is not a commercial association in the ordinary sense. In the last-named case it was held that the association was within the section, but every one of these cases must be judged on its own facts. This association was really formed under the Friendly Societies Acts. Steps are, in fact, now being taken to register it as a friendly society. The Friendly Societies Act 1896, s. 8, recognises unregistered friendly societies. This association is not formed for the purpose of carrying on any business that has for its object the acquisition of gain:

Smith v. Anderson, 15 Ch. Div. 247.

Sect. 4 of the Companies Act was directed against companies trading with outsiders, and does not touch a society formed merely for the benefit of its own members:

Wigfield v. Potter, 45 L. T. Rep. 612.

Lowenthal in reply.—On the question of carrying on business, this case is absolutely indistinguishable from *Re Padstow Total Loss Association (sup.)*. In *Peat v. Fowler* (55 L. J. 271, Q. B.) it was held that a society registered under the Friendly Societies Act 1875 need not be registered under the Companies Act 1862. It ought to be registered under one Act or the other. The Friendly Societies Act 1896 does not contemplate unregistered friendly societies.

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Lord ALVERSTONE, C.J.—The County Court judge has given judgment for the plaintiffs for 20*l.*, and there can be no dispute that the judgment is a just and right judgment. The question is whether it can be attacked on a technical rule of law. In 1890, probably in absolute ignorance of anything about the Companies Act 1862 and the Friendly Societies Acts—they ought to have known them, no doubt—some workmen joined together to make this friendly society. They had three trustees and a treasurer. The defendant was the treasurer, and he came under terms that if he collected more than 10*l.* he was to hand the excess over to the trustees. He was sued for a balance in his hands, and he said that his house had been broken into by a burglar who had taken away the money. That story the County Court judge disbelieved. It is now said that this treasurer, who set up this case, is not bound to pay, because the society was not registered under the Companies Act 1862. I am not satisfied that this society was one which needed to be registered under the Companies Act. The facts are not before us, and we know no more than I have stated, except that Mr. Lowenthal may say that the rules were put in. It is not clear that this society was not intended to be registered under the Friendly Societies Acts, and therefore the case of *Re Padstow Total Loss Association (sup.)* does not apply. Mr. Lowenthal's contention is that because the money never would have been received by the treasurer but for the fact that there was a society, he is entitled to hold the money. The consequences would be extraordinary, for if the fact of non-registration prevents the court from giving the members of the society any remedy and forces the court to treat them as outlaws, any person could defraud the society. That is inconsistent with *Reg. v. Tankard (sup.)*. That was a criminal case, and there may be a distinction on that ground. But I cannot help thinking that the courts have drawn a distinction analogous to that drawn by the County Court judge. In *Jennings v. Hammond (sup.)*, Cave, J. said: "If, as we hold is the case, the association is forbidden by the Act in question, it follows that all contracts made directly for the purpose of carrying on the business of the association are illegal. In this case the business of the society is to lend money, and consequently the loan to the defendant was made in pursuance of an illegal object, and the note sued on was given for an illegal consideration, and cannot be sued upon either by the society or by anyone suing as a trustee for the society, or even by anyone suing for his own benefit if he took the note with a knowledge that it was given for an illegal consideration." I would point out that I am by no means sure that if they had not sued on a promissory note the decision would have been the same. Unless the society is so contrary to public policy that the courts will not recognise it at all, I cannot conceive why the action should not lie. In *Shaw v. Benson (sup.)*, Brett, M.R. did not dissent from *Ex parte Day (sup.)*, but to prove in bankruptcy is a different thing, because there you are going against the general estate of the bankrupt and not claiming your own particular property. Brett, M.R. pointed out in *Shaw v. Benson (sup.)* that the reason why they must decide against the plaintiffs was that "the mere contract to lend was not illegal, and the question is whether the contract

of the borrowers is not merely a contract to repay money advanced. It seems to me that their contract is not a mere contract of repayment, for the liability was undertaken, and the money was to be repaid according to the rules of the society. Therefore the rules of the society form part of the contract for repayment, and as the society is illegal, the contract for repayment also must be illegal. The borrowing and the lending were parts of one transaction, which had for its object the carrying out of the illegal purposes of the society." And Fry, L.J. says in the same case: "The defendants became borrowers from the Thornhill Arms Club for the purpose of carrying out the objects of an illegal association; and this action is brought to enforce a contract for an illegal purpose." It is perfectly true that the defendant would not have had the money if he had not been treasurer, but the contract was a contract to hand it over. It is said that we are to assume that when handed over it was going to be dealt with by the society in some illegal way. But it may be that the trustees will proceed to get the society registered. I do not know why it is to be assumed that, if they found the society to be illegal, they would not have returned to the members their shares. A defendant who has set up this defence is not entitled to have everything assumed in his favour. Why are we to assume, first, that the contract by him to pay the money to those for whom he was no more than an agent was in furtherance of an illegal purpose? And why are we to assume in his favour that the plaintiffs were not prepared to put their house in order? I agree with the County Court judge in regard to what the real relations of the parties were, and I think that he was justified in coming to the conclusion that this was not an action in furtherance of an illegal or improper purpose, and the trustees were merely obtaining their own property which was held for the members. I think, therefore, that the appeal must be dismissed.

DARLING, J.—With regard to the point that the courts could not recognise this association, it is sufficient to look at the facts of this case. If the argument for the defendant is right, the burglar who was said to have entered his house could not be convicted, because the money was not the money of the association and was not the property of anybody in this sense, that the courts could not recognise it as being anybody's. And therefore the courts would have to say that the burglar might take it because it was not the property of anybody. The courts recognise this money as the property of somebody for some purposes. As to the facts of this case and the proper inferences to be drawn from them, I entirely agree with the judgment of my Lord and with that of the County Court judge.

CHANNELL, J.—I agree. I prefer to base my judgment on the fact that the society comes within the exception of a company formed under another Act of Parliament. This is a friendly society for all intents and purposes, and it was intended to be a friendly society. I think that the Friendly Societies Acts do contemplate the existence of friendly societies which are not in fact registered. It is not necessary in order to form a friendly society that you should begin by incorporating it, as you have to do with a limited company. A friendly society is formed in the

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first instance and then it is registered, and the friendly societies that are not registered still continue to have an existence for some purposes. While I do not desire to differ on the other point, I think it is a point of considerable difficulty. As to whether or not the contract with the treasurer (assuming that this was an illegal association under the Companies Act) was a contract so tainted with illegality that the ordinary maxim *Melior est conditio possidentis* would apply, seems to me a question of difficulty. The application of that maxim would involve such extraordinary consequences that one would not be inclined to follow it, but that maxim does involve injustice in many cases. I think that the appeal should be dismissed.

Lowenthal.—As this is an important question, I ask for leave to appeal.

Lord ALVERSTONE, C.J.—As it is an important question, it must be raised in the Court of Appeal in a more meritorious case.

Appeal dismissed. Leave to appeal refused.

Solicitors for the plaintiffs, *Robinson and Bradley*, for *Edward Clark*, Newcastle-on-Tyne.

Solicitor for the defendant, *H. W. Watkins*, for *Dix and Harle*, Newcastle-on-Tyne.

Wednesday, March 26.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. CROMPTON URBAN DISTRICT COUNCIL. (a)

Highway—Repairable by inhabitants—Substitution—Disrepair—Order under sect. 10 of Highways and Locomotives Act 1878—Width not specified in indictment—Liability of defaulting highway authority.

In 1891, by an order of quarter sessions, a highway was stopped and a new road substituted for it, which was made by the owner, at whose instance the change was made. The certificate stated that the new road was 12yds. wide, but in fact it was 14yds. or 15yds. wide.

The new road having got into bad repair, an order was made under sect. 10 of the Highways and Locomotives Act 1878 on the defendants, and an indictment was preferred.

After the order the defendants served notices on the frontagers under sect. 150 of the Public Health Act 1875.

The width of the road was not specified in the indictment, and the jury found that the old road was a highway repairable by the inhabitants at large before 1835.

Held, that judgment was rightly entered for the Crown.

CASE shown why a verdict obtained by the Crown at the Lancashire Assizes should not be set aside, and judgment entered for the defendants *non obstante veredicto*, or why a new trial should not be granted.

The grounds upon which the application was made by the defendants were (1) that the whole length of the diverted parts of Linney-lane was repairable by the frontagers under sect. 150 of

the Public Health Act 1875 by reason of the proviso at the end of that section; (2) that the whole of the length was a new street, and that it was the duty of James Henry Lees Milne to pitch and pave and construct the new street in accordance with the bye-laws of the Crompton Local Board and the amended plan and section submitted him to and approved by the Crompton Local Board; (3) that the diverted road substituted for the old road was not made of the width of 12yds. in accordance with the order of quarter sessions and plan annexed thereto, but was made of the width of 14yds. to 16yds., in accordance with the plan and section of the new street deposited by James Henry Lees Milne, and approved by the Crompton Local Board, or that the case did not fall within the provisions of sect. 92 of the Highways Act 1835, and the Crompton District Council were not made liable for the repair of the street; (4) that the burden of repairing Linney-lane was therefore removed from the Crompton District Council and placed upon the frontages of J. H. Lees Milne; (5) that the power of the Lancashire County Council to order the district council to repair a road did not extend to an old highway converted into a new street within the meaning of the bye-laws; (6) that the power of a county council to order a district council to repair a road only applied to a road which is throughout its whole breadth repairable by the inhabitants at large by reason of the same being widened by the owners of land adjoining thereto throwing additional land into it; and (7) that the power of a county council to order a district council to repair a road does not apply to a road where the character of the repairs required to keep the road in order had been altered and made more expensive by adjoining owners widening the same and laying the same out as a new street.

The indictment was for the non-repair of a certain road of a certain length which was specified in the indictment. The width of that length of the road was, as is usual, not specified in the indictment.

In May 1889 a Mr. Crompton Milne, a landowner on each side of the road in question, applied to the Crompton Local Board, the highway authority and the defendants' predecessors, to get them to apply to quarter sessions to make the new road and stop up the old one.

On the 22nd July 1889 two magistrates had a view under the Highways Act, and on the 4th Sept. they made their certificate, that having viewed the old road and the proposed new road, which they described as being 12yds. wide, they certified that the new road was more commodious, and that the old one might be stopped up.

Mr. Crompton Milne, after correspondence with the authority, in which he stated he intended to pitch and pave the road, in fact made it an ordinary road with boulders, and on the 28th Nov. 1890 the order of quarter sessions was made to divert the road. On the 3rd May 1891 the justices gave a certificate of the completion of the road, and on the 6th July 1891 the order of quarter sessions was enrolled.

The certificate of the completion of the new road stated it was to be 12yds. wide. As a matter of fact, it was 14yds. or 15yds. wide.

After that the road got into bad repair, and proceedings were taken under sect. 10 of the

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Highways and Locomotives Act 1878, and an indictment was preferred.

After the order was made by the County Council, and after the defendants under the Highways and Locomotives Act had demanded a jury, they served notices on the frontagers to pave, sewer, channel, &c., under sect. 150 of the Public Health Act 1875. No notice was taken by the frontagers, who denied liability, and the defendants did the work after the indictment was preferred.

The question left to the jury at the trial of the indictment was, Was the old highway a roadway repairable by the inhabitants at large before 1835? They found that it was.

At the termination of the trial the defendants applied for judgment to be entered for them, but the learned judge refused to do so, and delivered judgment as follows:—

WILLS, J.—On the best consideration I can give to this matter, I think it is much better that I should decide it now, especially as, my decision being in favour of the prosecutors, it will leave it open to the defendants to question it if they think on consideration that the view I have taken is wrong. I begin with the diversion and the enrolment of the certificate, which took place in July 1891. After that, by sect. 92 of the Highways Act 1835, a new road was subject to exactly the same incidents with respect to repair as the old road. The consequence is that the road, whatever it was which was shown on the deposited plan which was approved by the justices and enrolled at the quarter sessions, became a road which the parish were liable to repair. The parish have allowed it to go out of repair. That is an admitted fact, and I must look at the facts as they existed at the time to which this indictment refers, which is down at the time at which the order of the county council was made. This indictment was a proceeding against them for disobeying the order made by the county council, and that, therefore, is the time to look at. At that time, unless there was something to interfere with it, clearly there was a liability on the parish to repair. The argument that they ought not to repair, as I understand it, is this: It is said that one of the public, not the public itself but the contiguous landowner, had put himself into such a position that the defendants might, if they had been so minded, at any time between 1891 and the present time, have put in force the provision of sect. 150 of the Public Health Act 1895, and might have compelled Mr. Lees Milne, who is no party to this litigation—not a party representing the public—to do a good deal more than the parish would ever be compelled to do, because it is quite clear that under the circumstances with which I have to deal in the present case there could be no obligation on the defendants to pitch and pave or do anything of the kind. Their only obligation would be to do to the new portion of the road which was substituted for the old portion just what was sufficient to make a decent repair to such a road as this was apart from any question of the Public Health Act. Now, I cannot say that because a particular individual might have been made to do repairs which he has not done there has been any transfer of liability from the defendant to someone else. But to do Mr. Sutton's argument justice, that is

not quite the way he puts it. He does not say that there was a transfer of liability, but he says something ought to have been done which has not been done which would put the road into a good state of repair, after which, and only after which, the liability of the parish would arise. I cannot follow that, but it lay with the parish to take proceedings under sect. 150 if they chose to do so. What answer is that to the public? What answer is that to the Crown, who prosecute because this order to repair the road was not complied with? I think it is none. The Crown in a prosecution of this kind represents the community at large, and it is no answer to the public when they cannot use the road to say that if the district council had chosen to take some steps which they have not chosen to take they might have made the landowners pay for a good deal, and probably for a good deal more than they are bound to do, after which a heavier liability would have laid upon them than can lie upon them now. I therefore think that there is nothing in the facts which have been brought before us, and the very able argument which has been addressed to me by Mr. Sutton, for which I thank him, which would prevent me directing a verdict and judgment being entered for the Crown.

Thereupon the defendants made the present application.

Pickford, K.C. and Byrne showed cause.

E. Sutton and James Openshaw in support of the application.

LORD ALVERSTONE, C.J.—This was a rule moved by Mr. Sutton to set aside a conviction in a road indictment case, in which the only question left to the jury was liability of the defendants to repair an ancient highway. If, as I understand, Mr. Sutton asks for judgment for the defendants or for a new trial, on the ground, as he says, that the effect of the verdict is that they will be held liable to repair 14yds. or 15yds. width of the road, as the case may be, whereas, as a matter of fact, they ought only to repair 12yds. width, I have the greatest possible difficulty in following his point. I will deal in a moment with another point that he makes about the liability of another gentleman; but I have the greatest possible difficulty in following his argument with regard to the point I have mentioned. As I understand before the Act of 1878, if this question of liability to repair was required to be raised, it was done by means of sect. 19 of the Highway Act. There an order was obtained from justices for the trial by indictment of the liability to repair, and nobody disputes of course that the liability to repair the road would have been tried in that way. Then came sect. 10 of the Highway and Locomotives Act, which provides that prior to the indictment there should be preliminary proceedings of complaint before the county authority, and an order made, and the obligation to obey the order suspended until this question of liability had been tried. In this case such an order was made, and the liability being disputed, they went down to trial. I cannot myself understand how, when the question which is to be tried is the liability to repair, and the only evidence or the only material point in the evidence is with regard to whether or not it was a public highway, it can be said that this verdict involves some special construction or some special obligation being placed upon

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the order, and that there ought to be a new trial to try the question of liability or judgment entered for the defendants, because, that question of liability having been tried and found against them, there will be some uncertainty as to what road or what extent of road the defendants are to be bound to repair. It seems to me that that is the consequence of the order. If the order is bad it may be attacked on some other grounds, but why there should be judgment entered for the defendants because there has been some uncertainty as to the width of the road they were to repair, or why we should enter a new trial to try that question I cannot understand. The other point that Mr. Sutton raises is this: There had been contemporaneous proceedings by Mr. Crompton Milne either to get the sanction to a wider road which he was going to metal or pave, or possibly an idea of proceedings to compel the frontagers to do it; and it is contended before us that the circumstances that the road had been laid out by Mr. Crompton Milne, and that he had deposited plans which implied that he was going to pave it, and that possibly there had been an undertaking by him to put the road in its proper condition, and that the circumstances that there were these strips at the side of the road, in respect of which proceedings had been taken under sect. 150, all ought to be taken into consideration at the trial of this indictment. I agree that the only way in which they could be taken into consideration would be to press the jury that they ought not to convict the defendants. But why this obligation of someone else, or the rights which the local authority had to take proceedings under sect. 150, either in respect of the whole of the road or any part of it, is any reason why we should grant a new trial, or why the liability of the defendants should be negatived by our entering judgment for them I am really at a loss to understand. If it had been contended that on the face of these proceedings the result of the verdict was that there was an order on the defendants to repair more road than in law they were admitted to be liable to repair, possibly some question may have arisen. I do not know at the present time what the effect would be of the order standing which was made under sect. 10, except that, whether that the order is now to be operative or inoperative, the liability of the defendants to repair the old highway is established. It seems to me that none of the grounds which have been urged by Mr. Sutton afford the least reason for entering judgment for the defendants as regards liability to repair, or for ordering a new trial to try that liability. Therefore I think this rule should be discharged.

DARLING, J.—I am of the same opinion. It seems to me that the defendants were convicted for not doing that which they were bound to do. When one looks to see what they were bound to do, one looks at the indictment. It is presented that: "From time to time, whereof the memory of man runneth not to the contrary, there was and yet is a common and ancient highway called Linney-lane, and that the defendants were bound to maintain the said common and ancient King's highway." They have not repaired it, and of that they have been convicted. They were bound to repair that, whatever was the width of it. It is said to have

been 12yds. If that were so, they have been convicted of not repairing that which they were bound to repair—that is, 12yds. wide of that highway. Now, it is said that there ought to be a new trial, as I understand it, because, owing to what has been done, they will be said by someone to be liable to repair 14yds. width of highway. Well, if anybody tries to impose that burden upon them, it seems to me that their proper answer is to repair the ancient King's highway whatever it was, and they are not to do any more. Then, if any proceedings are taken against them for not doing more than that, this conviction will not hurt them at all. They will have to be proceeded against again. It may be that if they do adopt this process there will be a very nice ancient King's highway with a swamp on each side of it, and, in accordance with ancient maxims, it will be safest to go along the middle. We cannot help that. If they carry out the duty imposed upon them, this indictment will not hurt them. It is no good anticipating what will be the result of those proceedings, because we do not know what may then be alleged.

CHANNELL, J.—I agree. This rule is to enter the verdict for the defendants. I see no ground whatever for doing that. The liability of the defendants to repair at least 12yds. of this road, which is in point of fact 14yds. or 15yds. wide, is quite clearly established on the facts that the jury found, upon the only questions that went to the jury. There was no application at the trial, nor is there now, to enter the verdict specially as to so much road, 12yds. on one side or anything of the sort. I am not very familiar with criminal proceedings. I do not know whether it could have been entered distributively, as in civil action, but at any rate that is not the application before us, and the substance of the matter is found for the prosecution.

Judgment accordingly.

Solicitors: *E. Bogue, for Worth and Worth, Rochdale; Chester, Broome, and Griffiths, for Hesketh Booth and Sons, Oldham.*

Tuesday, April 15.

(Before WRIGHT, J.)

WELLS v. ARMY AND NAVY CO-OPERATIVE SOCIETY LIMITED. (a)

Building contract—Penalties—Building owner to make allowances for delay—Final decision—Default by building owner—Exclusive jurisdiction of building owner.

By a building contract certain matters causing delay and "other causes beyond the contractor's control" were to be submitted to the board of directors of the owners of the building, who were to "adjudicate thereon and make due allowance therefor if necessary, and their decision shall be final."

Held, that the exclusive jurisdiction of the board did not extend to delay caused by interference by the building owners or their architect with the conduct of the works, by default in not giving the contractors possession of the premises, and in not providing plans and drawings in due time; and so, such interference and defaults

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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being made out, the building owners could not recover penalties.

ACTION tried before Wright, J. without a jury.

The following statement of facts is taken from the written judgment of the learned judge:—

This was an action brought by a firm of builders to recover a balance admitted to be due under a building contract dated the 29th Oct. 1897. The defendants claimed to set-off damages or penalties at the rate of 10l. per day for delay in completion of the building beyond the period of twelve months allowed by the contract. The contract contained a provision of the ordinary kind for alterations, additions, or omissions to be made upon the order of the architect, and a special provision (clause 7) that such orders should not "vitiating the contract or the claim for penalties under clause 16."

Clause 16 of the contract was as follows:

The contractors are to complete the whole of the works within one year from the day of the date hereof unless the works be delayed by reason of any alteration or addition in or to the works authorised as aforesaid, or in case of combination of workmen or strikes or by the default of the sub-contractors the contractors are obliged to employ, or other causes beyond the contractors' control, satisfactory proof of all which must at the time of occurrence be at once afforded to the board of directors of the employers, who shall adjudge thereon and make due allowance therefor if necessary, and their decision shall be final, and then the contractors are to complete the works within such time as the said board of directors shall consider to be reasonable, and in case of default the contractors are to pay or allow to the employers as and by way of liquidated and agreed damages the sum of 10l. per day for every day during which they shall be so in default until the whole of the works shall be so completed.

English Harrison, K.C. and Hudson for the plaintiffs.

Bray, K.C. and McIntyre for the defendants.

WRIGHT, J. (having stated the facts set out above, continued:—) The completion of the works was delayed for nearly a year beyond the stipulated time. A principal cause of the delay was the default of sub-contractors, and an extension of the time by three months on this ground was allowed by the defendants' directors in accordance with clause 16. The plaintiffs claim to excuse the residue of the delay, firstly, on the ground of alterations and other matters which are clearly within the scope of clause 16, and are therefore within the exclusive jurisdiction of the directors; and, secondly, on the ground that the defendants or their architect by undue interference with the conduct of the works and by default in not giving possession of premises on which work was to be done, and in not providing plans and drawings in due time, obstructed the works so as to relieve the plaintiffs from their liability for the penalties. The plaintiffs contend that the exclusive jurisdiction of the directors under clause 16 does not extend to questions of this kind, and I think that this contention is well founded. The clause might have been framed in general terms so as to include all delays however caused, but it is not so framed. It enumerates specific causes of delay and contains no general words except "other causes beyond the contractors' control." These words, in my opinion, ought to be construed with reference to the preceding causes

of delay, and ought not to receive such an extension as would make the defendants judges in respect of their own defaults. As was said by Lord Esher, M.R. in *Dodd v. Churton* (76 L. T. Rep. 438; (1897) 1 Q. B. 562): "One rule of construction with regard to contracts is that when the terms of a contract are ambiguous, and one construction would lead to an unreasonable result, the court will be unwilling to adopt that construction." The construction which I have adopted is supported by clause 18 of the contract which treats defaults by the architect in the giving of instructions as a matter not within the scope of clause 16. For these reasons I think that Mr. Bray's summary mode of disposing of the case must be rejected, and I must consider the evidence relative to the alleged defaults and the interference on the part of the architect. [His Lordship, having considered the evidence, came to the conclusion that the defaults of the defendants were such that in their cumulative effect they were inconsistent with the defendants' claim to insist on completion within the stipulated time.]

Judgment for the plaintiffs.

Solicitors: *Mackrell, Maton, Godlee, and Quincey; Tyrrell, Lewis, Lewis, and Broadbent.*

Friday, April 18.

(Before WRIGHT, J.)

BRITAIN AND OTHERS v. HANKS BROTHERS AND CO. (a)

Copyright—Artistic production—Toys—Models of Soldiers—Sculpture Copyright Act 1814 (54 Geo. 3, c. 56), s. 1—Stamping proprietor's name on models—Date of publication.

Metal models of mounted yeomen produced and sold as toys are, where there is evidence that they are anatomically and technically correct and display artistic skill and merit on the part of the producer, within the protection of the Sculpture Copyright Act 1814.

The proviso in sect. 1 as to stamping such models with the proprietor's name is satisfied by the insertion of the name of one of the partners of the firm of proprietors, if he himself be the producer of the model.

The effect of the requirement in the same proviso as to the date of publication is that the date must not be misleading; and the insertion of a date upon the cast a few days earlier than the absolute date of putting forth and publication is no contravention of the proviso.

ACTION tried before Wright, J. without a jury in which the plaintiffs sought to restrain the defendants from making, selling, or otherwise disposing of any pirated copy or cast of certain new and original metal models of soldiers and horses put forth and published by the plaintiffs. The plaintiffs claimed that the copyright in the model was theirs by virtue of the Sculpture Copyright Act 1814, and they asked for an injunction and damages.

The plaintiffs were a firm trading in partnership as William Britain and Sons, and produced toy metal models of soldiers on horseback, or mounted yeomen. William Britain, junior, was

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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one of the members of the firm, and he had licensed and assigned to it the right to manufacture copies of such models, and he was both a designer and modeller of the figures of these toy soldiers. He designed a figure of a yeoman on horseback, the model of which was stamped with his name and not with the name of his firm. This model was dated the 1st June 1900, and in Aug. 1901 the plaintiffs discovered that the defendants were selling copies of it.

Sect. 1 of the Sculpture Copyright Act 1814 is as follows:

From and after the passing of this Act every person or persons who shall make any new and original sculpture, or model, or copy, or cast of the human figure, or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso-relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy and cast . . . hereinbefore mentioned, and of every such cast from nature for the term of fourteen years from first putting forth or publishing the same; provided, in all and every case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy or cast, and on every such cast from nature, before the same shall be put forth or published.

Sect. 2. And be it further enacted, that the sole right and property of all works, which have been put forth or published under the protection of the said recited Act, shall be extended, continued to, and vested in the respective proprietors thereof for the term of fourteen years, to commence from the date when such last-mentioned works respectively were put forth or published.

Bousfield, K.C. and Bonner for the plaintiffs.—The Sculpture Copyright Act 1814 is the only statute which gives protection to persons making models and plaster casts of any part of the frame of man or of animal. It was passed to amend an Act of 38 Geo. 3, c. 71, intituled an "Act for encouraging the art of making new models and casts of busts and other things therein mentioned," and was for the encouragement of artists and to secure to them the profits of and in their works and for the advancement of the said arts. The word "art" in the statute is used in the sense of skill, and the plaintiffs in making the model of the yeoman on horseback, the subject of the present action, use precisely the same amount of skill and adopt the same process that would be required in the modelling of a life-size figure. The same knowledge of anatomy as well as technical accuracy is requisite. This the plaintiff, William Britain, jun., the only and original maker of this model, has expended upon it, and although only a metal figure of the size of a toy, it is yet a new and original model within the meaning and protection of sect. 1, as well as a work of artistic skill. [William Britain, jun. was called and examined, and in cross-examination stated that he was one of a firm of four partners, and alone did all the modelling. He made the model in question from

a photograph, and it was dated a few days before the first putting forth or publishing for sale. A war correspondent for an illustrated paper from South Africa stated that the model showed a knowledge of anatomy and artistic skill on the part of the producer, and was technically correct and of considerable merit artistically.]

Scrutton, K.C. and H. M. Givens for the defendants.—The statute was intended to apply, and applies only, to substantial works of art, such as busts, large sculptures, and casts of copies of works recognised as works of art, and not to metal toys like these which are turned out of a mould by the thousand, and sold simply as toys. There is no artistic merit whatever in this particular production in the sense contemplated by the statute. Nor has the date of publication laid down in the proviso to sect. 1 been complied with, for the first metal model which came out from the mould was dated the 1st June; but the putting out and publishing did not occur till a week later. Again, the name stamped on the model was not that of the plaintiffs, the proprietors, but of William Britain, one of the four partners of the firm. Therefore there has been a further non-compliance with sect. 1. If the statute be held to apply to toy soldiers, it might with equal propriety be held to apply to dolls.

Bousfield, K.C. in reply.—The partnership here do not claim the proprietorship of the copyright, but they have an interest in it. The defendants suggest that the statute affords no protection to things of everyday life, and instance dolls. They say that these mounted yeomen are so small that the statute never could have contemplated them; but the same argument would apply to miniatures of the highest artistic merit. The plaintiffs, however, have proved that the whole production is an artistic process.

WRIGHT, J.—The first question is whether this toy representation of a soldier on horseback is an artistic thing—an artistic production within the meaning of the Sculpture Copyright Act 1814. It is tolerably certain that some toys would not fall within the protection of the Act; and the question whether this soldier's or mounted yeoman's figure comes within it must be decided upon evidence as to its artistic character. The evidence before me is all one way. A war correspondent has been called who is at the same time an artist and has shown several of these figures to be artistic productions, in that the anatomy is good, and that the modelling shows both technical knowledge and skill. I see nothing to quarrel with in this statement. On the whole, therefore, although I have great doubt as to the meaning of the Act, I am prepared to hold that the production of a metal figure of a mounted yeoman such as this is good enough to be protected by the provisions of the Act, if the requirements of the latter part of the 1st section have been complied with. The second question is, Have they been complied with? The proviso to sect. 1 is that "the proprietor or proprietors do cause his, her, or their name or names with the date to be put on all and every such new and original sculpture, model, copy, or cast . . . before the same shall have been put forth or published." In this case it is alleged on behalf of the defendants that there has been no compliance with this proviso because the name of one of the partners has alone been

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placed on the article as if he were the sole proprietor, whereas in fact the firm, consisting of several partners, of which he is one, were the proprietors; and that the name of the firm ought to have been used. In my opinion this is too narrow a construction to place on this proviso. The words of the earlier part of sect. 1 are "every person or persons who shall make or cause to be made any new and original sculpture, or model or copy," &c., and it seems to me that if Mr. Britain, jun., be the person who made the model of the new and original production, he is entitled to place his name upon it, and is none the less entitled because he happened to have partners in the venture of selling the article. If he had not been the designer and maker of the model himself, I should have thought that the firm's name ought to have been used; but, as he is the designer and maker, I am of opinion that his name upon the model is a sufficient compliance with the proviso in sect. 1, and that it is unnecessary that the name of his firm should appear. The remaining objection is that the wrong date has been used, because the plaster cast was placed in the show room, and so published or issued to the public a few days after the date was cut upon it; and the proviso to sect. 1 is that "the date" is "to be put on all and every such new and original . . . cast . . . before the same shall be put forth or published." In my opinion, the effect of these words is that the date must not be misleading. The common-sense view is that the difference of a few days between the date being put on the cast of the production and the date of its issue, or of its being put forth or published to the public, can be but a matter of small moment. That this plaster cast was placed in the show room for a few days—hardly a week—after the issued date was cut upon it, cannot in my opinion vitiate the title of the proprietor under the statute. The plaintiffs are accordingly entitled to the protection of the statute, and to the injunction they claim.

Judgment for plaintiffs.

Solicitors: for the plaintiffs, *Desborough, Son, and Prichard*; for the defendants, *H. H. Richardson*.

Wednesday, April 23.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

STOKES (app.) v. MITCHESON (resp.). (a)

Coal mine—Rules—Enforcement by agent—Breach—Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58), ss. 49, 50—Inspector of mines—Dismissal of information—Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43), s. 2—"Person aggrieved"—Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 33.

M., an agent of a coal mine, appointed a duly qualified manager and under-manager. Owing to the negligence of such manager and under-manager, a breach of sect. 49, r. 1 of the Coal Mines Regulation Act 1887 was committed, but such breach was an occasional irregularity and not one which had been continuous.

The justices found that M. had taken the proper steps to enforce the rules by appointing a duly

qualified manager and under-manager, who knew the rules and whose duty it was to carry them out, and that the breach was in no way caused by M. omitting to enforce the rules. They therefore dismissed the information preferred against him under sect. 49.

Held, that they were right.

An information having been dismissed, the justices on the application of the informant stated a case which purported to be stated under the Summary Jurisdiction Act 1879 only.

On an objection taken that the informant was not a "person aggrieved" within sect. 33 of that Act:

Held, that it could not be assumed that, because the Act of 1879 was only referred to, the case was not stated under both that Act and the Summary Jurisdiction Act 1857; and, further, that, under the Act of 1857, a person who was a party to the proceedings could apply for a case to be stated.

CASE stated by justices for the county of Warwick under the Summary Jurisdiction Act 1879.

The respondent was charged on the information of the appellant, one of His Majesty's inspectors of mines, which alleged that the respondent on the 1st Nov. 1901, at the parish of Baxterley, being the agent of the Baddesley mines there, the same being a mine within the meaning of the Coal Mines Regulation Act 1887, unlawfully did fail to cause an adequate amount of ventilation to be constantly produced in the mine to dilute and render harmless noxious gases to such an extent that the working places, levels, and workings of the mine would be in a fit state for working therein, contrary to the Coal Mines Regulation Act 1887.

Information for a similar offence had also been laid against the manager, who held a first class certificate, and against the under-manager, who held a second class certificate of the mine, and information for further offences under the Act had also been laid against the manager. The three defendants were separately represented, and all the charges were heard together with the consent of all the parties.

The respondent was admitted to be the agent of the Baddesley mines within the meaning of the Coal Mines Regulation Act 1887.

The evidence for the prosecution consisted only of the evidence of Mr. Henry Richardson Hewitt, the assistant inspector of the mines. He stated in effect that he had visited the mine, which was a dry and dusty one, and more liable therefore to explosions, on the 1st Nov. last, and then found an accumulation of gas in a certain heading, No. 29 and no sufficient ventilation, and that no entry of the gas was made in the report-book.

He also proved certain admissions by the manager and under-manager which collectively showed that the non-ventilation had been going on for several days previously, during which period the heading had been roughly fenced off, but not so as to prevent the escape of gas. Such admissions, however (as the justices considered), were not evidence against the respondent, and therefore in deciding the charge against him they had regard only to the state of things on the 1st Nov. But with that limitation the justices considered that the evidence showed that there was evidence of want of ventilation on the

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1st Nov. which amounted to a violation of the general rules.

The non-ventilation of the heading No. 29 was caused by the temporary diversion of the air-pipes at the entrance thereto into an adjacent heading which was then being driven. The report books stated that the ventilation was satisfactory and that there was no gas.

The under-manager in evidence stated that he first discovered gas on the 19th Oct., and that on that day he fenced the heading off, as hereinbefore mentioned, and reported the presence of gas to the manager either on the 25th or 28th Oct.

The respondent was personally present at the hearing, but his advocate called no witnesses. There was no evidence as to any visits to the mine by the respondent.

The justices convicted the manager and the under-manager on all the charges against them.

It was contended for the appellant that if the justices came to the conclusion that a contravention of, or non-compliance with the rules existed, they were bound to convict the respondent unless he proved that he had taken all reasonable means by publishing, and to the best of his power enforcing, the general rules to prevent such contravention or non-compliance as mentioned in sect. 50 of the Act, and that no evidence to that effect had been given by or on behalf of the respondent.

It was contended for the respondent that all the requirements as to the publication of the rules had been complied with, and that there was a certificated manager and a certificated under-manager both experienced and acquainted with the rules, and that the non-ventilation of heading No. 29 was due to the temporary diversion by the under-manager of the otherwise adequate means of ventilation of such heading.

In deciding the case the following considerations were present to the minds of the justices: (a) The manager was the person primarily responsible for the conduct of the mines; (b) no evidence was given of personal negligence by the respondent. The evidence showed that the violation of the rules took place by the personal negligence of the manager and the under-manager, who had also failed to enter the cause of the violation in the report-book, but, on the contrary, had stated in the report that the mine was free from gas; (c) no evidence was given of the publication of the rules, nor was such publication admitted, but they considered that the respondent had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager who knew the rules and whose duty it was to carry out the rules without further interference from him. The violation of the rules therefore was in no way caused by the respondent omitting to enforce the rules; (d) in the present case as against the respondent only an occasional irregularity was proved and not one which had been continuous.

They therefore considered that the charge was not proved against the respondent, and they dismissed it.

The question of law for the opinion of the court therefore was whether, having regard to sect. 50 of the Coal Mines Regulation Act 1887, the justices were or were not justified upon the evidence before them in dismissing the charge against the respondent.

B. C. Brough for the respondent.—This case is stated under the Summary Jurisdiction Act 1879, and I take the preliminary objection that the appellant here whose information was heard and determined and dismissed is not a "person aggrieved" within the meaning of sect. 33 of that Act. The point was taken in *Stokes v. Checkland* (68 L. T. Rep. 457), but was not decided. He also referred to

Reg. v. Justices of London, 63 L. T. Rep. 243; 25 Q. B. 357.

H. Sutton for the appellant.—The question does not rest merely on sect. 33 of the Act of 1879. One must go back to the original statute under which cases are stated—viz., 20 & 21 Vict. c. 43. The word "aggrieved" must include a party to the proceedings. [CHANNELL, J.—You commonly find in these cases a statement that they stated under both Acts.] It ought so to be stated. I submit that the term "aggrieved" is put in as a general term, certainly to include those who had originally by the principal Act a right of appeal, and also possibly to cover cases where this court might hear a person if he showed he was aggrieved in some way, or was affected by the order. Instead of cutting down the former Act it really enlarges the right of appeal. The case of *Reg. v. Justices of London (sup.)* was not a case under these Acts at all; that was a case of an appeal to quarter sessions. As to the merits of the case, the respondent here was the agent of the mine, and by sect. 75 of the Coal Mines Regulation Act 1887 "agent" means any person appointed as the representative of the owner in respect of any mine or any part thereof, and as such superior to a manager appointed under the Act. The justices here refused to convict because they thought the respondent had brought himself within sect. 50 of that Act, which provides that every person who contravenes or does not comply with any of the general rules of this Act shall be guilty of an offence against this Act, and in the event of any contravention or non-compliance with any of the general rules in the case of any mine to which this Act applies by any person whatsoever, the owner, agent, and manager shall be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine to prevent such contravention or non-compliance. My contention is that upon the facts found there was no evidence whatever that the agent had done anything under the section. [LORD ALVERSTONE, C.J.—Do you say the appointing of a duly qualified manager by the agent is not sufficient under sect. 50?] Certainly, for there is a separate penalty if he does not do that. Simply appointing a manager will not do. [LORD ALVERSTONE, C.J. referred to *Baker v. Carter* (3 Ex. Div. 132).] In *Wynne v. Forrester* (40 L. T. Rep. 524; 5 C. P. Div. 361) it was decided that the agent of a mine, subject to the Coal Mines Regulation Act 1872, may be convicted for the breach of the regulations prescribed by sects. 51 and 52 of that Act, although the mine is under the control of a duly certificated manager. [LORD ALVERSTONE, C.J.—It says "may" be convicted, but that does not show that he "must." *Baker v. Carter (sup.)* decided that

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if the owner had appointed a properly qualified certified manager he was not bound personally to interfere, and that the justices might find that the respondent had taken all reasonable means of publishing and to the best of his power enforcing the rules. Why does that not apply to an agent? The agent, as defined by sect. 75, supervises the manager, and is in a different position to the owner. In *Wynne v. Forrester* (sup.) Lord Coleridge said: "In my opinion it is plain from both the 51st and the 52nd sections that it was intended to compel strict and constant attention by the heads of these establishments by making them, agent as well as manager, personally liable unless they can show that they have done their best to enforce the performance of the regulations by their subordinates. If they show this they will be exempt from liability, but *prima facie* they are to be held responsible." I submit here that there was a *prima facie* case for the prosecution, and there was no evidence to rebut the *prima facie* liability of the respondent.

Brough was not called upon to argue upon the merits.

LORD ALVERSTONE, C.J.—I think it is as well that we should say just one word upon this preliminary objection. The Summary Jurisdiction Act 1857, by sect. 2 gave power to state a special case; and expressly provided that either party to the proceedings before the justices might, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days. It is not disputed that in those circumstances the person who has laid the information is a party to the proceedings and can apply for a case. Then came sect. 33 of the Summary Jurisdiction Act 1879, which purported to amend the procedure, which gave the power to a person aggrieved to apply to the court to state a special case, and if the court decline, he may apply to the High Court of Justice for an order requiring a case to be stated. Sub-sect. 2 of that section is :

The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in a manner prescribed by rules of court, and in pursuance of the Supreme Court of Judicature Act 1875 and the Acts amending the same, and subject as aforesaid the Summary Jurisdiction Act 1857 shall, so far as it is applicable, apply to any special case stated under this section as if it were stated under that Act. Provided that nothing in this section shall prejudice the statement of any special case under that Act.

I do not think there was any intention by sect. 33 to cut down the right of the party to the proceedings to apply to a case. Mr. Brough suggested to us that because at the heading of this case there was no assertion or statement that the case was stated under both Acts, therefore it must be taken to be stated only under the Act of 1879, and that a "person aggrieved" would not include an unsuccessful prosecutor, and he referred to the case of *Reg. v. Justices of London* (sup.) before Lord Coleridge. That case did not arise under these two Acts at all; it arose under the Highway Act, which gave a right of appeal to quarter sessions. I think it is probable that some question may arise as to who has a right to come and ask for a case under sect. 33, or ask the court to order a case to be stated, but I

am clearly of opinion that a person who was a party to the decision of the magistrates is within the first Act and within these two Acts together, and I do not think that this case could have been stated except under the two Acts. It cannot be taken that because only one Act is referred to that the case was not stated under both Acts. I therefore think the preliminary objection ought not to prevail. The point was raised in *Stokes v. Checkland*, and it has not been raised since. It seems to me that one cannot assume that because the heading of the case stated only refers to one Act of Parliament therefore you must assume that the case was not stated under both. I think the inspector had a right to raise this point under sect. 2 of the Act of 1857, and that we are entitled to entertain the appeal. Now, upon the merits. The magistrates have found "that the respondent had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager who knew the rules, and whose duty it was to carry out the rules without further interference from him. The violation of the rules, therefore, was in no way caused by the respondent omitting to enforce the rules." They further find that "the non-ventilation of the heading No. 29 was caused by the temporary diversion of the air pipes at the entrance thereto into an adjacent heading which was then being driven;" and, lastly, they find that only an occasional irregularity was proved, and not one which had been continuous. Under those circumstances it is contended by Mr. Sutton that under sect. 50 of the Coal Mines Regulation Act 1887 the respondent who was acquitted, being the agent, has not discharged the onus which is thrown upon him. I think it is very material to observe that all three men were prosecuted, and that the manager and the sub-manager were convicted. The agent was acquitted. It cannot be contended that the agent of the person charged must be called. That was practically negatived by *Baker v. Carter* (sup.), which was recognised as good law in *Stokes v. Checkland* (sup.). Further, it cannot be said in this case that no rules were published. It is obvious from the statement in the case that the rules had been published, and at any rate no point was made against the respondent in that particular respect. Therefore Mr. Sutton is driven to say this, that you must apply a different rule when you are dealing with the onus of proof under sect. 50 in the case of an agent to what you are to apply in the case of an owner. There are, I think, agents and agents. There may be an agent who is doing part of the duties of a manager. There may be an owner who is taking such part in the supervision that he will have some of the duties cast upon him which are ordinarily cast upon either owner or agents; but to say that the magistrates must convict because the agent has not done more than appoint a fully competent and qualified certified manager and under-manager, and must convict in respect of an offence, which is found in fact to be due to the negligence, on a single occasion, of the manager, seems to me to begoing a great deal further than we ought to go, or any proper construction of this section would lead to. I have already pointed out that in *Baker v. Carter* (sup.) it was found in favour of the owner that it was sufficient that he had appointed a competent manager. I do not think

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that is in any way altered by anything that was said in the judgment of the Queen's Bench Division in the case of *Stokes v. Checkland* (sup.), in which *Baker v. Carter* (sup.) and *Wynne v. Forrester* (sup.) were both referred to. That strongly supports the view that the magistrates might find such finding as they have come to in this case. I will only add one further word. I think this case brings out in strong relief the distinction between a case stated after acquittal and a case stated after conviction. As my brother Channell pointed out in another case, where there has been acquittal, you have to show upon the facts stated that there must have been a conviction. In this case all we have to say is we must be satisfied that the magistrates could not have come to the conclusion they did upon the facts before them; or that upon the evidence and case before them, it not being necessary to call the agent, they were satisfied that the agent had taken all reasonable means. I think the latter is the right view, and I think we should be wrong if we threw any doubt upon their decision, and I therefore think that this appeal must be dismissed upon its merits.

DARLING, J.—I am entirely of the same opinion. With regard to the preliminary point which was taken, I think an appeal does lie here. With regard to the other point, the magistrates have found that the agent of the mine took proper steps to enforce the rules. What he had done was this: he had appointed a manager; he had appointed an under-manager. The rules were broken in this, that in making a new heading the under-manager had by his negligence allowed a temporary diversion of a ventilating pipe, the ventilations of the headings being found by the magistrates to be otherwise adequate. Now, it seems to me impossible that anyone with any acquaintance of a colliery manager such as I have no doubt these magistrates had, could have come reasonably to any other conclusion than that to which they came. They knew perfectly well what the agent of a colliery does. He may be agent for a very large extent of property. He appoints a manager and an under-manager. Why? To see after the very things to which it is not reasonable to suppose that he can be giving his own personal constant attention. He will have to go away. He has to manage not only the engines and the workings, but all the men, the labour question, and such things he has to deal with. How is it possible that a man in a position like that can see that the ventilation is not temporarily interfered with? It seems to me not only was there evidence here upon which the magistrates could have come to the conclusion to which they came, but that if sensible men, they could not have come to any other. To hold otherwise would be to hold this, that if you have a general in command it is his duty to go round to every corporal and see that he is doing his duty. I think this appeal should be dismissed.

CHANNELL, J.—I am of the same opinion upon both points. I have a strong opinion that there is some case—I suppose not reported—upon this preliminary objection. These minor points arising in cases very often do not get reported, and if they are reported they are sometimes a little difficult to find, as they do not get into the headnote. At any rate we ought to decide it

now, and although we are doing here the same as was done in *Stokes v. Checkland* (sup.)—namely, dismissing the case upon its merits—so that it may be said our decision upon the preliminary point is not necessary, I think we must be taken to have decided it. My opinion is that the two powers to state a case, given by the Acts of 1857 and 1879, are not separate powers, although there is slightly different machinery, and in substance the two Acts are to be read together. There is, as my Lord has pointed out, just a slight doubt whether, when a person comes to get a rule here to order a magistrate to state a case, such a person must not be a person who is aggrieved, and whether it applies therefore to a prosecutor. That question may arise at some time. I do not think it has been noticed, and I think there are numerous cases to be found in which orders have been made upon magistrates to state cases under such circumstances. Then, as to the other point, the point under the merits, I think it is quite clear that the magistrates did not in any way make any mistake. I think they were aware when they gave their decision that the onus was upon the defendant, but they held, and I think rightly, that although the onus was upon him it might be, and in fact had been, made out upon the evidence that had been given for the prosecution, and that here, upon the evidence for the prosecution, there was abundant reason why they should come to the conclusion that that onus had been made out upon the evidence given on the other side. The substantial point is that they find the negligence in question was a mere casual piece of negligence which nobody could have anticipated, and it was therefore unnecessary for the respondent to go into the witness-box and swear that he did not know of it.

Appeal dismissed.

Solicitors: *The Solicitor to the Treasury; Sharpe, Parker, and Co., for V. H. Jackson, Hanley.*

April 23 and 24.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

BURTON AND SONS (apps.) v. MATTINSON (resp.). (a)

Food and Drugs—Margarine—Excess of water—Sale not of nature, substance, and quality demanded—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6—Margarine Act 1887 (50 & 51 Vict. c. 29),

Margarine having been purchased and analysed, evidence was given that it contained 21 per cent. of water, which was at least 5 per cent. in excess of water that margarine should contain.

Held, that the vendor was rightly convicted of selling to the prejudice of the purchaser margarine not of the nature, substance, and quality demanded, contrary to sect. 6 of the Sale of Food and Drugs Act 1875.

CASE stated upon an information charging the appellants under sect. 6 of the Sale of Food and Drugs Act 1875 with selling margarine not of the nature, substance, and quality demanded by the purchaser.

On the 9th Dec. 1901 the appellants exposed

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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for sale at their shop at Rushden a substance labelled margarine, and ticketed for sale at 6d. a pound.

The respondent entered the shop and asked for 1lb. of margarine, to be supplied out of the margarine so exposed for sale, and he was served with 1lb. of the substance, for which he paid 6d.

The formalities required by the Act were carried out, and the substance was duly analysed. It was admitted that the appellants had complied with all the requirements of the law as to labelling and selling the substance sold as margarine.

The analyst's certificate stated that the sample contained the percentage of foreign ingredients as follows :

Water, 21 per cent. [and this was at least 5 per cent. in excess of the amount of water which margarine should contain].

It was objected on behalf of the appellants that the words in brackets were no proper part of the analyst's certificate, but were a mere expression of opinion which was in no way receivable in evidence.

It was stated by the analyst, who was called as a witness for the respondent on the requisition of the appellants, that the average percentage of water contained in margarine was from 8 to 10 per cent., so that, in stating in his certificate that this sample contained at least 5 per cent. in excess of the maximum amount which should be present in margarine, he was dealing with the margarine leniently, and allowing the same maximum as is allowed in butter—namely, 16 per cent.; that margarine, in his experience, should contain rather less moisture than butter; that well-made butter contains 10 to 12 per cent. of water on an average; that the principal or valuable constituent of butter was fat, of which the percentage should be from 80 to 85; that the only valuable constituent of margarine was also fat, of which it should contain at least 85 per cent.; that this particular sample contained only 70 per cent. of fat, so that what was lacking in fat was made up in water and salts; that margarine was made from various fats, either animal or vegetable—it was usually made from the more liquid portions of animal fat mixed with various vegetable fats; that margarine should, in his opinion, imitate butter, not only in appearance, but also in its constituent elements.

It was admitted that there was nothing in the substance sold injurious to health, and that margarine was sold at times in the district for as much as 8d. to 10d. per pound, and for as little as 4d. per pound, so that 6d. per pound was the price of a comparatively cheap quality of margarine.

It was admitted by the two witnesses of the respondent that the sample sold was in outward appearance an imitation of butter.

No evidence was given on the part of the appellants, but it was contended by counsel for them on the above facts that they had committed no offence in point of law because (1) the term margarine was not a conventional term or one affixed by usage to any substance, but was a statutory term affixed by the Margarine Act, 1887, to all substances whether compounds or otherwise prepared in imitation of butter, and that the substance then in question being prepared in imitation of butter was rightly sold as mar-

garine, and was, therefore, of the nature and substance demanded by the purchaser; (2) the quality of the substance supplied was that demanded by the purchaser, being the margarine at 6d. per pound then exhibited for sale in the appellants' shop at Rushden; (3) the Legislature had not fixed any standard for margarine nor enacted of what ingredients it should be composed nor the proportions in which they should be combined; (4) if it be necessary that a substance sold as margarine should imitate butter, not only in outward appearance and nature, but in the ingredients used in its composition, the substance then in question being not only similar to butter in such outward appearance, but also being composed of the same ingredients as butter—namely, fat, water, and salts—was margarine and an article of the nature, substance, and quality demanded.

It was contended for the respondent that, although the Legislature had not fixed any standard for margarine, neither had it fixed any standard for butter, and yet there had been several convictions for selling butter which contained more than 16 per cent. of water, and such convictions had been upheld on appeal, and that if it was illegal to sell butter with more than 16 per cent. of water it was also illegal to sell margarine with more than the same percentage. That if it was lawful to sell as margarine a substance containing 21 per cent. of water there was no reason why such substance should not be sold containing 40 or 50 per cent. of water. That water was not a substance prepared in imitation of butter within the definition of margarine contained in the Margarine Act 1887.

The justices overruled the appellants' objections, being of opinion that the water found in the margarine was excessive, and that, therefore, the article sold was not of the nature, substance, and quality demanded, the same being adulterated with water, and they convicted the appellants.

Avory, K.C. (W. H. Stevenson with him) for the appellants.—Here the magistrates have convicted under sect. 6 of the Sale of Food and Drugs Act 1875, because of the water in the margarine. The magistrates have made a standard for margarine themselves. The preamble of the Margarine Act 1887 says: "Whereas it is expedient that further provision should be made for protecting the public against the sale as butter of substances made in imitation of butter, as well as of butter mixed with any such substances." Then by sect. 3 it goes on to say "the word 'butter' shall mean the substance usually known as butter, made exclusively from milk or cream or both, with or without salt or other preservative and with or without the addition of colouring matter. The word 'margarine' shall mean all substances whether compounds or otherwise prepared in imitation of butter, and whether mixed with butter or not, and no such substance shall be lawfully sold except under the name of margarine." Therefore margarine means everything that is sold in imitation of butter without regard to its composition. There cannot be a conviction under sect. 6 of the Act of 1875, for the purchaser has not been prejudiced. In asking for margarine he has asked for something in imitation of butter and has got it. Margarine

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is by statute an authorised adulteration. He referred to

Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51).

There was no evidence that the article sold was other than what was asked for. The words of the definition, I submit, mean that every article of food which is in fact an imitation of butter must be called and sold as margarine. [Lord ALVERSTONE, C.J.—But why should not a man be convicted for selling what is not margarine under the name of margarine?] There was no evidence that this was not margarine.

Swinburns Hanham for the respondent.—The evidence shows that the margarine was adulterated with excessive water. The definition in the Margarine Act 1887 is not an exclusive one at all. [He was stopped.]

Lord ALVERSTONE, C.J.—In this case, the sale being a sale of margarine, and all the provisions of the Margarine Act having been complied with, the magistrates found that the water in the margarine was excessive, and that therefore “the article sold was not of the nature, quality, and substance demanded, the same being adulterated with water.” As I understand, that means that it was margarine and water, not margarine. We have been pressed by Mr. Avory to say that that is wrong, that there can be no finding of the magistrates to that effect, because there was no evidence on which they could come to the conclusion that it was margarine and water. It is a little difficult quite to follow the reason of his argument. He has contended, in the first place, that the whole thing is governed by the Margarine Act of 1887, s. 3, the last part of which says that “the word margarine shall mean all substances, whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not, and no such substances shall be lawfully sold except under the name of margarine.” He has in effect contended that if stuff is sold in imitation of butter and called “margarine” there can be practically no inquiry as to what its contents are and what its composition is. I think the objection to that argument is that it overlooks what I may call the other existing legislation as to the adulteration of food, under which a purchaser is entitled to get what he asks for. I am not saying, and I do not wish to be understood as expressing the opinion, that of necessity the presence of any particular percentage of water in margarine would prevent it being margarine; it is not on that ground that I think this case should be decided. I think we have to say whether there was evidence upon which the magistrates could rightly come to the conclusion, as they thought fit to do, that it was not margarine, but was margarine and water. The facts are that the inspector says: “I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under—viz., water 21 per cent. This is at least 5 per cent. in excess of the maximum amount of water which margarine should contain.” I need not do more than remind those who have to deal with these matters that, unless the analyst is called, that certificate is sufficient evidence of the facts therein stated, but he can be called, as he was in this case, at the request of the defendant. The analyst is called, and no doubt he stated the

ground of reasoning which has led him to come to the conclusion that he was right in stating that at least 5 per cent. in excess of the maximum amount of water was present. His reasons have been criticised. It is said that he ought not to compare margarine and butter. That may be perfectly true as a matter of argument as to what is the proper method of arriving at what is margarine and what is not margarine. But no evidence has been called about this, and it seems to us impossible to say that the magistrates were not justified in acting on a certificate supplemented by the evidence of the analyst that there was such an extra amount of water in this margarine that they have described it, I think, as margarine and water, or margarine adulterated with water, and not margarine. I must say, speaking for myself, that when you look at the Act there certainly was intended to have been a good deal of similarity between margarine and butter, and while I am far from saying that it of necessity follows that the percentage was the same, it seems to me quite impossible to say that the analyst was wrong in forming his conclusion as to how far margarine should be adulterated with water by reference to what his experience had taught him as to what the amount of water was that there was in butter. But, be that as it may, it is impossible for us, in my opinion, to say that the magistrates had not evidence before them on which they were justified, if they so thought fit, in coming to the conclusion that the stuff was not margarine or was margarine adulterated with water. Therefore I think this appeal should be dismissed.

DARLING, J.—I am of the same opinion. It seems to me that the argument which Mr. Avory used would lead to attributing to the Legislature an intention which I feel certain they never had when they passed this Act of Parliament. Mr. Avory contends that margarine is a thing of statutory creation; that any substance prepared in imitation of butter, he said at first, no matter what it was made of, if it looked like butter, was properly described as margarine and could be sold as margarine. He amended that definition to this extent, that the imitation, in order to come within the Act of Parliament, must be capable of being eaten, or otherwise it is not a food, and that therefore a block of wood or a lump of plaster of Paris made up to look like butter would not be statutory margarine, but that if you made the imitation of anything that could be eaten, anything which was a food, then it would be properly described as margarine, no matter how unwholesome or deleterious it might be. Take a sample case. It would come to this, that if you could make a block of flour and colour it to look like butter, so that to the eye it imitated butter, then, according to Mr. Avory, you would be perfectly safe in labelling that margarine and selling it as margarine and selling it at a price hardly below butter as butter is now understood, the price at which margarine is commonly sold. If the Legislature meant to bring about that state of things they put a very odd preamble to the Act of Parliament by which they did it, because the Act is called “An Act for the better prevention of the Fraudulent Sale of Margarine.” It says, “Whereas it is expedient that further provision should be made for protecting the public against

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the sale as butter of substances made in imitation of butter, as well as of butter mixed with any such substances." They go on to enact that "the word 'margarine' shall mean all substances, whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not." I think that what they were doing there was, they were not only providing that you might sell any imitation of butter if you called it margarine, provided that it was an imitation of butter to the eye, but I think they were dealing with a good deal more. I think they were dealing with things which professed to imitate butter in other respects than in appearance, because every article of food or other has qualities besides those which the eye can appreciate. There are some things which are made chiefly to please the eye—many things—one knows even places where they are made. But if it is a matter of food those who make imitations generally take care to imitate other properties of the article which they are imitating than those which the eye can appreciate. An artificial flower, for instance, you simply look at; you do not try to eat it; you would be satisfied if it looked like a flower. If a man is going to sell something for food it is quite certain that he will take care in the imitation, and that the Legislature understood that he would take care in the imitation to imitate it in some other of its qualities besides those which appeal to the eye. What did this man do? He made up a thing which would pass as butter to the palate. I think if he does that you are entitled to consider what is butter for the sake of finding out what is imitating butter. Therefore I think you let in the evidence of the analyst, and the evidence of the analyst is that this thing possessed all this quantity of water, which would prevent it properly being considered as butter at all, and because of that would prevent it being considered an imitation of butter, and therefore prevent it being considered as margarine, and prevent it being properly described and sold as margarine. I have thought it necessary to add these words, but otherwise I entirely agree with the judgment that my Lord has delivered.

CHANNELL, J.—I am of the same opinion. I think the fallacy of Mr. Avory's ingenious argument is in using an interpretation clause for a purpose for which it never was intended, and for which it is not legitimate. The object of an interpretation clause is to assist in the interpretation of the particular Act in which it is placed, and to prevent having to repeat long sentences in half a dozen different places in the Act of Parliament. For the purposes of this Margarine Act, which was an Act intended to prevent imitations of butter being sold as butter, there is a definition which practically says that everything which is made to look like butter and is not butter is margarine, and that is a sensible and useful interpretation for the purpose of interpreting that Act; but you cannot apply that generally, and say that everything which is not butter but a little like it is margarine. It leads to all the absurd results which my brother Darling has pointed out very effectively, and the truth is that you never can use an interpretation clause for that purpose. If I may refer to an interpretation clause which I have often heard of but have never been able to find, but which I believe does exist,

the interpretation in a local Act of "street music as including a bear and a performing monkey," it is very obvious that you cannot use that for general purposes, and to say what music is, although it is a very useful definition, I daresay, for the purposes of that particular Act, in preventing annoyances in the street which might be even worse than music. It illustrates the object and abuse of a common interpretation clause. Mr. Avory is saying that because that is what "margarine" is intended in the Margarine Act to be, when you come to apply another Act and find a person going into a shop and asking for "margarine," therefore you must assume that he asks for "margarine" as defined by the Margarine Act. I think it is a question of fact for the magistrates what margarine is, whether there is such a substance as margarine to begin with, and, if so, what it is. Assuming that is so, to begin with, these magistrates had to find out what margarine was, and they had a witness before them who said that margarine at any rate is a substance which contains at least 5 per cent. less water than this does. He said at any rate that this substance contained 5 per cent. in excess of the maximum of water which margarine should contain. That being so, the magistrates had some evidence of what margarine was and some evidence that the substance sold was not margarine within the true meaning of the word "margarine," therefore they were entitled to convict, as it seems to me. I think in substance there was evidence before the magistrates, and that this conviction should stand.

Appeal dismissed.

Solicitors: *Bernard Wright*, Nottingham; *Heygate* and *James*, Wellingborough.

House of Lords.

Tuesday, April 22.

(Before the LORD CHANCELLOR (Halsbury), LORDS MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY.)

LAW UNION AND CROWN INSURANCE COMPANY v. HILL AND ANOTHER. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Will—Construction—Exception of eldest son for time being entitled to possession of specified estate—Sale of specified estate before death of the testator.

A testator by his will, made in 1855, devised his real estate to A. for life, with remainder to every son and sons of A. born in the testator's lifetime or in due time after, other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits of certain estates at C., after the decease of A. as tenant for life, or for any greater estate or interest. A's eldest son on coming of age became entitled as tenant in tail on A's death to the C. estates.

In 1869 he joined A. in executing a disentailing deed, under which the C. estates were sold, and the purchase money received by trustees upon

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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trusts under which he took certain benefits. He afterwards became bankrupt, and his interest under the trust was purchased by A., who subsequently died. The testator died in 1875.

Held (affirming the judgment of the court below), that the words of the exception must be construed according to their ordinary and natural meaning, and as at the death of the testator A's eldest son was not entitled either to the possession or the rents and profits of the C. estates, he was not excluded from taking under the will.

Collingwood v. Stanhope (L. Rep. 4 H. L. 43) distinguished.

THIS was an appeal from a judgment of the Court of Appeal (Rigby, Williams, and Stirling, L.JJ.), reported under the name of *Shuttleworth v. Murray* (84 L. T. Rep. 605; (1901) 1 Ch. 819), who had reversed a judgment of Cozens-Hardy, J., reported (82 L. T. Rep. 668; (1900) 1 Ch. 795).

The question arose upon a summons taken out by the trustees of the will of E. Grimshaw, deceased, in an administration suit. The facts are fully set out in the report of the case before Cozens-Hardy, J. and appear sufficiently from the headnote above.

The present appellants were incumbrancers interested in the succession of the younger son of Richard Atkinson. The respondents were the assignees of the life estate of his elder son.

Levett, K.C., *Vernon R. Smith, K.C.*, and *E. S. Ford* appeared for the appellants, and contended that there was a clear intention in the will that the same person should not have both estates. The question depends on the meaning of the word "entitled" under the settlement "as eldest or only son for the time being." These words qualify the expression "eldest son." A man is not the less "entitled" because he has sold the property and taken the proceeds. "Entitled" denotes the person who would take under the settlement, not the person in physical possession. Having once become "entitled" the eldest son was disqualified once for all from taking under this will. When he has once come under the definition of "eldest son for the time being" he cannot be heard to say that he is not "entitled" because he has sold the property. They referred to

Collingwood v. Stanhope, L. Rep. 4 H. L. 43;

Harrison v. Round, 2 De G. M. & G. 190;

Fazakerly v. Ford, 4 Sim. 390; 33 E. R. 129.

Haldane, K.C., the Hon. *E. C. Macnaghten, K.C.*, and the Hon. *T. H. Watson* for the respondents, maintained that the words must be construed in their natural sense as "eldest son entitled to possession." At the death of the tenant for life the son was not entitled to possession or to the receipt of the rents and profits. The appellants' argument reads in the words "entitled but for his own act." At the date of the death of the testator the eldest son had no title to the Cockerham estate. The facts do not bring the case within the words of the exception, and the cases cited are distinguishable.

Levett, K.C. was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: I am extremely glad that we have not in dealing with this will to consider any artificial rules. There is no question here as to what has

been called "the paramount intention" or "the truth and honour of the settlement." I do not for my own part care about the expressions "paramount intention" and "the truth and honour of the settlement," or words of that character. To my mind, I confess, those expressions are not much more definite than a good many other propositions with regard to the construction of documents. As I have said, the rule is to adhere to the language and meaning of the instrument, remembering throughout that in adhering to the language you must take the full instrument as written. So far as taking any particular statement or any one passage is concerned, if you can infer anything reasonable from that statement itself, then you ought to do so; and if you can, you may compare that reasonable inference with what seems to be manifestly apparent in other parts of the instrument. I have to ask myself here, whether, when for the first time this instrument became operative, there was any person who could be ascertained to be within this exception. I have not succeeded in finding any such person. There was no person who was then "entitled" to the possession of the estates in question. I do not want to read the whole of the words; I think that the meaning of them is manifest. I quite agree with counsel for the respondents that this is a very short point—namely, whether there was anybody who filled that position at that time, and I think that there was not. Under these circumstances it appears to me that the plain and proper construction of this language must be simply what it says, and that the judgment of the Court of Appeal was right, and that this appeal must be dismissed with costs.

LORD MACNAGHTEN and LORD SHAND concurred.

LORD DAVEY.—My Lords: I am of the same opinion, and the reasons for my opinion are expressed in the judgment of Rigby, L.J. With regard to the case that was relied on by Cozens-Hardy, J. this is the only observation I desire to make: In *Collingwood v. Stanhope* (L. Rep. 4 H. L. 43) in this House, it appears from the report that every one of the learned Lords who gave judgment—Lord Hatherley, Lord Westbury, and Lord Cairns—pointed out that it was one of the class of cases where there had been a family settlement in which provision was made for portions of the younger children, and the eldest son took the estate. Therefore it came within that class of cases in which the principle is applied of considering what is the overriding or paramount intention—or whatever expression you choose to use; to put it more clearly, perhaps, the intention that is to be collected from the whole instrument—and that is that provision is to be made for the children generally. According to the English mode of making settlements of that kind, the eldest takes the estate and the younger children have portions provided for them, and no child who takes the estate should encroach upon the portions of the other children, but if the eldest child does not take the estate he is entitled to have a portion provided for him. All the observations to which Cozens-Hardy, J. referred in the passages which he quoted must, it appears to me, be read with reference to the case which the noble and learned Lords then had before them, which was a case of

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that description. If I may say so with respect, Cozens-Hardy, J. appears to have fallen into the converse error to that into which Lord Hatherley acknowledged that he had fallen—namely, applying the rule by which a portion is given to an eldest son who does not take the estate to a class of case to which it does not apply—overlooking the principle on which it is founded; while Cozens-Hardy, J., on the other hand, has applied the rule against double portions to a case to which it did not apply. Here the settlor was not *in loco parentis* at all. I think that the words of this exception must be construed literally—I mean according to the plain use of language; and, so construing them, I cannot doubt that the right meaning has been put upon them by the Court of Appeal. I think it not unworthy of observation that the will only came into operation in the year 1875, and neither at that time nor ever for one moment since that time, has any son of Richard Atkinson been entitled in any sense whatever to a scintilla of interest in the Cockerham estate. It could not be predicated that any son of Richard Atkinson was “entitled to the possession or to the receipt of the rents, issues, and profits” of those estates when, according to the terms of the will, the succession opened upon the death of Richard Atkinson. As I have already said, since the will became a living instrument no son of Richard Atkinson filled that description. I therefore agree that the appeal should be dismissed.

Lord BRAMPTON and Lord ROBERTSON concurred.

Lord LINDLEY.—My Lords: I am of the same opinion. I think that the whole difficulty arises on the use of the word “entitled,” and if you ask “When entitled?” the difficulty vanishes. When the succession opened on the death of Richard Atkinson, the devisee under the will of the testator at that time was not “entitled” to the Cockerham estate, and it is only by inventing a theory to the effect that the testator could not have intended the two estates to be possessed by the same person that any question arises. A reference to that is to be found in the judgment of Stirling, L.J. where his Lordship says: “So far as appears by the will it seems to me that the testator simply considered that a son who was in actual enjoyment of the Cockerham estates would not in any way require his bounty.” I think that the language is plain, and that it is not necessary to invent a theory to fit it.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Robins, Hay, Waters, and Hay.*

Solicitor for the respondents, *Robert Blyth Dode.*

Tuesday, April 29.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY.)

WIGLEY v. WILLIAM WHITTAKER AND SONS. (a)
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Employer and workman—Injury by accident—Factory—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 7, sub-s. (1).

“Employment by the undertakers in or about a factory” in sect. 7, sub-sect. (1), of the Workmen's Compensation Act 1897 means employment in or about their own factory; and therefore in a case in which the respondents, who were engineers, had contracted to put a new wheel, made in their own factory, to an engine in a factory occupied by other persons, and in the course of fixing the wheel an accident took place by which one of their workmen was injured:

Held (affirming the judgment of the court below), that they were not liable to make compensation.

Francis v. Turner Brothers (81 L. T. Rep. 770; (1900) 1 Q. B. 478) followed.

THIS was an appeal from a judgment of the Court of Appeal (Smith, M.R., Collins and Romer, L.J.J.), reported under the name of *Smith v. Bagley and Wright and others* (84 L. T. Rep. 415; (1901) 1 K. B. 780), dismissing an appeal by Sarah Ann Wrigley against an award made by the judge of the Oldham County Court, on the 7th Feb. 1901, in an arbitration under the Workmen's Compensation Act 1897, in which the appellant was applicant, and Messrs. Bagley and Wright and the respondents, Messrs. William Whittaker and Sons, were respondents. This appeal was from the order only so far as it concerned the respondents, Messrs. William Whittaker and Sons. The appellant was the widow and administratrix of Joseph Wrigley, an operative millwright, who, at the time of the accident resulting in his death, was in the employ of the respondents, Messrs. William Whittaker and Sons, millwrights, of Oldham. At the time of the accident Wrigley was employed under Messrs. William Whittaker and Sons, as contractors in repairing the engine at the factory or mill called Wellington Mills, in the occupation of Messrs. Bagley and Wright. The accident took place on the 2nd Sept. 1900. Wrigley's earnings for the past three years had exceeded 600*l.*; and the appellant, as his widow and legal personal representative, claimed for herself and her two infant children, as the dependants of the deceased workman, 300*l.* compensation, to be apportioned according to the discretion of the arbitrator. The respondents by their answer denied their liability on the ground that the employment of Wrigley was not an employment to which the Act applied. On the 7th Feb. 1901 the arbitration came on for hearing, when the following facts were admitted or proved: That the respondents were engaged in fixing a new driving wheel (or fly wheel) to the engine which turned the machinery in the Wellington Mills; that the work was being done under a written contract, which provided that Messrs. Bagley and Wright were to furnish the unskilled labour, whilst the skilled labour and the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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lifting tackle and the wheel itself were to be furnished by Messrs. William Whittaker and Sons; that blocks were used for the purpose of fixing the said wheel—a three-sheafed block was fixed to the ceiling, and another three-sheafed block was fixed to the portion of the wheel to be lifted, the lifting being performed by means of pulleys attached to a double-handed winch, of which the handles were turned by hand. The County Court judge found that the pulleys and winch did not constitute “machinery driven by steam, water, or other mechanical power” within sect. 7, sub-sect. 2, of the Act, being of opinion that the driving power in this case was hand power and not mechanical, and directed an award to be entered in favour of the respondents. The Court of Appeal affirmed the award, and also held that the respondents were not liable as “undertakers” in respect of the “factory” in which the accident took place.

This latter point was not argued, as it was admitted that it was governed by the decision of the Court of Appeal in the case of *Francis v. Turner Brothers* (81 L. T. Rep. 770; (1900) 1 Q. B. 478), from which this was in fact an appeal.

Asquith, K.C., J. Montefiore, and Clement Edwards appeared for the appellant.

Cripps, K.C. and F. H. Mellor, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellant their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: After hearing the arguments that have been addressed to your Lordships I must say there seems to me to be no ground for this appeal. The thing done was done not in a factory at all. When I say “not in a factory at all,” the place where the thing happened was, it is true, a factory for some other purposes, but not a factory within the meaning of these words, which I think obviously mean a factory where the original employers of the man were manufacturing—in this case big iron wheels. If the accident had happened there, I agree that there would no doubt have been a liability, but in this case there was nothing of the sort. The act of manufacturing the wheel was complete and past. The wheel when completed was sent somewhere else. I will assume for this purpose (though I am sure I do not know whether it is the fact or not) that the place to which the wheel was sent was a factory; but it was a factory in another sense, and to say that you can put those two things together seems to me to be absolutely absurd. The thing that was being done was what is described as fitting the wheel to a cotton mill where the persons who were to pay for it wanted to have it put. Something was done there by a person sent by the original manufacturers, entirely away from their own place of manufacture, and an accident happened. I am wholly unable to put those two propositions together so as to make it possible to argue that thereupon there was an accident happening in the course of the employment in or about the factory, which was for the manufacture of iron wheels. I need not say any more about the case. It seems to me that the appeal is absolutely unarguable, and I move your Lordships that it be dismissed.

Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Mills, Lockyer, and Mills*, for D. E. Griffiths, Oldham.

Solicitors for the respondents, *R. B. Wheatley and Sons*, for *Cobbett, Wheeler, and Cobbett*, Manchester.

Dec. 2, 3, 1901, and May 16, 1902.

(Before the LORD CHANCELLOR (Halsbury), Lords SHAND, DAVEY, BRAMPTON, and ROBERTSON.)

COOPER AND CRANE v. WRIGHT. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Employer and workman—Injury by accident—Compensation—Undertaker—Sub-contractor—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), ss. 4, 7.

In the case of a building, a sub-contractor may be an “undertaker” within the meaning of the Workmen's Compensation Act 1897, and consequently where a workman employed by the sub-contractor has been injured by an accident in the course of his employment, and has recovered compensation from the principal contractor, such principal contractor is entitled to be indemnified by the sub-contractor.

Judgment of the court below reversed, Lords Brampton and Robertson dissenting.

Cass v. Butler (82 L. T. Rep. 182; (1900) 1 Q. B. 777) overruled.

THIS was an appeal from a judgment of the Court of Appeal (Smith, Collins, and Romer, L.J.J.) dated the 3rd March 1900, reversing an order in favour of the appellants made by the County Court judge of Nottingham on the 27th Oct. 1899.

The question was whether when an “undertaker” or person doing the whole of a piece of work contracts with another for part of it, and a labourer in the employment of the latter is killed or injured, and compensation is paid by the undertaker, he is entitled to indemnity from the sub-contractor, the man's immediate employer.

In 1899 Messrs. Cooper and Crane had contracted to erect a building. They arranged with the respondent Wright to do all the slating work. A labourer employed by Wright was killed by an accident. Compensation—217*l.*—was awarded to his widow against Cooper and Crane, who claimed a right to be indemnified by Wright.

The County Court judge held them entitled to this indemnity, but his decision was reversed by the Court of Appeal, on the authority of the case of *Cass v. Butler* (82 L. T. Rep. 182; (1900) 1 Q. B. 777), from which decision this case was in fact an appeal.

The facts are fully set out in the judgment of Lord Brampton.

Llewelyn Davies and T. Lindley appeared for the appellants and argued that the decision in *Cass v. Butler* (*ubi sup.*) was wrong, and that a sub-contractor was an “undertaker” within the meaning of the Act, and was bound to indemnify

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

the contractor against liability for an accident to one of the sub-contractor's workmen. *Mason v. Dean* (82 L. T. Rep. 139; (1900) 1 Q. B. 770) cannot be reconciled with *Cass v. Butler*, and should be followed in preference to it. There is no common law liability; it depends entirely on the statute. Sect. 4 makes the respondent liable, as well as the appellants, and he is an "undertaker" within the meaning of sect. 7. *Hoddinott v. Newton, Chambers, and Co.* (84 L. T. Rep. 1; (1901) A. C. 49) decides that any work on a building is "construction." See also

Cooper v. Davenport, 16 Times L. Rep. 266.

Ruegg, K.C. and *Clavell Salter*, for the respondent, contended that if the appellants' argument was sound, any person who came on to a building in the course of construction to do a small job might become liable as an undertaker. The employer is defined as the "undertaker" in sect. 7, but the "contractor" referred to in sect. 4 is not necessarily an "undertaker." *Cass v. Butler* was rightly decided, and if *Mason v. Dean* cannot be distinguished from it, it was wrong. The small sub-contractor is not the person aimed at by the Act, though he may come on to a building to which the Act applies. Wright was not "the" person undertaking the construction of the building, even if he was "an" undertaker.

Llewellyn Davies was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 16.—Their Lordships gave judgment as follows:—

LORD ROBERTSON.—My Lords: Like all your Lordships, I have found this a most unsatisfactory question to decide. It can hardly be called a question of legal construction, the problem being how to patch up certain statutory enactments which are incoherent and almost contradictory. The Court of Appeal have adopted a view of which I can only say that it had seemed to me as good and as little exposed to objection as the competing theory; and accordingly I should not have felt justified in disturbing their judgment. But Lord Brampton has examined the subject with great care and skill; I have read his opinion with the more attention because it was not in accordance with the opinions of my friends opposite; and to the negative, although adequate, reason already given for my not voting for reversal, my noble and learned friend's arguments have enabled me to add an affirmative opinion that his conclusion is right.

LORD BRAMPTON.—My Lords: This is an appeal against a decision of the Court of Appeal setting aside an order of the County Court judge for Nottinghamshire, requiring the respondent to indemnify the appellants, as the undertakers for the construction of a building, against an award of compensation made upon them in respect of an accident causing fatal injury to a workman employed by the respondent, a sub-contractor with the appellants for the slating work of the building. The question for your Lordships' decision has arisen out of the following circumstances: Early in the year 1899, in which all the events hereinafter mentioned occurred, Barker and Co., as building owners, being desirous of having a building erected for them at Nottingham, according, as usual, to plans and

specifications, entered into a contract with the appellants—Cooper and Crane, a firm of builders—by which they undertook to construct for the building owners the whole of such building, including the roof and slating. For their own convenience, and on their own sole responsibility, Cooper and Crane made a sub-contract with the respondent Wright, a slater, whereby he agreed to supply the slates and do for them all the slating work of the roof. Cooper and Crane began to carry out their contract with the building owners, and by means of scaffolding had constructed the building to a height exceeding 30ft., including the framework of the roof, ready to receive the slating. The respondent Wright then began to fulfil his sub-contract, and the slating work was proceeding on the 29th June, the deceased man, named Brady, being employed by Wright as a labourer to convey slates to the roof. While so engaged an accident occurred arising out of and in the course of such employment, causing him fatal injury, from which he died during the same day, leaving a widow and two children, dependants on him. In July his widow, on behalf of herself and such dependants, gave notice of the accident to Cooper and Crane and to Wright, describing it as having been caused by the breaking, collapse, or falling of a hoist or lift under circumstances which would (if proved) have given her, as the representative of her dead husband, a cause of action against one or other of them under the Employers' Liability Act 1880, but no such proof was offered. No agreement for compensation having been come to, the widow elected to avail herself of the facilities afforded for obtaining it under the Workmen's Compensation Act 1897, and with this view, on the 22nd Sept. she filed with the registrar of the County Court a request for an arbitration between herself, Cooper and Crane, and Wright, as provided by that Act, appending to that request such particulars as are required by the rules of court. Cooper and Crane by their answer denied their liability to pay any compensation to the widow on the ground (amongst others) that the deceased man was not immediately employed by them, but by Wright their sub-contractor. Alternatively they claimed against Wright an indemnity in respect of any amount which might be awarded to be paid by them. Wright by his answer denied that he was the undertaker of any work to which the Act of 1897 applies. The case was heard by the County Court judge on the 24th Oct., when, upon the facts above stated, he made his award for payment of the sum of 217l., with costs, by Cooper and Crane, as undertakers of the building, for compensation to the widow and dependants. But he made no award against Wright for payment of any compensation to the widow. A few days afterwards he made a further order (that now in question), whereby, after reciting the award I have just mentioned, he found that Wright was the original employer of the deceased man, that he had under his sub-contract with Cooper and Crane, the undertakers, himself undertaken the slating of the roof, and so become the person who undertook the construction of a substantial part of the building within the meaning of sect. 7, sub-sect. 2 of the Act. Upon these findings he made the order on Wright for the indemnity as claimed. There was no evidence before the judge

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of any negligence, misconduct, or default on the part of anybody; nor can I find anything to lead me to think that the cause of the accident was ever investigated. No action or proceeding under the Employers' Liability Act could have been maintained against Wright. No appeal was made by Cooper and Crane against the award for compensation. Against the order for indemnity Wright appealed, and the Court of Appeal set it aside upon the ground that a mere sub-contractor is not an undertaker within the meaning of the Act. In my opinion that decision was right, and I will proceed to state my reasons for so thinking. I desire, however, first to remind your Lordships, very shortly, of the difficulties which before the Act of 1897 beset a workman who sustained injury in the course of his employment, in seeking to obtain redress, for I think that, by bearing them in mind, they will assist in enabling your Lordships to form a reasonable conjecture as to the objects which the Legislature had in view in passing that Act, and thus in interpreting the enactments contained in it, to which I shall have occasion to refer. In the first place there was no available process known to the law by which such redress could be recovered except by action at law or by proceeding under the Employers' Liability Acts; but no such action or proceeding could be successful unless the workman was in a condition to prove by legal evidence that his injury was due to actionable negligence or other misconduct or default of the person from whom he sought to recover, or some other person or persons for whose negligence he was responsible. Compensation without proof of such negligence was unheard of, and such proof was often hard to discover. Moreover, it was often extremely difficult, even when the facts were ascertained, to determine who was the person liable to be sued in the action; and to avoid such difficulties many persons were often made defendants in actions who were under no legal liability. Added to these obstacles the law itself was for the most part too uncertain, too dilatory, and far too expensive for an ordinary workman to embark in. Good illustrations of these difficulties will be found in *Wiggett v. Fox* (11 Exch. 832) and *Johnson v. Lindsay* (65 L. T. Rep. 97; (1891) A. C. 371). Having regard to this unsatisfactory state of things, it was, as I have gathered from a study of the Act, felt by the Legislature that it would be but just and right to confer upon a large class of workmen whose necessities compelled them to seek employment in certain specified dangerous occupations, in the course of which accidents not always possible to be guarded against are of frequent occurrence, some purely casual, others no doubt attributable to negligence or default of fellow workmen, whom it would be idle to sue, or others whose identity could not be established, a right to claim compensation to a moderate and limited amount in respect of the loss of such wages as they were incapacitated from earning in consequence of accidental injury, upon mere proof of the accident and its resulting loss, irrespective of its cause. Another object was to impose the obligation of providing such statutory compensation upon those to whom good sense would naturally point as the fittest persons to bear it, and to define, for the convenience of an injured workman seeking compensation, the persons from whom he was entitled to claim it; and,

further, to provide a simple proceeding, entailing comparatively trifling expense, by which such compensation might, if necessary, be enforced. To carry out these very laudable objects the Act of 1897 was passed. It is, however, so framed as to provoke rather than minimise litigation; and those who are responsible for the language of some of its enactments little knew the amount of labour which they were entailing upon those whose duty it might be to interpret them. I turn now to the Act itself, the 1st section of which enacts as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." The 7th section (1) enacts: "This Act shall apply only to employment by the undertakers as hereinafter defined, on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined, on, in, or about any building which exceeds 30ft. in height and is either being constructed or repaired by means of a scaffolding or being demolished." Sect. 7 (2) defines the meaning of the term "undertakers" in the cases of a railway, factory, quarry, laundry, or mine to be those who represent the persons or bodies actually carrying on the businesses or work so described. "In the case of a building the word 'undertakers' is declared to mean 'the persons undertaking the construction, repair, or demolition.'" Sect. 1, imposing upon "his employer" the liability to pay compensation to a workman, must be read by the light of sect. 7 (1), which enacts: "This Act shall apply only to employment by the undertakers" as defined. It follows that the general words "his employer" in sect. 1 must be read as "his employer, being also the undertaker." In this case the deceased man having been employed by Wright, the sub-contractor, and not by Cooper and Crane, the undertakers, his employment, although on the work undertaken by Cooper and Crane, was not, in my opinion, an employment to which alone the Act applies. It is obvious that the Legislature did not intend that such a workman, who had been exposed to equal risks and dangers with his fellow-workmen, should be excluded from the benefit of the Act; this is apparent from sect. 4, which in substance provides that the undertakers of works of construction of or on buildings shall be responsible for compensation to injured workmen employed by their sub-contractors as if they had been employed by the undertakers themselves. The language of this section is so important that, as I shall have to refer to it hereafter for other purposes, I have felt it convenient to set it out in full. Sect. 4: "Where in an employment to which this Act applies the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the

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workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to and is no part of or process in the trade or business carried on by such undertakers respectively." That the widow was entitled to compensation from Cooper and Crane as the undertakers seems to me to admit of no possible doubt. The judge was right, therefore, in his award of compensation against them. Even had this been open to question, no appeal against it having been made, that award was not during the argument and cannot now be questioned. The real question before your Lordships arises out of the claim of Cooper and Crane for indemnity from their sub-contractor, Wright. The case in support of that claim is thus put: That, by his sub-contract with Cooper and Crane, Wright became an "undertaker" equally with them within the meaning of the 7th section, and was in every respect under the same primary obligation to pay compensation to the widow; and that such liability was a liability imposed by sects. 1 and 7, independently of sect. 4, so as to bring him within the proviso in that section, and to give them a right to claim indemnity from him. I do not think that these propositions can be maintained. First, Wright was not an undertaker within the meaning of sect. 7 of the Act. It may be that in the ordinary common acceptance of the expression a man may be said to undertake anything which he has taken upon himself to do, with or without a contract; but this is not the interpretation contemplated by the framers of the definition clause. The Legislature, in using the expression "the undertakers," has given it a limited statutory meaning, beyond which it cannot be extended. The whole Act is new to the law; it gives new rights to workmen and imposes new obligations upon employers, and, so far as it can be, it must be strictly construed. To bring any person within the definition clause he must have undertaken some definite specific work of construction which is to form the subject of his undertaking. In this case it was for the construction of an entire building. Secondly, the contract of the undertaker must be with a person who has authority to employ and to authorise the undertaker to accomplish the work undertaken. For such a work as the construction of an entire building, as in the case before us, it seems to me that two persons or sets of persons only can fill the position of "the undertakers" defined by the Act. The building owner who takes upon himself the construction of the building which he requires, or the persons who, through the medium of a contract with him, engage to take upon themselves the obligation of executing that work for him. I carefully abstain from expressing any opinion touching the responsibility of a building owner who sub-divides the construction of a building among several contractors, because, in this case, Cooper and Crane, by their contract

with him, undertook the construction from the foundations to the top of the roof. By that contract they constituted themselves "the undertakers" of the whole building within the definition in sect. 7, sub-sect. (2). From that contract they could not recede or be discharged, unless with the assent of the building owner, until the building was completely constructed; and to the execution of their undertaking they were bound to bring their personal skill and experience and to exercise personal control over all the necessary operations. There was beyond this an obligation, attached by the statute to their undertaking, towards every workman employed by them on that work undertaken, to pay to him, in the event of injury to him by accident, compensation according to the Act. Neither the contractual obligation to the building owner nor the statutory obligation to the workman could be terminated or altered at the mere will or by any act of the undertakers. They could not assign their contract or any part of it nor could they delegate their authority or any part of it to another. It is obvious that such authority of the undertakers must emanate from the building owner himself, for no one else could confer it. In most cases, I have no doubt, it is immaterial to the building owner whether his undertaker employs his own materials and workmen or engages another to do isolated portions of the work for him; but the building owner has no contractual relations with the sub-contractor, and can only look upon him as a mere *employé* of those with whom he has himself contracted. The very name sub-contractor imports that he occupies an inferior position to the persons who have undertaken responsibility for the whole building, and that while they are bound to exercise control over his work, he cannot control any of theirs. Those who are pleased to do so may call him a sub-contractor or a sub-undertaker, for every day labourer undertakes to do his work, but he is not an undertaker as defined by the statute (see *Percival v. Garner* (1900) 2 Q. B. 406). If undertakers could add to their numbers by sub-contracts for different parts of a building there would be no limits to their number; this would greatly tend to defeat the object of the Legislature in its endeavour to assist the workmen by pointing out specifically the persons to whom he may look for compensation. Moreover, I can conceive none on whom the obligation to pay compensation could more reasonably rest than on those who, as a matter of business, have undertaken the whole control and every responsibility attaching to the erection of the building which they have undertaken to construct. One must be careful not to be led astray by cases where the building owner, as in the case of *Mason v. Dean* (82 L. T. Rep. 139; (1900) 2 Q. B. 770), has reserved out of his contract with the undertaker the execution of a portion or portions of the building which he requires to be erected, and himself contracts with some other person or persons to do such portion or portions, for there is a wide and marked difference between undertakers as defined by contracts direct with the building owners and sub-contractors with persons who are themselves already under a binding contract to undertake the whole building. I cannot see how the two positions of undertaker and sub-contractor with the undertaker for the same work

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can exist at the same time in one person, any more than that one person could at the same time be both master and servant. Yet that would be the position of Wright if, being a mere sub-contractor, he were to be treated also as the undertaker of the same work. The language of sect. 4 indicates a thorough appreciation by the Legislature of the difference between undertakers to whom the Act applies, and a sub-contractor with them for the execution of part of the work. It nowhere speaks of or refers to sub-contractors as undertakers; and if it had been intended that they should be so considered with all their obligations, it is impossible to suppose that it would not have imposed those obligations and expressed such intention in clear intelligible language. In *Cass v. Buller* (82 L. T. Rep. 182; (1900) 1 Q. B. 777) the Court of Appeal expressly held that a sub-contractor with and under those who are already undertakers is not an undertaker within the meaning of the Act, and the same was held in *Cooper v. Davenport* (16 Times L. Rep. 266). These cases are in point, and I think that they were correctly decided. I must not leave this part of the case without dealing with that which was suggested as some authority for the appellants: (*Hoddinott v. Newton, Chambers, and Co.*, 84 L. T. Rep. 1; (1901) A. C. 49). When the facts of that case are carefully considered it will be found that it really does not in the least assist the appellants. No question as to the liability of a sub-contractor arose or was discussed in it. The facts are shortly these: An entire building had been completely erected for the General Omnibus Company by a firm of builders who had undertaken its construction according to certain plans and specifications, and it had been handed over to the company and used for some months for the purposes for which it had been built. At the end of that time the company decided to have new work of construction done in it, to give it more strength, by iron supports. The whole of that new work was undertaken by contract direct from the company by Newton, Chambers, and Co., ironworkers, who were altogether unconnected with the original building. In the course of such new work a workman employed on it was killed by an accident, and his widow claimed compensation from Newton and Co. One main objection was that the new work was not work of construction. This House held that it was. Another question was whether the scaffolding used in the new work was a scaffolding under the Act. There was no sub-contract at all, for Newton and Co. contracted directly with the omnibus company. I see no similarity between that case and this. All these considerations have satisfied me that the Act by no reasonable interpretation can be held to make a mere sub-contractor an undertaker within the meaning of the Act. If I am right in this view it is admitted that the appeal must fail, for Wright does not come within the proviso to sect. 4. But even if Wright could, contrary to my opinion, be considered such an undertaker, with an obligation equal to that of Cooper and Crane to pay compensation, I fail to see upon what ground the claim of Cooper and Crane for indemnity as distinguished from contribution can be supported in this case. The common law certainly would not enable one of two persons, each equally liable to pay statutory compensation to

an injured workman, who had paid such compensation in full, to obtain indemnity against the other for the whole amount so paid. To justify such a claim some enactment by statute, or some contract between the parties, would be necessary. No such enactment or contract has been shown to exist in this case. I do not think that a doubt could be entertained that if the accident was caused by the actionable misconduct of a stranger, and the injured workman elected to proceed against the undertakers, being employers, they are, by sect. 6, entitled to indemnity from that stranger, and so indemnity might be claimed if the accident was caused by any person, whether the employer or not, under circumstances which would have entitled the injured man to maintain an action or proceedings under the Employers' Liability Act. It is very reasonable that it should be so, and I think that this is what the Act intended by the language employed. But there is not to be found in the Act anything expressly, nor as, I think, impliedly creating in the possible event of there being two or more undertakers, all being equally liable for compensation, and neither guilty of actionable negligence, an obligation of indemnity in the event of some only of them being called upon to pay. But I would point out another objection to the claim for indemnity. The proviso in sect. 4 is that "the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." Now if it could be truly said that Wright was one of the defined undertakers mentioned in that section, and that there was a common obligation as undertakers upon Cooper and Crane and Wright, how can it be said that Wright was some person other than the undertakers, treating him as a mere sub-contractor, this objection could not arise. In my opinion Cooper and Crane were the only undertakers within the definition of sect. 7, sub-sect. 2, of the Act; they admit that the award was right, and the burden of it must rest where it has fallen. If undertakers desire to cast the responsibility of an indemnity upon their sub-contractors, they must provide for it in their sub-contracts. It follows that in my opinion this appeal ought to be dismissed with costs.

Lord DAVEY.—My Lords: It is difficult to come to any conclusion on the subject of this appeal which is not open to criticism, and I can only say that I think that the conclusion to which I have come is less open to criticism than the opposite one. There are three words used in the Act—"employer," "undertaker," and "contractor"—and your Lordships are called upon to define the relative meaning in which these words are used. By sect. 1 it is enacted as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." Three conditions, therefore, are necessary under this section to give the workman a right to compensation—(1) that the employment shall be one to which this Act applies; (2) that the injury has been caused by an accident arising in the course of the employment; (3) that the workman shall be in the employment of the person from whom he claims compensation. Passing by sect. 4 for

a moment, I come to sect. 7, sub-sect. 1, which provides that the Act shall apply only to employment by "the undertakers as hereinafter defined," on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined (the words are repeated), on, in, or about any building of a certain character. We have therefore the employments to which the Act applies defined, and a fourth condition is added to those I have mentioned—viz., that the employer must be "the undertaker" as defined in sect. 7 (2). In that sub-section I find that in the case of a building "undertakers" means the "persons undertaking the construction, repair, or demolition." In other words, the undertakers are the persons who undertake. I take the liberty of saying that this is not a definition, but a mere verbal or grammatical synonym, and it affords but little assistance in construing the Act. It seems to come to nothing more than this—that the word "undertakers" in the case of a building is used in its ordinary sense, whatever that may be. It has been decided by the Court of Appeal in *Mason v. Dean* (*ubi sup.*) that a person who has contracted with a building owner for part only of the work of construction is an "undertaker" within the meaning of the Act. I think this decision right, for otherwise it appears to me that a workman of such an employer would not get any compensation under the Act at all, and it is quite immaterial for that purpose what the extent or nature of his employer's contract may be, provided that the work on which the injured workman is employed is within the Act. Indeed, I think that the point is covered by implication, though not expressly, by the decision in *Hoddinott v. Newton, Chambers, and Co.* (*ubi sup.*). Persons who undertake a part only of the work of construction are therefore within the definition of undertakers. Nor can I find anything in the definition which requires the undertaking or engagement to be directly with the building owner, or excludes a sub-contractor to whom the contractor for the whole building has let a certain portion of the work. Such a person undertakes the work which he has engaged to do as literally and truly as if his contract was directly with the building owner. Confining myself, therefore, to the definition, and independently of the 4th section, I am of opinion that in the case of a building a sub-contractor may be an undertaker within the meaning of the Act, and consequently a workman employed by him who has been injured by an accident in the course of his employment would be entitled to claim compensation from him. It may be that the so-called definition is so general as to include two persons, each of whom from a different aspect may be the undertaker. Turning now to sect. 4, I regard that section as a proviso on sect. 1; it provides that in a certain case the workman may have a right to compensation from one who is not his employer. It is thereby enacted (in substance) that where "the undertakers as hereinafter defined"—i.e. (for the present purpose) persons who have undertaken in whole or in part the construction of any building—contract with another for the execution of any work, the "undertakers"—i.e., the said undertakers—shall be liable to pay compensation to a workman employed by the contractor. The words

describing the compensation which the undertakers are to pay to the workmen are these: "Any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies." Two cases are therefore contemplated—(1) where compensation is payable under the Act by the contractor—i.e., the sub-contractor; and (2) where it would be payable if he were an employer to whom the Act applies. I omit for clearness of argument compensation independently of the Act. In other words, the language of the section expressly provides for a case in which both the so-called undertakers and the sub-contractor are severally liable under the Act to pay compensation to the workman for the same injury. The section appears to give an additional remedy to the workman, and not to restrict his right under sect. 1. It may be difficult in the case of a building to suggest cases in which a sub-contractor may or may not be an employer to whom the Act applies. It would seem that a sub-contractor who has undertaken part of the work must be one or the other in all cases alike. It is, however, possible that the work undertaken by the sub-contractor might not be an employment within the meaning of the Act. But in the case of a railway, mine, or quarry (where there is a more restricted and special definition of undertakers), it is quite conceivable that a sub-contractor might not be an undertaker or employer to whom the Act applies, and probably in many cases would not be so. The language of the section is, of course, adapted to meet the case of every kind of employment within the Act. I now turn to the proviso on which the question before your Lordships turns: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." The meaning of this proviso is plain. Omit sect. 4, and ask yourself, Is any other person liable? (either under the Act or independently of the Act, I think it must mean.). I have already expressed my opinion that, excluding sect. 4 from consideration, a person who has contracted by way of sub-contract to execute work on a building would be liable, and I have pointed out that the language of the section itself contemplates that very case. In the present appeal the liability of the appellants is not questioned. The only question is whether they are entitled to be indemnified by the respondent, and that question has been argued exclusively on the construction of the Act. For the reasons which I have given I think that the appellants are right. It was argued that the construction of the appellants would oblige the sub-contractor to indemnify the principal contractor, although the accident might have been caused by the default of the latter. I do not think that this consequence would follow, for the reasons stated by the learned counsel for the appellants in his very able argument. I think that sect. 6 would place the ultimate liability on the person in default. I think that the appeal should be allowed, with the usual consequences.

LORD SHAND.—My Lords: I agree with those of your Lordships who think that in this case the appeal should be allowed and the judgment of

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the County Court judge restored, and I am content to rest my judgment on the reasons which the County Court judge has himself given. It is almost a hopeless task to attempt to reconcile or to make a consistent whole of the provisions of the Employers' Liability Act 1897 which have a bearing on the question of relief which this action raises, and I do not therefore propose to go into a detailed examination of the clauses containing these provisions. The deceased workman, Brady, was not in the employment of the appellants as a servant of theirs, yet they have been held responsible for compensation for the accident under sect. 4 of the statute, which makes them "undertakers," in the same way as if the work on the building which they had undertaken to put up in its entirety had been "executed by workmen immediately employed by them," a provision which gives a workman or his representatives greater security for the payment of compensation in case of accident than if they had to rely on the employer alone. Sect. 4 of the statute concludes with the words: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section;" and the question is whether, under this proviso, the appellants are entitled to the relief claimed. On this question I am of opinion, in the first place, that the respondents, the employers of the deceased, were themselves undertakers within the meaning of the Act, which provides by sect. 7 that, in the case of a building, that term means "the persons undertaking the construction, repair, or demolition." It is true they were sub-contractors. They were, in my opinion, none the less undertaking the construction of part of the building, the slating, and I agree with the County Court judge in thinking that this was a substantial part of the construction itself. It is clear the respondent would be an undertaker within the meaning of the Act, if his contract had been direct with the proprietor having the building erected under different contracts, and I do not think that the respondent is the less an undertaker because he was a sub-contractor for the same work, which he actually did, and in the course of which his servant, the workman, was accidentally killed. It follows that, if the action had been originally raised against the respondent alone, he would have been held liable under sect. 1 of the Act. This appears to me to show that the proviso to sect. 7, which gives the right of relief in this case, applies, for the respondent's liability arises independently of that section. It has been said that the use of the word "person" in that proviso must refer to others than persons who were themselves also undertakers under the Act, but I do not read the term as qualified in any way, if only the liability arises independently of sect. 4 itself.

The LORD CHANCELLOR (Halsbury).—My Lords: In this case a building was being constructed for Messrs. Barker and Co. by Cooper and Crane, as builders. Cooper and Crane contracted with the respondent Wright to supply slates for the roof, and perform the work of completing the roof. Wright in his turn employed a labourer named Brady to carry the slates, and in the course of that employment a lift broke and caused Brady fatal injuries. It is not denied that under the express language of the statute Brady's representatives were entitled to

compensation from Cooper and Crane. They were the persons constructing the entire building, but they had obtained a sub-contractor to construct the roof. No question therefore can be raised but that this is an employment to which the Act relates. To get out for the moment of the technical language of the statute, the substance of the matter would appear to be that Barker was the person for whom the building was being erected. Cooper and Crane were the persons who contracted to build it. Wright was the sub-contractor for the roof, and Brady was employed by Wright, who was Brady's actual employer. Now it appears to me that the general design of the statute was to enable an injured workman, or in the event of his death his representative, to make a claim for damages against the employer in the sense of a person who was constructing the building. Even if he was not the immediate employer of the person injured, the theory of the Act is that, apart from any negligence or misconduct, a man employed in certain dangerous employments shall be in a certain sense insured against any accident that takes place. It was probably obvious to the Legislature that if the workman were driven to sue a sub-contractor and could not rely upon the responsibility of the person engaged to perform the whole work, a series of sub-contracts might render it practically impossible for him to ascertain the person whom he ought to sue, or if he did to obtain satisfaction. But then the Legislature seems to have provided that, though the contractor for the whole work might be sued even by a person not immediately under his control or in his employment, yet the theory of the statute being that the employer was to be made liable, the contractor for the whole work might pursue his indemnity for the liability against the actual employer of the injured workman. Now here, of course, it cannot be denied that Wright is the actual employer, and if the design of the statute is what I have suggested, it is clear that if Messrs. Cooper and Crane, who did not employ Brady at all, are only made liable by the statute in the first instance, and the statute saves their right of indemnity against the real employer, the case is one actually contemplated by the statute, and so the County Court judge decided. The objections appear to be that Wright was not an undertaker at all; that in a popular sense he undertook the construction of the roof is admitted, that he employed Brady is admitted, that the accident happened in the course of Brady's employment under Wright in the construction of the building is also admitted, and the question is whether there is anything in the statute to show that Wright cannot be within the meaning of the statute itself as undertaker. The whole point seems to turn upon the question whether the persons who are described as undertakers must be undertakers of the whole construction, and I suppose that the argument turns upon the word "the," because the interpretation section enacts that in the case of a building the undertaker means the person undertaking the construction, repair, or demolition. If by that is meant that in order to be an undertaker the person must have undertaken the construction of the entire building, it would be an intelligible construction, though it is not the one that I should place upon the section. But if, as the

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Court of Appeal seems to have held, an undertaker does include a person who sub-contracts for a substantial part of a building, then I do not understand why in this case Wright was not an undertaker by any of the ordinary particulars by which an undertaker can be described. Wright was certainly an undertaker. He undertook a substantial part of the work—namely, the roof. He had the control and management of that part of the work. He employed Brady as a labourer in that form of employment, and I do not understand why it is suggested that he was not an undertaker, unless it is suggested that in order to be an undertaker he must take upon himself the entire contract that has been made by another person. It seems to me that this would be an unreasonable construction of the statute, which in its language is sufficiently clear. To apply therefore the language of the statute itself to the facts of this case, the employment here of Cooper and Crane was an undertaking by them, and they are in their turn undertakers. But they contracted with Wright for the execution of certain work—namely, the roof. But by the language of the statute they are made liable if such work were executed by workmen not immediately employed by them, but on the work for which they contracted. They must pay compensation under the Act to those workmen in respect of any accident arising out of and in the course of such employment. That is the liability imposed upon Cooper and Crane, nor have they denied their liability, nor appealed against the judgment. But while providing that the building contractors shall be liable, the section goes on to provide that they are entitled to be indemnified by any other person who would have been liable independently of that section. Observe that it is not independent of the statute, but of the section. Whether the enactment is felicitously worded or not, when one looks at the section and the proviso together, I think that it can hardly be doubted that the meaning of it was that where part of the work is let out, although the builder of the entire structure shall in the first instance be liable for injury to the workmen employed by the sub-contractor, nevertheless he is not the actual employer, and the builders, who are thus made liable for injuries to a workman not employed by them shall have a right of indemnity against the actual employer, between whom and themselves there was no relation except that of contractors. I doubt whether the attempted definition of the word undertaker has added anything to the interpretation of the statute. Cooper and Crane undertook the whole building. Wright undertook the construction of the roof. It is in course of the construction of the roof that Wright's labourer is injured, and if it is contended that the words of sect. 4 do not apply, this consequence would follow, that Wright, apart from that section, would not be liable to Brady, although Brady was employed by him and was engaged in a building operation; and, if the argument is right, inasmuch as apart from that section Cooper and Crane would not be liable at all, the workman would have no remedy whatever; so that, though Wright [should be employing a man in a trade considered dangerous by the Act, and though in the course of that employment Wright's labourer was injured, the labourer would have no remedy. It seems to me that this

would reduce the legislation to an absurdity, and I cannot think that the Legislature could have intended such a result. Put this case. Suppose there was no one who undertook the construction of the whole building. The owner is not in any sense the undertaker. The different contractors undertook to construct each a different substantial part of one building; there would be no person who undertook the whole building. Then suppose this very accident occurs. Who is liable? No one, if the objection is a good one; and yet one of the contractors would be an employer of a man who by this hypothesis is engaged in a work which the statute has regarded as dangerous; yet he would have no remedy. I think this cannot have been intended. I am not quite certain what is meant by Lord Brampton when he uses the phrase "the building owner." I do not understand whether he means a person who means to have a building built for him or a person who himself undertakes the actual construction. I agree that the Act does not apply to a man who takes no such part at all, but by four or five different contracts places out the building to four or five different builders. If he did this, there would be no undertaker and no compensation. This seems to me to show that, looking at the whole purview of the section in question, it cannot have been intended. In these circumstances I think the judgment of the Court of Appeal wrong and I move that it be reversed.

Judgment appealed from reversed. Respondent to pay to the appellants their costs in this House and in the court below.

Solicitors for the appellants, *Mason, Edwards, and Mason*, for *B. H. Beaumont*, Nottingham.

Solicitors for the respondent, *Mackrell, Maton, Godlee, and Quincey*.

Judicial Committee of the Privy Council.

April 15 and June 5.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY, and Sir FORD NORTH.)

COMMISSIONERS OF TAXATION v. ANTILL. (a)
ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Land and Income Tax Assessment Act 1895—Deductions.

A lessee of Crown lands in New South Wales is not entitled to deduct from the taxable amount of his income "a sum representing the fair rental value of the said leasehold premises and improvements thereon" for the current year, as being a "loss, outgoing, or expense actually incurred in the production of his income" within sect. 28, sub-sect. (i.) of the Land and Income Tax Assessment Act 1895.

Judgment of the court below reversed.

THIS was an appeal from a judgment of the Supreme Court of the State of New South Wales (Darley, C.J., Owen and Simpson, JJ.) upon a special case stated by the Court of Review under sect. 45 of the Land and Income Tax Assessment Act 1895 (59 Vict. No. 15) on appeal by the

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respondent from an assessment for income tax made by the appellants.

The facts appear sufficiently from the judgment of their Lordships, in which the material sections of the Act are also set out.

Asquith, K.C. and Vaughan Hawkins appeared for the appellants.

Cohen, K.C. and T. T. Paine for the respondent.

Vaughan Hawkins was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 5.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—This appeal raises a question under the Land and Income Tax Assessment Act 1895. The appeal is against a judgment of the Supreme Court of New South Wales on a special case stated by the Court of Review under sect. 45. The appellants are the Commissioners of Taxation. It appears from the special case which was founded on admissions made for the purpose of the appeal to the supreme court that Mr. Antill the present respondent carried on business as a grazier on a station or run called Mara, held under lease from the Crown. The special case set forth: (1) The sum paid by Mr. Antill for the purchase of the station from the prior lessees; (2) the rent payable to the Crown; (3) the term unexpired; (4) the value of the improvements at the time of Mr. Antill's purchase; (5) the amount spent on improvements by Mr. Antill after the purchase; (6) the present value of Mr. Antill's interest; (7) the fair rental value of the premises apart from improvements over and above the rent payable to the Crown; (8) the present value of Mr. Antill's interest in the improvements; and (9) the fair rental value of such improvements. The question on which the decision of the supreme court was pronounced was whether or not Mr. Antill was entitled to deduct or have deducted from the taxable amount of his income for the year 1899 "a sum representing the fair rental value of the said leasehold premises and improvements thereon for that year." The full court, consisting of Darley, C.J. and Owen and Simpson JJ., answered that question in the affirmative. The Act of 1895 imposes both a land tax and an income tax. Under Parts 2 and 3 of the Act the land tax is to be assessed on the unimproved value of all lands with certain exceptions. It is common ground that the holding known as Mara station falls within the exception of "Crown lands" and is exempt from land tax. The provisions as to income tax are contained in Part 4 of the Act, beginning with sect. 15. By sect. 15 it is declared that subject to the provisions of the Act income tax is to be levied in respect of the annual amount of all incomes exceeding 200*l.* per annum:

(i.) Arising or accruing to any person whosoever residing from any profession, trade, employment, or vocation carried on in New South Wales, whether the same be carried on by such person or on his behalf wholly or in part by any other person. . . . (iii.) Derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown. (iv.) Arising or accruing to any person whosoever residing from any kind of property except from land subject to land tax as hereinafter specifically excepted, or from any other

source whatsoever in New South Wales not included in the preceding sub-sections.

Under sect. 17 certain incomes, including "income derived from the ownership of land subject to land tax" and "income derived directly from the use or cultivation of land subject to land tax," are exempt from income tax. Sects. 27 and 28, so far as material for the present question, are as follows:

Sect. 27. For the purpose of ascertaining the sum hereinafter termed "taxable amount" on which (subject to the deductions hereinafter mentioned) income tax is payable, the following direction and provisions shall be observed and carried out: (i.) The amount of taxable income from all sources for the year immediately preceding the year of assessment shall be taken as the basis of calculation. . . . (iii.) No tax shall be payable in respect of income earned outside the colony of New South Wales. . . . (vi.) In all other cases the taxable amount shall be the total amount of taxable income arising or accruing to any person from all sources except to the extent of the exemptions provided by sect. 17.

Sect. 28. From the taxable amount so ascertained as aforesaid every taxpayer shall be entitled to deductions in respect of the annual amount of (i.) Losses, outgoings including interest and expenses actually incurred in New South Wales by the taxpayer in the production of his income.

It may be observed in passing that a taxpayer occupying for the purpose of business any land in respect of which land tax is payable by him is authorised by sub-sect. (vi.) of sect. 28 to "deduct a sum equal to 5 per cent. on the amount of the unimproved value of such lands plus 5 per cent. on the amount of the value of the improvements thereon which are used and required for the purposes of such business." No such deduction, however, is authorised in the case of a taxpayer who occupies for the purpose of business land not subject to land tax. The result of these enactments seems to be that the only deductions which Mr. Antill was entitled to make from the income arising or accruing to him from Mara station were those specified in sect. 28, sub-sect. (i.). In the opinion of their Lordships the deduction sanctioned by the full court under the head of "fair rental value of the leasehold premises and improvements thereon" is not an outgoing loss or expense within the meaning of that sub-section. The learned Chief Justice thought that it fell "exactly within the word 'expenses.'" His view was that the word "income" as used in the Act of 1895 was equivalent to the expression "balance of gains and profits" in "the English Act." "The thing taxed," he said, "is the same in both Acts," and he relied on some well-known decisions in England in cases under sched. D. His learned colleagues agreed with the Chief Justice. Owen, J. was clearly of opinion that the principle in "the Act of 1895" and "the English Act" was the same. "They both," he said, "impose a tax on net income and net income only." Simpson, J. was of the same opinion, principally for the reason that the tax was an income tax. "Income," he said, "means profit." The terms were, he thought, "synonymous." Their Lordships may observe that the case of *Russell v. Town and County Bank* (59 L. T. Rep. 481; 13 App. Cas. 418), on which Owen, J. relied, has little or no bearing on the question. It merely decided that bank buildings used by a bank for the pur-

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poses of its business were not used as a "dwelling-house" within the meaning of one of the rules under sched. D, although an official of the bank was required to reside there. Instead of collecting income tax by separate returns under different schedules of charge as is the case under the income tax code in force in this country, the Act of 1895 in force in New South Wales first imposes a land tax upon all lands in the State with certain exceptions, and then requires inclusive returns of all income arising from any kind of property in the State except from land subject to land tax. The Act of 1895 differs so much both in its general scheme and in its language from the income tax code in force in the United Kingdom, that it is difficult to see how decisions in cases under sched. D, which imposes the tax on trade and professional incomes in this country, can be any guide to the construction of the Land and Income Tax Assessment Act of 1895. Their Lordships are of opinion that the decision of the full court cannot be supported, and they will therefore humbly advise His Majesty that the order of that court should be varied by answering in the negative the question which has been answered in the affirmative. Having regard to the terms on which leave to appeal was granted, and to the fact that the difficulty was in a great measure due to directions issued by the Commissioners of Taxation, their Lordships are of opinion that the costs of the respondent of this appeal, although it has been successful, ought to be paid by the appellants.

Solicitors: for the appellants, *Light and Galbraith*; for the respondent, *Paines, Blyth, and Huxtable*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 20 and 23.

(Before WILLIAMS, ROMER, and STIRLING, L.JJ.)
Re DRUCKER; *Ex parte* THE TRUSTEE v. BIRMINGHAM DISTRICT AND COUNTIES BANKING COMPANY LIMITED. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Property of debtor—Act of bankruptcy—Petition—Charge by debtor on his property in favour of his solicitor—Payment by debtor's solicitors to petitioning creditor to obtain dismissal of petition—Advance for special purpose—Trust—Adjudication—Right of trustee to repayment.

The respondent company had presented a bankruptcy petition against the debtor, the act of bankruptcy being the non-compliance with a bankruptcy notice issued by another creditor. This petition, in pursuance of an arrangement between the solicitors for the debtor and the respondent company, was by consent dismissed in consideration of 300*l.* paid by the debtor's solicitors' own cheque. On the previous day the debtor had given his solicitors, to whom he owed 328*l.*, a

charge of 628*l.* on certain property. The solicitor for the respondent company stated that he understood that the money was not the debtor's, but was provided by his friends.

Held, by Wright, J., that the money in question never formed part of the debtor's general assets, having been advanced by his solicitors out of their own money impressed with a trust for the purpose of being applied towards the discharge of the debtor's indebtedness to the respondent bank.

Re Snyder; *Ex parte* Pixley (8 Mor. 127) distinguished.

Held, by the Court of Appeal, that the facts as found by Wright, J. were correct and the case was within *Re* Rogers; *Ex parte* Holland (8 Mor. 243), and therefore his decision must be affirmed.

THIS was a motion by the trustee in the bankruptcy for a declaration that a sum of 300*l.* paid to the respondent company on the 15th Feb. 1901 formed part of the property of the debtor.

On the 24th Jan. 1901 the respondent company, to whom the debtor owed 999*l.* 19*s.* 5*d.*, presented a bankruptcy petition against the debtor, the act of bankruptcy being the non-compliance with a bankruptcy notice issued by a creditor named Belton on the 4th Dec. 1900.

On the 14th Feb. Messrs. Beyfus and Beyfus, the debtor's solicitors, obtained the following charge from the debtor:

To Philip and Alfred Beyfus.—In consideration of the sum of three hundred pounds this day advanced by you to me and also in consideration of the costs, charges, and expenses for work done by you as my solicitors and moneys expended by you for me, amounting to three hundred and twenty-eight pounds, thirteen shillings, and sevenpence, now due and owing by me to you, making together the sum of six hundred and twenty-eight pounds, thirteen shillings, and sevenpence, I hereby charge in your favour and that of your executors, administrators, and assigns with payment of such said sum and also with payment of all moneys hereafter to be advanced by you to me and also with payment of all costs and charges and expenses hereafter to become due and owing by me to you as such solicitors all that my interest in, &c.

On the 15th Feb. the petition presented by the respondent company came on for hearing, and was by consent dismissed in consideration of a cheque for £300 drawn by Messrs. Beyfus and Beyfus in favour of the bank, in pursuance of an arrangement previously entered into between the solicitors.

The solicitor for the respondents stated that he understood that the money was not the debtor's money, and that the debtor's solicitors informed him that the debtor's relatives were very wealthy people, who would help the debtor so long as there was no receiving order against him.

A receiving order was afterwards made against the debtor and he was adjudicated a bankrupt, and this was a motion by the trustee in that bankruptcy.

The motion was heard by Wright, J. on the 5th May.

H. Reed, K.C. and Carrington for the trustee in bankruptcy.—This sum of 300*l.* was received by the respondent company with knowledge of an act of bankruptcy; it formed part of the property of the debtor, and must therefore be repaid. They referred to

Re Snyder; *Ex parte* Pixley, 8 Mor. 127;

Re Rogers; *Ex parte* Holland, 8 Mor. 243.

(a) Reported by J. ANWYL THEOBALD and W. C. BISS Esqrs., Barristers-at-Law.

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Muir Mackenzie and *J. G. Joseph* for the respondent bank.—This money never formed part of the property of the bankrupt as part of his assets divisible amongst his creditors. If it was advanced to the bankrupt by Messrs. Beyfus and Beyfus, the general principle of which *Cohen v. Mitchell* (63 L. T. Rep. 206; 25 Q. B. Div. 262) is an instance applies:

Re Rogers; Ex parte Woodthorpe, 8 Man. 236.

This transaction is covered by the judgment of Lindley, L.J. in *Re Rogers; Ex parte Holland* (*ubi sup.*). This money paid by Beyfus and Beyfus was not the bankrupt's money, but the bankrupt through his solicitors paid part of his debt with money lent by his solicitors, and, even though received with knowledge of an act of bankruptcy, the payment cannot be impeached by the trustee. The conclusion to be drawn from the facts is a different one from that drawn in *Re Snyder; Ex parte Pizley* (*ubi sup.*). This money was obtained as a loan after the commission of an act of bankruptcy, and is in the same position as after-acquired property, and can be disposed of by the bankrupt before the trustee intervenes:

Mercer v. Vans Colina, 78 L. T. Rep. 21; (1900) 1 Q. B. 180.

Messrs. Beyfus and Beyfus would not have been able to prove in the bankruptcy, because they had notice of an act of bankruptcy; they were therefore obliged to take the charge. This money was paid to a creditor for valuable consideration, and is in exactly the same position as if the bankrupt had after his adjudication borrowed money and paid it away, in which case his trustee could not follow it.

H. Reed, K.C. in reply.—This money can be followed:

Ward v. Fry, 85 L. T. Rep. 394.

Re Snyder; Ex parte Pizley (*ubi sup.*) is a binding authority. It is a most astonishing proposition that money under such circumstances can be retained if the receiver merely states that he believed it was not the debtor's money.

WRIGHT, J.—I have not to consider to-day whether the charge which Mr. Drucker gave to Messrs. Beyfus and Beyfus can be sustained or whether it might not be attacked by the trustee. All that I have to consider is whether this money, which was paid to the respondents, the Birmingham Bank, was the money of Drucker or not. Now, it is not a very easy matter, either in point of law or in point of fact, to decide, but, if the 300l. ever became Drucker's money, it is plain that Drucker might spend it or do whatever he pleased with it—as Mr. Mackenzie points out, he might have speculated with it or done what he liked with it. But what I find is that it never came into Drucker's hands at all, and I am clearly of opinion that it never was intended to come into Drucker's hands at all. It is quite clear that Messrs. Beyfus and Beyfus would never have consented to that money going out of their hands into those of Drucker, or being applied for any other purpose whatever, except the settlement of the petition by the Birmingham Bank. Messrs. Beyfus and Beyfus themselves could not have applied it to any other purpose after the arrangement which they had made with the respondents' solicitor on the one hand and Drucker on the other. Nor, as I have said, could Drucker have

applied it to any other purpose. The charge is contemporaneous with the arrangement that is made with the respondents' solicitor, and, although the charge on the face of it treats this as a loan by Messrs. Beyfus and Beyfus to Drucker, that cannot alter the real character of the transaction if the real character was inconsistent with the way in which it is described in the charge. I cannot help thinking that this money was never free and never became part of the general assets of Drucker at all. He never had any right to receive it, or use it, or apply it to any purpose except this one particular purpose. Under these circumstances it seems to me it was impressed with a trust—not in the strict sense of the word trust—but in substance with a trust that it should be applied by Messrs. Beyfus and Beyfus out of their own money for the discharge *pro tanto* of the claim of the bank. That being so, the present application of the trustee in Drucker's bankruptcy fails. I say nothing about any possible application to get rid of the charge. I do not know whether it would succeed or not.

From this decision the trustee appealed.

H. Reed, K.C. and *Carrington* for the appellant.

Muir Mackenzie and *J. G. Joseph* for the bank.

WILLIAMS, L.J.—The only question it is necessary for us to decide is between the trustee in Drucker's bankruptcy and the bank. I am of opinion that if we accept the findings of fact by Wright, J. this case is absolutely concluded by that of *Re Rogers; Ex parte Holland* (*ubi sup.*). That puts an end to the whole matter unless we are prepared to differ from the conclusion of Wright, J. as to the facts; but I think on this evidence it is impossible to come to any other conclusion than that to which he came. I think it impossible to doubt that this money was impressed with a trust for the purpose of being applied towards the discharge of this debt, and *Re Rogers* was decided on the fact that the money was impressed with a trust, and therefore never became the property of the debtor. I am of opinion, therefore, that the decision of Wright, J. was correct as to the facts and the law. The appeal will be dismissed with costs.

ROMER, L.J.—I am of the same opinion. In my opinion there never was a time at which this money could be used except for the purpose to which it was applied.

STIRLING, L.J.—I agree. I cannot differ from the decision of Wright, J. as I am not prepared to differ from his findings of fact.

Solicitors: *King, Wigg, and Co.*; *Ernest Salaman, Fort, and Co.*, agents for *Alfred Green*, Birmingham.

[CT. OF APP.]

Re CRICHTON'S OIL COMPANY LIMITED.

[CT. OF APP.]

April 26 and 28.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

Re CRICHTON'S OIL COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Profits of last year of working—No dividend declared before winding-up—Surplus assets—Previous loss of capital—Rights of preference shareholders.

By the memorandum of association of C.'s Oil Company Limited it was provided (the capital being divided into preference and ordinary shares) that the preference shareholders should be entitled to a fixed cumulative preferential dividend of 5 per cent. per annum on the capital paid up thereon, subject to the company's articles of association, which provided that "in the event of the winding-up of the company the surplus assets shall be distributed between the holders of preference and ordinary shares according to the amount paid up thereon"; "that the profits of the company from time to time available for dividend shall . . . be applicable: First, to the payment of the fixed cumulative preferential dividend on the preference shares in the original capital. Secondly, the surplus shall be applicable to the payment of dividends on the other shares in proportion to the capital paid up thereon, but the whole or any part thereof may be carried to reserve or otherwise dealt with as the directors, with the sanction of the company in general meeting, may from time to time determine"; that the company in general meeting might declare a dividend to be paid to the members; that no dividend should be payable except out of the profits arising from the business of the company; and that if the company should be wound-up and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should, subject to the earlier provision as to distribution, be distributed so that as nearly as might be the losses should be borne by contributors in proportion to the capital paid up, or which ought to have been paid up, on the shares in respect of which they were contributors at the commencement of the winding-up. But this clause was to be without prejudice to the rights of holders of shares issued upon special conditions. The assets of the company, exclusive of the profits made in the last year of its working, had been sold to an agent for a new company. No profits had been previously made since the year 1896 (except about 25*l.* in the year 1899), and no dividend had been paid to the preference shareholders; and at the date of the contract for sale there was a debit of over 4000*l.* standing in the books of the company for such losses.

The preference shareholders now contended that the amount of the profits of the last year's working should be distributed among them as dividend.

Held, that, no dividend having been recommended by the directors or declared by the company in general meeting, the preference shareholders' claim failed, and those profits must be divided as capital among all the shareholders rateably.

Decision of Wright, J. (84 L. T. Rep. 864) affirmed.

(a) Reported by W. C. BISH, Esq., Barrister-at-Law.

Re Bridgwater Navigation Company (64 L. T. Rep. 576) distinguished.

Bishop v. Smyrna and Cassaba Railway Company (73 L. T. Rep. 337) considered.

THE Crichton's Oil Company Limited was registered in March 1889, and went into voluntary liquidation in Aug. 1900. This was an application by the liquidators to determine the question whether the sum of 1875*l.* 6*s.* 11*d.*, being the amount of the profit appearing by the books to have been made by the company on its trading for the year ending the 31st March 1900, or any and what part of such sum ought (notwithstanding a previously existing debit to profit and loss) to be distributed in the liquidation as dividend among the holders of preference shares, or how otherwise such sum ought to be dealt with.

By the memorandum of association, clause 5, it was provided:

The capital of the company is 40,000*l.*, divided into 400 preference shares of 10*l.* each and 3600 ordinary shares of 10*l.* each. The said preference shares shall confer on the holders the right to a fixed accumulative preferential dividend at the rate of 5*l.* per cent. per annum on the capital paid up thereon, subject to the provisions of the company's articles of association; and any new capital may be issued with any preferential, deferred, or special rights and privileges which may be assigned thereto by or in accordance with the regulations of the company for the time being.

By the articles of association it was provided (in clause 6) that the holders of the preference shares for the time being should be entitled to a cumulative preferential dividend at the rate of 5*l.* per cent. per annum, payable half-yearly, on the 1st Sept. and the 1st March; and that, in the event of the winding-up of the company, the surplus assets should be distributed between the holders of the preference shares and ordinary shares according to the amount paid up thereon.

The articles further provided:

Clause 103. The directors shall be intrusted with the following powers—namely, power . . . (14) from time to time to set aside out of the profits of the company or otherwise such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, for redeeming debenture stock, and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and to invest the several sums so set aside upon such investments as they think fit [other than company's own shares], and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company; and to divide the reserve fund into such special funds as they think fit, with full power to employ the assets for the time being constituting the reserve fund in the business of the company, and that without being obliged to keep the same separate from the other assets of the company. But so much only of the reserve fund as represents profits shall be applicable to the payment of dividends.

Clause 108. The profits of the company from time to time available for dividends shall, subject to the provisions hereinbefore contained, be applicable: First, to the payment of the fixed cumulative preferential dividend on the preference shares in the original capital. Secondly, the surplus shall be applicable to the payment of the dividends on the other shares in proportion to the capital paid up thereon, but the whole or any part thereof may be carried to reserve or otherwise dealt with, as the directors, with the sanction of the company in general meeting, may from time to time determine.

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Clause 110. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits, and may fix the time for payment.

Clause 111. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.

Clause 112. No dividend shall be payable except out of the profits arising from the business of the company.

Clause 113. The directors may from time to time pay such monthly or interim dividends as in their judgment the position of the company justifies.

Clause 139. If the company shall be wound-up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall, subject to clause 6, section b, be distributed so that, as nearly as may be, the losses shall be borne by contributories in proportion to the capital paid up, or which ought to have been paid up, on the shares in respect of which they are contributories at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions.

All the preference shares and 1804 of the ordinary shares were fully paid up. No dividends on the preference shares had been paid after the 28th Feb. 1896.

By the last balance-sheet made out before the company went into voluntary liquidation there was on the 31st March 1899 a debit balance on profit and loss account of 4346l. 3s.

The company executed an agreement on the 3rd Aug. 1900 for the sale to a trustee on behalf of another company intended to be formed of all its undertakings and assets, but excepting any undivided net profits of the business of the vendor company appearing in the balance-sheet for the year ending the 31st March 1900; and, by a subsequently prepared account, the profit on this year was shown to be the sum of 1675l. 6s. 11d.

At the meeting held on the 23rd July, when it was resolved that this agreement should be executed, a resolution was passed for the voluntary winding-up of the company, which was confirmed as a special resolution on the 8th Aug.

The preference shareholders now claimed that this sum of profit should be devoted to paying a cumulative dividend on the preference shares under art. 108 from the 28th Feb. 1896, when the last dividend was paid.

The application was heard by Wright, J., who held (84 L. T. Rep. 864) that, no dividend having been recommended by the directors or declared by the company in general meeting, the preference shareholders' claim failed, and they appealed.

Dunham for the appellants.—The preference shareholders are entitled to have this profit for the year divided in payment of the cumulative dividend to which they are entitled under art. 108. It is income and not capital:

Re Bridgewater Navigation Company, 64 L. T. Rep. 576; (1891) 1 Ch. 155; (1891) 2 Ch. 317;

Bishop v. Smyrna and Cassaba Railway Company, 73 L. T. Rep. 337; (1895) 2 Ch. 596.

If the company were a going concern, the directors could not have been compelled to declare a dividend; but now the company is in liquidation, and therefore all the provisions as to the declaration of a dividend are gone. Therefore the money must be applied as income or capital, and, as it is profit within art. 108, the preference

shareholders are entitled to it. They have an inchoate right to the profit, subject to the directors under the articles diverting it for another purpose and not recommending any dividend. This money is not surplus assets within art. 139. Surplus assets means what remains after payment of debts and preferential claims. Regard must be paid to the last clause of the article. These shares were issued on special conditions. They are entitled to a fixed accumulative preferential dividend of 5l. per cent. The case of *Re Odessa Waterworks Company Limited* (1901) 2 Ch. 190, n) does not apply. *Byrne, J.* did not decide any principle in that case, but merely construed the particular articles of that company which were different to those under consideration here. In this case this money is profit and ought to be distributed as profit. He also referred to

Re Barrow Hematite Steel Company, 83 L. T. Rep. 397; 85 L. T. Rep. 493; (1900) 2 Ch. 846; (1901) 2 Ch. 746;

Lee v. Neuchâtel Asphalts Company, 61 L. T. Rep. 11; 41 Ch. Div. 1;

Dovey v. Cory, 85 L. T. Rep. 257; (1901) A. C. 477.

Cassel, for the ordinary shareholders, and *Kirby*, for the liquidator, were not called on.

COLLINS, M.R. (after stating the facts, continued:—) The solution of the question in this case depends on the construction of the memorandum and articles of association of the company. Clause 5 of the memorandum gives the preference shareholders a right to a fixed cumulative preferential dividend of 5 per cent., subject to the provisions of the articles of association. Then art. 6 provides what is to happen, first, while the company is a going concern, and, secondly, when it is being wound up. In the latter event the surplus assets are to be distributed between the holders of preference shares and ordinary shares, according to the amount paid up thereon. [His Lordship then referred to the other articles set out above, and continued:] Now, that being the scheme which regulates the rights of the different classes of shareholders, it is contended that, there being this sum of 1675l., which represents profits earned—that is, the excess of income over expenditure—between March 1899 and the time when the winding-up commenced, it is distributable among the preference shareholders as dividend. That contention is met with this difficulty: first, that the directors have not exercised their discretion in recommending the declaration of any dividend, and no doubt after the commencement of the liquidation they could not do so. But it is said that this is immaterial and that the preference shareholders would have had a right to a dividend if the company were a going concern and the directors had not exercised their discretion in carrying the 1675l. to a reserve fund, and that, as the directors cannot exercise that discretion now, the preference shareholders are entitled to the funds, although no dividend was declared during the last year of the company's existence. In my opinion that argument cannot be sustained. Art. 6 distinguishes between what is to be done while the company is a going concern and what is to be done when it is being wound-up. I think the sum in question must be treated as "surplus assets" within that article, the meaning of surplus assets being what is

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left after all the outside liabilities of the company have been satisfied. Then comes art. 139, with which, if I am right as to the meaning of "surplus assets," Mr. Dunham would have had great difficulty in dealing but for the final sentence in it. Can he rely on that proviso as excepting the preference shareholders from the previous part of the clause? He said that the preference shares were issued on special conditions, and that there can be no "surplus assets" until the claims of the preference shareholders have been disposed of. I can see no ground, however, for giving to the term "surplus assets" any other meaning than the sum remaining after all outside claims have been satisfied. What protection then does the final sentence of art. 139 give to the rights of the preference shareholders? What are their rights? Suppose the company had been a going concern, what right would they have had to this sum of 1675*l*? Their right would have been subject to the discretion of the directors as to the application of the fund. Can the circumstance that the directors have had no opportunity of exercising their discretion give the preference shareholders an absolute right to the fund which, if the directors had exercised their discretion, they would probably not have given to the preference shareholders? I think it cannot. I think the presumption is that the directors would not have applied this sum to paying a dividend to the preference shareholders. But it is not necessary to go so far. The onus is on the preference shareholders to show that the condition which would give them a right to the fund has been fulfilled, and this they have not done. I think, upon the construction of the memorandum and articles, their claim fails, and that the decision of Wright, J. must be affirmed. Several authorities have been referred to, but I do not think they have any direct bearing on the point for decision in this case. The case of *Re Bridgwater Navigation Company* (*ubi sup.*), so far as it goes, is an authority adverse to the claim of the preference shareholders. The articles of that company contained a clause (85) which was very strongly in favour of the right of the shareholders to a dividend after the winding-up. The capital had been all repaid to the shareholders, and all the outside claims had been satisfied, and the question was, what was then to be done with the surplus? North, J. held that under the special circumstances of that case the mere fact that a dividend had not been declared before the winding-up did not defeat the right of the shareholders to be paid a dividend. That case differs from the present case in its most salient points. Reliance was also placed in the decision of Kekewich, J. in *Bishop v. Smyrna and Cassaba Railway Company* (*ubi sup.*), which was considered by Byrne, J. in *Re Odessa Waterworks Company Limited* (*ubi sup.*), and distinguished by him from that case, a distinction which was adopted by Wright, J. in his judgment in the present case. If that is a sound distinction it shows that *Bishop v. Smyrna and Cassaba Railway Company* has no application to the present case. If it is not a sound distinction, I prefer the decision of Byrne, J. At all events, having regard to the very special terms of the memorandum and articles in *Bishop v. Smyrna and Cassaba Railway Company* (*ubi sup.*), that case cannot, I think, be an authority in favour of the present appellants.

STIRLING, L.J.—I am of the same opinion. The shares of this company were divided into preference and ordinary shares, and they were fully paid up. The preference shareholders had a right to a cumulative preferential dividend of 5 per cent. per annum upon the amount paid up thereon so long as the company was a going concern. During four years, before the commencement of the winding-up, the company did not declare any dividend, and in the first three of those years the expenditure exceeded the income, so there was a loss of capital. In the fourth year the income exceeded the expenditure to the amount of 1675*l*. No dividend has been declared, and the question is whether that sum ought to go to the preference shareholders, or whether it ought to be divided as surplus assets between the ordinary and preference shareholders according to the amount paid up on the shares as provided by the articles. The rights of the ordinary and preference shareholders are a matter of bargain, and are defined by the contract which created them. That contract is contained in the memorandum and articles of association of the company. By clause 5 of the memorandum and the 6th article the holders of the preference shares are entitled to a cumulative preference dividend of 5 per cent. *Primâ facie* a dividend means a payment made to a shareholder while the company is a going concern. After the commencement of a winding-up a dividend is no longer payable. Therefore *primâ facie* the right of the preference shareholders was limited to the payment of a preferential dividend while the company was a going concern. Then clause (b) of art. 6 provides what is to happen in the event of the winding-up of the company—namely, that the "surplus assets" are to be divided between the holders of preference and ordinary shares according to the amount paid up thereon. *Primâ facie* I think "surplus assets" means that which remains after the claims of creditors of the company and the costs of the winding-up have been satisfied. Bearing in mind the loss of capital here, I think this amount, which is the excess of income over expenditure during the last year the company traded, is "surplus assets" and ought to be dealt with as such. The other material article is 139. [His Lordship read it.] In that article I am of opinion that "surplus assets" means what remains after payment of outside claims. But the clause is to be without prejudice to the rights of holders of shares issued upon special conditions. If, therefore, the preference shareholders have any special rights, effect must no doubt be given to them. What, then, are their rights? Their rights are defined by arts. 6 and 108. Art. 108 does not give the owners of preference shares a lien on the profits simply, but only on the profits "available for dividends." I am not, at present, prepared to hold that this sum of 1675*l*. is really profit at all; but, assuming that it is, still the preference shareholders must make out that it is profit "available for dividends." All that can be said is that it might have been made "available for dividends" if the directors had thought fit to recommend a dividend to be paid out of it. This has not been done, and therefore upon the construction of the memorandum and articles I think the decision of Wright, J. was correct. I wish to add a few words out of regard for the able argument of Mr. Dunham founded

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upon the decision of North, J. in *Re Bridgewater Navigation Company (ubi sup.)*. In that case there had been no loss of capital, and it appeared that during the year before the winding-up commenced an undoubted profit had been made which had not been divided. The language of the articles was very different from that of the articles in the present case. In that case art. 83 provided "No dividend shall be paid except out of the profits of the company arising from the business of the company as shown upon the balance-sheet, which shall from time to time have been examined and passed by the auditors." Art. 86 empowered the directors to pay an interim dividend. Art. 85 provided that subject to the power of the directors to set aside out of the profits a reserve fund, &c., "the entire net profits of each year shall belong to the holders of the shares of the company and be divided *pro rata* upon the whole paid-up share capital of the company, and the directors may with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon." And North, J. said (64 L. T. Rep. 579; (1891) 1 Ch. 167) "In my opinion, the preparation of a balance-sheet is not of the essence of the matter at all. We have to consider what the rights of the shareholders are, although no balance-sheet was made up by reason of the summary determination of the company, as nearly as we can ascertain those rights by reference to what they would have been if the business had continued until the end of the year, and an ordinary balance-sheet had been arrived at." The learned judge then referred to art. 85, which was very different from any article in the articles of the company with which we are now dealing, and he said: "Now, at the end of the year, whatever profits there were available for division would have been divided by the directors. They would have been applied first of all in paying 5 per cent. to the preference shareholders, and the balance would have been distributable among the ordinary shareholders. In my opinion, such profits would, under the words of the 85th article, have belonged to the holders of the shares in the company, and at the proper time (not at that moment, as I read it) are to be divided by the directors among the shareholders. Those, therefore, are given to the shareholders in the company, and having regard to what took place subsequently to the time when this article was penned, and to the fact that the preference shareholders were to receive 5 per cent. only, this article would have to be read as if it said 'shall, after payment of the dividend to the preference shareholders, belong to and be divided *pro rata* among the ordinary shareholders of the company.' The question is, What is it that is to be so divided? In my opinion, it is the profits which would have to be divided at the end of the year, if the company had gone on to that time, and had then come to an end. In my opinion there is nothing in the summary determination of the business of the company which gives the preference shareholders a right to say that they shall receive more than interest at 5 per cent. out of the profits of that year." In that case all the creditors of the company had been paid, and all the paid-up capital had been returned to the shareholders, and art. 85 gave the entire net profits to the shareholders, and

North, J. held that the sum which had been ascertained to be profits must be applied in accordance with that article. It is different in the present case. It is not established that the excess of income over expenditure in the year before the winding-up did constitute profits at all. In *Verner v. General and Commercial Investment Trust* (70 L. T. Rep. 516, 520; (1894) 2 Ch. 239, 266), Lindley, L.J. said: "It has already been said that dividends presuppose profits of some sort, and this is unquestionably true. But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." Those observations were cited with approval by Lord Davey in *Dovey v. Cory* (85 L. T. Rep. 261; (1901) A. C. 493). Assuming the passage which I have read from the judgment of North, J. in *Re Bridgewater Navigation Company* (64 L. T. Rep. 579; (1891) 1 Ch. 167) would apply to a case like the present, in which there has been a loss of capital, what would have been done with this excess of income over expenditure if the test mentioned by Lindley, L.J. had been applied? No one can tell now. It cannot be said that this sum of 1675l. could have been properly applied in the payment of dividend. It may well be that the loss of capital was a loss of floating capital, which, according to Lindley, L.J., must be kept up. I think, therefore, it has not been shown that the preference shareholders are entitled to this money, and that the decision of Wright, J. was correct.

COZENS-HARDY, L.J.—I agree. The strength of the argument for the appellants rests, I think, on the last clause of art. 139. It is said that the preference shares were issued on special conditions, and that the rights of the preference shareholders are preserved by the final words of that article. Can that be so, having regard to the provisions of the memorandum and articles? Clause 5 of the memorandum is in terms made subject to the provisions of the articles. Art. 6 gives an exhaustive statement of the rights of the preference shareholders. It provides by clause (a) that the preference shareholders shall be entitled to a cumulative preferential dividend at the rate of 5l. per cent. per annum, and clause (b) provides not that they shall be entitled to preference as to capital, but that in the event of a winding-up the surplus assets are to be distributed between the holders of preference and ordinary shares according to the amount paid up thereon. Then art. 139 provides: [His Lordship read it.] That recognises, I think, that the rights of the preference shareholders as against the ordinary shareholders are exhaustively defined

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in art. 6. I think the clause at the end, "without prejudice to the rights of holders of shares issued upon special conditions," refers to new capital which might be issued under clause 5 of the memorandum, and does not apply to these preference shares already issued, and whose rights are dealt with by art. 6. On the construction, therefore, of the memorandum and articles, I think the preference shareholders have failed to make out any right to this money beyond a right to share in an equal distribution of it among themselves and the ordinary shareholders according to the amount paid up on their shares. It is said that *Re Bridgewater Navigation Company* (*ubi sup.*) shows that the preference shareholders have a greater right. In that case there was no article analogous to arts. 6 and 139 in the present case providing for the division of any surplus assets on a winding-up. All the capital had there been returned to the shareholders, and therefore there was no question of adjusting the account as between capital and income. The only question was on the construction of a clause which was much stronger in favour of the shareholders than any clause in the present case. With regard to *Bishop v. Smyrna and Cassaba Railway Company* (*ubi sup.*), I adopt what has been said by Collins, M.R., and if that case cannot be distinguished from *Re Odessa Waterworks Company* (*ubi sup.*), I prefer the decision of Byrne, J. in the latter case.

Solicitors: *George Reader and Co.*, agents for *Hoyle, Shipley, and Hoyle*, Newcastle-on-Tyne; *Ashurst, Morris, Crisp, and Co.*, agents for *Stanton, Atkinson, and Hudson*, Newcastle-on-Tyne.

April 30, May 3 and 6.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

Re J. C. JOHNSON AND CO. LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Practice—Debentures ranking pari passu—Omission to register part of issue—Extension of time—Protection of creditors—Rights of debenture holders inter se—Form of order—Companies Act 1900 (63 & 64 Vict. c. 48) ss. 14, 15.

Where a company resolved to issue a certain amount of debentures to rank *pari passu*, and a part only were issued before the *Companies Act 1900* came into force, and the remainder were issued afterwards, but were not registered in due time, the court extended the time for registration under sect. 15 of the Act, and directed that the order should contain such provisions as were necessary to make both sets of debentures *inter se* rank *pari passu*.

Order in *Re Joplin Brewery Company Limited* (85 L. T. Rep. 411; (1902) 1 Ch. 79) considered. *Crew v. Cummings* (59 L. T. Rep. 886; 21 Q. B. Div. 420) distinguished.

Form of order.

Whether the rights of any creditor who has not actually issued execution ought to displace the rights of those debenture-holders whose debentures were not registered until after his debt had accrued, *quære*.

IN 1899 J. C. Johnson and Co. Limited duly passed resolutions, under a power for that purpose, to issue debentures to the amount of 85,000*l.*, and in 1900 a deed was executed by which certain property was conveyed to trustees by way of mortgage to secure 1700 debentures of 50*l.* each.

By the debentures the company charged all its property, present and future, including uncalled capital for the time being, with payment of the sum secured, and each debenture was stated to be part of a series of 1700, all of which were to rank *pari passu*.

Debentures for a considerable part of this series were issued before the 1st Jan. 1901, when the *Companies Act 1900* came into operation.

After that date debentures for a further amount of the same series were issued, but, owing to a mistake, they were not registered within the time prescribed by sect. 14 of the Act. The company was in a prosperous condition, and, together with the holders of the debentures issued after the Act came into force, applied for an extension of time under the section for the purpose of registering them.

On the 21st March 1902 Kekewich, J. made an order extending the time, but, following *Re Joplin Brewery Company Limited* (85 L. T. Rep. 411; (1902) 1 Ch. 79), directed that the order should contain the words "but this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered," and he refused to direct any statement to be inserted to show that they were not to affect the priorities of the debenture-holders *inter se*.

In consequence of the illness of Kekewich, J. the case came before Joyce, J. on the 15th April, who further extended the time until the 18th May, in order to give time for an appeal, and he made the order in the same form.

The company and the holders of debentures issued after the 1st Jan. 1901 appealed, and by their notice of appeal claimed to have the above-mentioned words modified so that they should not be taken to give priority to the holders of debentures issued before the 1st Jan. 1900.

The *Companies Act 1900* provides:

Sect. 14. Every mortgage or charge created by a company after the commencement of this Act, and being either (a) a mortgage or charge for the purpose of securing any issue of debentures; or (b) a mortgage or charge on uncalled capital of the company; (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (d) a floating charge on the undertaking or property of the company; shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured.

Sect. 15. A judge of the High Court on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or misstatement of any particular with respect to any such mortgage or charge was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified.

Haldane, K.O. and Christopher James for the appellants.—These words will give the holders of debentures issued before the Act of 1900 came into force priority over those referred to in the order. They are all part of one issue of debentures, and the fundamental condition of the issue is that they shall all rank *pari passu*. In *Re Joplin Brewery Company* (85 L. T. Rep. 411; (1902) 1 Ch. 79) this point does not appear to have been raised. That case has been followed:

Re Spiral Globe Limited, 85 L. T. Rep. 778; (1902) 1 Ch. 396;

Re S. Abrahams and Sons Limited, 86 L. T. Rep. 290; (1902) 1 Ch. 695.

In *Re Spiral Globe Limited; Watson and Co. v. Spiral Globe Limited* (86 L. T. Rep. 499; (1902) 2 Ch. 209) Joyce, J. held that where the seal of the company was fixed to a series of twenty debentures in 1900, and ten were issued in that year, and the remaining ten in Jan. 1901, the latter did not require registration under sect. 14 of the Act of 1900.

Neville, K.C. and J. G. Pease for the holders of first issue of the debentures.—The practice of the court should not be departed from. The object of these words is to protect the rights of persons who had accrued rights as creditors which would be prejudicially affected if registration were allowed without saving and protecting those rights. Sect. 14 of the Bills of Sale Act 1878 gives power to a judge to extend the time for registering a bill of sale in circumstances similar to those contained in sect. 15 of the Companies Act 1900, but it has been held that the time for registration cannot be extended under that section so as to defeat the vested right of an execution creditor:

Crew v. Cummings, 59 L. T. Rep. 886; 21 Q. B. Div. 420;

Re Parsons; Ex parte Furber, 68 L. T. Rep. 777; (1893) 2 Q. B. 122.

Haldane in reply.

COLLINS, M.R.—This is an appeal from an order made by Kekewich, J. following the terms of an order made by Buckley, J., and the question arises upon the 14th and 15th sections of the Companies Act 1900. It is not disputed that this case comes within sect. 15, nor that the judge has properly exercised his discretion in enlarging the time for registration, but the point that does arise is as to a qualification upon that right which has been inserted by the last words of the order. The order states that the court, being satisfied that the omission to register was accidental, "doth, pursuant to the 15th section of the Act, order that the time for registration of the said debentures be extended unto the 18th April 1902 inclusive," and then came the words that are objected to: "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." Now, it is said by counsel for the appellants that these words are capable of being interpreted, and, in fact, *prima facie* do involve this, that that proportion of the debenture holders whose debentures were issued before the Act came into force will take priority over

those as to which this order permitting registration now is made, and he says that such a result is one that this court ought not to permit, because as regards the contract under which these debentures were created, the most fundamental provision on the matter provides that those debenture-holders are to rank *pari passu*, and that if the mere omission, under circumstances excused by the judge, is to be held to have the effect of giving different rights to these two sets of debenture-holders between themselves, by giving those whose debentures were issued before the Act came into force priority, and so put these two sets of debenture-holders upon an inequality, then that is really to defeat the fundamental provision of the contract under which the debentures were issued; and that is a consequence which ought to be avoided if the statute does not compel the court so to hold. I assume that the words in the order are capable of, and indeed *prima facie* do bear a construction which the appellants object to, and dealing with it on that footing, the question is whether or not, construed in that way, it is properly within the section as interpreted by some decisions which have already been made upon it. Now, Kekewich, J. based his decision in this case upon the decision of Buckley, J. in *Re Joplin Brewery Company* (*ubi sup.*). I do not think he gave any opinion on the matter himself, but he simply followed the form which Buckley, J. accepts. In his judgment in that case Buckley, J., after reading sect. 15, says (85 L. T. Rep. 411; (1902) 1 Ch. 81): The language of the latter section is larger than that of the former, but I do not see that the variance makes any difference to the point with which I have to deal. Under sect. 14 of the Companies Act 1900 a security if not registered within a given time is void as against the liquidator and any creditor of the company. These applications are made without serving the creditors, and the orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale." (He therefore treats the two provisions in the two Acts as analogous). "I therefore direct that there be added to the order the words 'but that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered,' and I intimate my opinion that these words ought to be added in every case, unless there is some good ground to the contrary—e.g., in cases in which the order could not prejudice the rights of any creditors." Now, those words are inserted in this order. Now, for the purposes of this application, ought there to be any doubt left as to whether the mere fact of a portion of these debentures being issued before registration became necessary, and the second part being issued after it became necessary and requiring the indulgence which is given under the 15th section, ought to make any difference between the rights of these parties *inter se*? It seems to me that it certainly ought not—that the mere fact of their debentures having been issued at a time when registration was not required does not put them and ought not to put them in any better position than those debenture-holders who have had their bonds issued to them after registration became necessary; and even although they made

a slip and did not have them registered within the proper time. How is that to be met? It seems to me that the condition under which these debenture-holders took their securities was that, as between themselves, they were to rank *pari passu*. That agreement was made in view of the certainty that they would not in point of fact be issued at one and the same time, and it was to meet that possible contention that those who took first should have the first rights, that that provision negating that and indicating that they should take equally—*pari passu*—was introduced. Therefore, it seems to me that the mere fact of there having been a slip in the matter of registering the second set, and that the first did not require registration at the time they were issued, did not alter the rights of the parties *inter se*, and that words ought to be introduced into this order to make this practically clear. While, at the same time, the rights of these parties *inter se* ought not to be interfered with merely on the facts that I have stated, it is possible that under the section the rights of other outside persons might intervene. It is impossible to say under what circumstances they could intervene. It is not necessary for us in this case to decide whether any creditor who had not actually issued execution is a creditor who ought to be protected, and who ought to displace the rights of those who were not registered until after his debt had accrued. It is not necessary to give a decision upon the point, though I am bound to say that the judgment of Buckley, J., which purported to apply this Act on the analogy of the clause in the Bills of Sale Act does seem in these terms rather to enlarge the area to which the Bills of Sale Act was held to be limited; for, instead of dealing with the creditors who have actually issued execution—that had been the subject of this discussion under former Acts—he says this: “The orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale.” Now in the case of bills of sale, the case of *Crew v. Cummings* (*ubi sup.*) has been cited to us in the Court of Appeal, where Bowen, L.J. delivered the judgment in which Lord Esher, M.R. concurred. In that case an execution had actually been put in between the date of the execution of the bill of sale and the time of the application to enlarge the time for registration, and the court held that registration could not be extended under the 14th section of the Bills of Sale Act 1878 so as to defeat the vested right of an execution creditor. But in that case the execution had actually been put in, and the court having taken time to consider their judgment, based their judgment on the fact that a title had been acquired by the creditor who had put in execution. Bowen, L.J. said (59 L. T. Rep. 887; 21 Q. B. Div. 423): “I do not think that the Act of Parliament in giving the power to extend the time could have intended that such an extension of time should be granted after the title to the goods had actually vested in the execution creditor by reason of the failure of the holder of the bill of sale to comply with the provisions of the Act.” Now, it seems to me that that judgment is given on the footing that but for the execution put in, that the creditor would have taken no rights which might not have been interfered with by giving permission to extend the time necessary

for the registration of the bill of sale. However, it seems to me that it is not necessary for this court to decide any point about creditors, whether execution creditors or others; but what we can decide, and what I think the order ought to provide for is, that as between these two sets of debenture-holders this fact of registration and failure to register ought not to make any difference, and that their rights *inter se* ought to rank *pari passu*. The order will be considered by counsel and will be framed to meet that view, and we shall have an opportunity of considering it; but it seems to me on these grounds the order as it stands ought to be altered and that to that extent this appeal ought to be allowed.

STIRLING, L.J.—I agree.

COZENS-HARDY, L.J.—I agree. I only wish to add this, that sect. 15 indicates or points out various circumstances under which the court may exercise its jurisdiction. One of those is when the registration is not of the nature to prejudice creditors; but if there has been omission, misstatement, or inadvertence, or some other sufficient cause, the court is empowered to allow registration, although it will affect the creditors. The analogy of the Bills of Sale Act which Buckley, J. took in *Re Joplin Brewery Company Limited* (*ubi sup.*) seems to me to be very close and precise, but, speaking for myself, I doubt whether the words which he has inserted—which are a mere transcript of the common form under the Bills of Sale Act—would have any effect in protecting creditors who had not taken some proceeding to get a charge or a security upon the goods. The appeal must therefore be allowed.

The form of the order was subsequently discussed, and eventually the court approved of the following:—

“This court being satisfied that the omission to register the several debentures of the appellant company set forth in the schedule to this order within the time required by the Companies Act 1900, was accidental, doth, pursuant to the 15th section of the said Act, order that the time for registration of the said debentures be extended until the 18th of May 1902 inclusive, provided always that this order is to be without prejudice to any rights (other than rights in respect of debentures of the said series) which may have been or may be acquired against the holders of the said debentures set forth in the schedule to this order prior to the time when the last-mentioned debentures shall be actually registered. And it is hereby declared that except so far, if at all, as may be necessary for giving effect to the proviso aforesaid, such proviso shall not interfere with the rights of equality among themselves attached to all the debentures of the said series, but so that in the event of the debentures set forth in the said schedule being avoided as against parties having any such rights as are preserved by the said proviso, none of the holders of the debentures of the said series, other than the holders of the debentures set forth in the said schedule, shall by reason of such avoidance be required to accept any less share of the assets comprised in his security than he would have taken if there had been no such avoidance.”

Solicitors: *Stibbard, Gibson, and Co.*, agents for *Gibson, Pybus, and Pybus*, Newcastle-on-Tyne.

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HUGHES v. PUMP HOUSE HOTEL COMPANY LIMITED.

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Wednesday, June 11.

(Before MATHEW and COZENS-HARDY, L.JJ.).
 HUGHES v. PUMP HOUSE HOTEL COMPANY
 LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Assignment of debt—Absolute assignment in writing—Assignment of money to become due under a building contract as security for money due or to become due on a banking account—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.

By an agreement in writing, made between a builder and a banking company, the builder in consideration of the company continuing his banking account, and by way of continuing security for all moneys due or to become due by him to the company on his said account or otherwise, assigned to the company all moneys due or to become due to him from a building owner under a certain building contract. Express notice in writing of this assignment was given by the company to the building owner.

Held, that the assignment was an absolute one within sect. 25, sub-sect. 6, of the Judicature Act 1873, and was not one "by way of charge only," since by it complete control over the money payable to the builder under the building contract was passed to the banking company; and therefore the builder could not bring an action in his own name to recover from the building owner moneys payable under the building contract.

THIS was an appeal by the defendants from a judgment of Wright, J. upon a point of law raised by the pleadings in the action and ordered to be disposed of before the trial of the action.

The action was brought by a builder to recover the balance of moneys which he alleged to be due to him from the building owners under a building contract.

By a contract dated the 1st Nov. 1899 the plaintiff agreed with the defendants, the Pump House Hotel Company Limited, to build a new pump-room and make certain alterations at the Pump House Hotel at Llandrindod Wells for the sum of 6200l.

On the 7th March 1901 the plaintiff made an assignment in writing to Lloyd's Bank Limited, which contained the following clauses:

In consideration of your continuing a banking account with me . . . and by way of continuing security to you for all moneys due or to become due to you from me alone or jointly with others either on the said account or otherwise, I hereby assign to you all moneys due or to become due to me from the Pump House Hotel Company Limited of Llandrindod Wells, under or by virtue of a certain contract dated the 1st day of Nov. 1899 . . . and all other moneys, if any, due or to become due to me from the said company, including all moneys due or to become due for extras in connection with the works contemplated by the said contract. And I hereby empower you, on my behalf and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also if necessary to sue for or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned or any part thereof; and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expenses of recover-

ing the moneys hereby assigned are to be paid out of the amount recovered. And I hereby undertake at your request and my cost to do and execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created.

On the same day the bank gave notice in writing of this assignment to the defendants, and required them "not to pay the said moneys or any part thereof to any person other than Lloyd's Bank Limited without their written consent."

The bank also inclosed a written request, signed by the plaintiff, authorising and requesting the defendants to pay the said moneys to the bank, whose receipt should be a sufficient discharge.

In Oct. 1901 the builder commenced the present action against the Pump House Hotel Company, claiming 2788l. as money due to him for work done under the contract of the 1st Nov. 1899.

The defendants by their statement of defence denied that any money was due from them under the contract, and further contended that by reason of the assignment of the 7th March 1901 and the notice given by the bank, the plaintiff was not entitled to sue for the sums so assigned, and that the plaintiff had no interest in the same and no cause of action.

The plaintiff, in his reply, said that the assignment was not an absolute assignment, but was by way of charge only as a continuing security to Lloyd's Bank for all moneys due or to become due from him to them.

The point thus raised was ordered to be argued before the trial of the action.

Wright, J. held that the assignment was not an absolute one, because it was a continuing security for moneys due or to become due by the plaintiff to the bank, and that the action was therefore maintainable.

The defendants appealed.

The Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) provides as follows:

Sect. 25, sub-sect. 6. Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor . . . shall be and be deemed to have been effectual in law . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same. . . .

S. T. Evans, K.C. and R. E. L. Vaughan Williams for the defendants.—The assignment is an absolute one within sect. 25, sub-sect. 6. Under it all the plaintiff's rights passed to the bank, so that the defendants would be bound to pay to the bank any money due under their contract with the plaintiff. The plaintiff is therefore unable to sue the defendants for money payable by them under their contract. An assignment is none the less absolute within the meaning of this section because it contains a proviso for redemption, or a trust in respect of any money recovered:

Tancred v. Delagoa Bay and East Africa Railway Company, 61 L. T. Rep. 229; 23 Q. B. Div. 239;
Durham Brothers v. Robertson, 78 L. T. Rep. 438;
 (1898) 1 Q. B. 765;
Comfort v. Betts, 64 L. T. Rep. 635; (1891) 1 Q. B. 737;
Brice v. Bannister, 38 L. T. Rep. 739; 3 Q. B. Div. 569;

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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Burlinson v. Hall, 50 L. T. Rep. 723; 12 Q. B. Div. 347;

Wiesener v. Rackow, 76 L. T. Rep. 448.

They also contended that if the assignment were not absolute within sect. 25, sub-sect. 6, it was an equitable assignment, and Lloyd's Bank ought to have been joined as plaintiffs.

Lewis M. Richards for the plaintiff.—This is not an absolute assignment. It is made by way of charge only. It was made to secure the repayment of money which might become due to the bank. There cannot be an absolute assignment in respect of an unascertained sum. Moreover, the assignment only purports to be of so much of the money due to the plaintiff as will suffice to cover the money due from him to the bank. He has not assigned the whole of his rights to the money payable by the defendants:

Mercantile Bank of London v. Evans, 81 L. T. Rep. 376; (1899) 2 Q. B. 613;

Jones v. Humphreys, 85 L. T. Rep. 488; (1902) 1 K. B. 10.

Evans, K.C. in reply.

Cur. adv. vult.

June 11.—MATHEW, L.J.—This is an appeal from a judgment of Wright, J. in which he held that the assignment made by the plaintiff was not an absolute assignment within sect. 25, sub-sect. 6 of the Judicature Act 1873, but was only a charge. The learned judge held, therefore, that the action had been properly brought in the name of the assignor. The defendants contended that the assignment was an absolute one, and that therefore the action ought not to have been brought in the name of the assignor. Now, in every case of this kind the terms of the assignment must be referred to in order to find out the meaning of the document. It is clear that if no more than a charge was intended by the parties, the case is not within sect. 25, sub-sect. 6; but, on the other hand, if all the rights of the assignor were intended to pass to the assignee, the case is within the provisions of the Act. The language used in the document seems to me to indicate that the assignment was absolute. The circumstances under which it was made were these: The plaintiff was a builder, and had contracted with the defendants to erect certain buildings. Some months after he assigned to Lloyd's Bank all moneys due or to become due to him from the defendants under his contract with them, and on the same day the bank gave notice of the assignment to the defendants. When the building to be done under the contract was completed, a dispute arose as to the amount of the balance due to the builder, who eventually brought the present action claiming 2788*l*. In their statement of defence the defendants pleaded that the plaintiff, by reason of the assignment and notice, was not entitled to bring the action. Now, what was the effect of the assignment and notice? It seems perfectly clear to me that the intention was to pass to Lloyd's Bank complete control over all moneys to be paid to the plaintiff under his contract with the defendants. The bank was for all purposes in the position of the plaintiff. That being so, unless there is some difficulty in the way, it is clear that the assignment was an absolute one; that is to say, it was an assignment by which all the rights of the assignor under a certain contract were intended to pass to the

assignee. Wright, J. held that the assignment was not absolute because it was a continuing security for moneys due or to become due from the bank. If that were the true criterion, a mortgage could not be an absolute assignment within sect. 25, sub-sect. 6. A mortgage is a security, but it is an absolute assignment within the meaning of the Act, because all the rights of the mortgagor in the mortgaged property pass to the mortgagee. The principle is illustrated by the decisions of the Court of Appeal in *Comfort v. Betts* (*ubi sup.*) and in *Durham Brothers v. Robertson* (*ubi sup.*). In *Comfort v. Betts* creditors of the defendant assigned their debts to the plaintiff on the terms that he should proceed to recover the same and pay to the creditors proportionately the amount which he might be able to recover. The document was in form an absolute assignment of the debts, but it contained a trust for payment of the moneys to be recovered to the creditors. The Court of Appeal held that the assignment was an absolute one within the Act. The principle which was there acted upon is entirely applicable to the present case. The cases which the plaintiff in the present case principally relied on were *Mercantile Bank of London v. Evans* (*ubi sup.*) and *Jones v. Humphreys* (*ubi sup.*). In each of those cases general words were used, but on looking at the whole document in each case it is clear that the intention was to assign only so much of the assignor's claim as would be enough to provide the assignee with 200*l*. in the one case, and 22*l*. 10*s*. in the other. It is clear, therefore, that the true character of the assignments in those cases was that of a charge only. The distinction between those cases and the present case is plain, and it is not necessary to dwell further upon them. One of the questions raised in the argument here was whether an absolute assignment of part of a particular fund is within sect. 25. It is not necessary in this case to give any answer to that question, but it seems to me that there is much reason for saying that it is not within the Act. A further question was also raised as to who should be named as plaintiffs if this assignment were not absolute. But that question also it is not necessary to decide. In my judgment this assignment was an absolute one, and that is enough to dispose of the whole case. I think, therefore, that the appeal must be allowed.

COZENS-HARDY, L.J. read the following judgment:—The question raised by this appeal is, whether a document of the 7th March 1901 is an "absolute assignment (not purporting to be by way of charge only)" within the meaning of sect. 25, sub-sect. 6, of the Judicature Act 1873. Now, it has been repeatedly held that the word "absolute" does not mean absolute by way of sale, and that an assignment may be absolute though by way of mortgage: (see *Burlinson v. Hall* (*ubi sup.*) and *Tancred v. Delagoa Bay and East Africa Railway Company* (*ubi sup.*)). These were decisions of Divisional Courts; but the Court of Appeal has adopted the same view. In *Durham Brothers v. Robertson* (*ubi sup.*) this court held that the particular document in question was not absolute but conditional. The judgment of Chitty, L.J. is, however, very much in point. He there said: "To bring a case within the sub-section transferring the legal right to sue for the debt, and empowering the assignee to give a good discharge for the debt, there must be (in the language

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of the sub-section) an absolute assignment not purporting to be by way of charge only. It is requisite that the assignment should be, or at all events purport to be, absolute; but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within the enactment. As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred v. Delagoa Bay and East Africa Railway Company* (*ubi sup.*) there was an assignment of the debt to secure advances with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court (disapproving of a decision in *National Provincial Bank of England v. Harle*, 44 L. T. Rep. 585; 6 Q. B. Div. 626) that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute; it purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a reassignment on redemption, and the sub-section would apply to the case of such an absolute assignment." It was suggested to us in argument that this was in some way inconsistent with the subsequent case in this court of *Mercantile Bank of London v. Evans* (*ubi sup.*). I cannot, however, adopt this contention. On the construction of the particular document before them, the court held that there was not an assignment of the whole debt. The position of a mortgagee was not in any way challenged. I may observe that Smith, L.J. was a party to the decision in *Burlinson v. Hall* (*ubi sup.*). If on the construction of the document it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it cannot in my opinion be material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum, or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee. Nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance from the assignor. Both these elements were found in *Burlinson v. Hall* (*ubi sup.*). The real question, and in my opinion the only question is this, Does the instrument purport to be by way of charge only? It remains to apply these principles to the document of the 7th March 1901. In my opinion this is an absolute assignment, and it does not purport to be by way of charge only. It assigns all moneys due or to become due under the contract. It

follows that the plaintiff Hughes has no right of action, and that the order of Wright, J. must be discharged.

Appeal allowed.

Solicitors for the plaintiff, *Patersons, Snow, Bloxam, and Kinder*, for *Hadley and Dain*, Birmingham.

Solicitors for the defendants, *Vanderpump and Sons*, for *Daniel Evans*, Brecon.

Wednesday, June 25.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

ABRAHAM v. BULLOCK. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Master and servant—Negligence—Hire of carriage and driver for the use of a jeweller's traveller—Implied duty of jobmaster—Driver's duty to take care of carriage in absence of traveller—Theft of jewels from inside of carriage—Remoteness of damage.

A manufacturing jeweller hired from a jobmaster a carriage with a horse and driver at an agreed weekly sum for the express purpose of sending his traveller with a stock of jewels to go round to his customers. One day while making his rounds the traveller went into an hotel and left the carriage, with a stock of jewels inside it, in the charge of the driver. Before leaving the carriage the traveller locked the door. The driver then went into a coffee-house, leaving the carriage unattended in the street. A thief drove the carriage away and stole the jewels. The jeweller brought an action against the jobmaster to recover the value of the stolen jewels.

Held, reversing the judgment of Ridley, J. reported 85 L. T. Rep. 237, that it was the duty of the defendant to provide a driver who should take ordinary care of the carriage during the temporary absence of the traveller, and that the theft of the jewels was the natural and ordinary result of a breach of such duty, so as to make the defendant liable for the loss suffered by the plaintiff.

THIS was an appeal by the plaintiff from the judgment of Ridley, J. at the trial of the action without a jury.

The plaintiff was a manufacturer of jewellery and the defendant was a jobmaster.

The action was brought to recover 460*l.*, the agreed value of some jewellery which had been stolen in consequence, as the plaintiff alleged, of the negligence of the defendant's servant.

It had been the practice of the plaintiff to hire for the purposes of his trade a brougham, horse, and driver, and to send out a traveller every day to make the round of his customers, taking with him in the carriage a considerable stock of jewellery.

On the 21st June 1898 the defendant wrote and sent to the plaintiff the following letter:—

Gentlemen,—Referring to conversation re brougham, I shall be pleased to supply you with same brougham as you are having at 3*l.* for the five days week, payable monthly. Holidays or days it is not required to be allowed for. You can choose the brougham yourself, and I will keep the same coachman (Shed), paying him 18*s.* weekly for five days, and will try and give him

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

work the other two days with extra pay. Reply will oblige—Yours truly, T. BULLOCK.

On the 28th June the plaintiff wrote and sent the defendant the following letter:—

To Mr. T. Bullock,—Dear Sir,—In accordance with your favour of the 21st inst., please start the brougham on Monday next (the 4th July) at 9.15 a.m. We called yesterday at Messrs. Alford and Alder and saw a brougham, No. 135, which we should very much like to have, if you will call and see them not later than to-day about it, otherwise they could not get it ready in time. They would have to put a side shelf and speaking tube in it. We shall be glad if you will give this matter your immediate attention, and let us know as soon as you have arranged it.—Yours faithfully, per pro. BARNET ABRAHAMS.

The brougham in question was fitted up accordingly and was regularly used as above stated by Cohen, the plaintiff's traveller, with Shed as coachman, until June 1900. Shed then left, and his place was taken by a man named Mills, who continued to drive the brougham till the 24th Oct. 1900.

On the 24th Oct. 1900, at about one o'clock, Cohen went into an hotel in the Old Kent-road to get his luncheon.

Before going into the hotel Cohen locked up the brougham, in which was the jewellery the loss of which was the subject of this action, and left it in charge of Mills.

Mills drove the carriage a few yards and then went into a coffee tavern to get his dinner, leaving the brougham standing unattended in the street.

Someone seized the opportunity and drove off with the carriage. The carriage was only recovered late in the evening, and when it was found at Brixton the jewels that Cohen had left inside it had disappeared.

The plaintiff then brought the present action, alleging that the loss of the jewels was caused by the negligence of Mills, the defendant's servant.

The action was tried before Ridley, J. without a jury. The learned judge held that the protection of the jewels was no part of the duties of Mills, and that the traveller Cohen was the person who was responsible for their safe custody. He therefore gave judgment for the defendant.

The case is reported 85 L. T. Rep. 237.

The plaintiff appealed.

C. A. Russell, K.C. (*Sims Williams* with him) for the plaintiff.—The defendant undertook to manage the brougham properly. The coachman's duty was not limited to the mere driving of the horse. It was part of his duty to take care of the carriage when it was standing still in the temporary absence of Cohen. The defendant, as the correspondence shows, knew what was the purpose for which the plaintiff hired it—viz., for carrying about a traveller with a stock of jewellery. [He was stopped.]

Dickens, K.C. and *Schwabe* for the defendant.—The sole duty of the driver, so far as the defendant was concerned, was to drive properly. When Cohen got out of the brougham to go into a shop, leaving the jewellery in charge of Mills, he was using Mills as his servant. Mills was the general servant of the defendant, but for that special purpose he was acting as the servant of Cohen:

Donovan v. Laing, Wharton, and Down Construction Syndicate Limited, 68 L. T. Rep. 512; (1893) 1 Q. B. 629.

There was never any bailment of the jewels to the defendant's servant. Mills could not be said to have been in charge of the jewels when Cohen was in the carriage, any more than he would have been in charge of jewels in Cohen's pockets; and the mere fact of Cohen's getting out of the carriage would not transfer the possession of the jewels to Mills. Cohen knew that Mills was in the habit of leaving the carriage unattended, or he ought to have known it, and by his negligence in allowing it he contributed to the loss. Moreover, even if the defendant has, by his servant, been guilty of any negligence, the negligence was not the cause of the loss of the jewels. It is not the natural and ordinary consequence of leaving jewels in a locked-up brougham that they should be stolen:

Mayne on Damages, 6th edit., pp. 78, 90;

Re United Service Company, Johnston's Claim, 24 L. T. Rep. 115; L. Rep. 6 Ch. 212.

In a case in which a passenger claimed to recover as damages from a railway company a sum of money of which he had been robbed in consequence, as he alleged, of the company's negligence in allowing their carriage to be overcrowded, the Court of Appeal held the damage to be too remote:

Cobb v. Great Western Railway Company, 68 L. T.

Rep. 483; (1893) 1 Q. B. 459.

Lord Esher, M.R. there said: "It was the duty of the defendants not to allow their carriage to be overcrowded. But then it is necessary to show that the alleged damage was such as would naturally and ordinarily result from such breach of duty. It cannot be considered as the probable and ordinary result of allowing a compartment of a railway carriage to be overcrowded that a passenger should be robbed by his fellow-passengers. The damage alleged is too remote."

COLLINS, M.R.—I am of opinion that this appeal must be allowed. The facts of the case are simple. The plaintiff is a manufacturer of jewellery and the defendant is a jobmaster. The plaintiff entered into a contract with the defendant for the hire of a brougham with a horse and driver. The contract is contained in two letters of the 21st and the 28th June [His Lordship read the two letters which are set out *supra*]. The contract was made with reference to the intended use of the carriage by the plaintiff's traveller, and certain structural alterations were made in the interior of the carriage for the purpose of making it more convenient for his use. It is clear that when the defendant entered into the contract he was well aware of the purpose for which the plaintiff required the carriage. There was, therefore, an obligation incumbent on the defendant not only to furnish a carriage reasonably fitted and adapted for the particular purpose known to him, but also to supply a driver who should drive with care and should not in the usual way as regards taking care of the carriage in the occasional and temporary absence of the traveller. Ridley, J. came to the conclusion that the relationship created between the plaintiff and the defendant did not involve any duty on the part of the defendant to see that the carriage was safeguarded in Cohen's absence. But, in my opinion, it is a reasonable and proper inference to draw from the contract and the circumstances under which it was made, that the defendant undertook to supply a driver who would take ordinary care

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of the carriage when Cohen was obliged to leave it. Ridley, J. held that the defendant was not liable in the action on two grounds. He said: "First, the loss was the theft of the goods which was not within the scope of the driver's duty, as the servant of the defendant, to protect; so that the latter is not liable for negligence committed in performance of any duty owed by him." And then he said that, secondly, the driver was *quâ* the custody of the goods under the control of Cohen, and that Cohen was the only person responsible to the plaintiff for the safety of the jewels. As to the first point, I have already said that I think that the defendant was under an obligation to use ordinary care in looking after the carriage in Cohen's absence, and that his servant failed in that respect. As to the second point, I can see no foundation for it in the evidence before the learned judge, and therefore I cannot agree with him in his holding that the position of Cohen negatived the liability of the defendant. It seems to me that the decision of the learned judge comes to this; that the loss was due to contributory negligence by Cohen. That is to say, that Cohen knew that the driver was in the habit of leaving the carriage unattended, and that his acquiescence was such as to bar the plaintiff from relying on the negligence of the driver. But then the express findings of the learned judge negative that view. Cohen denied ever having known that Mills left the brougham unattended, and the learned judge says as to that, "I think that the proper inference to draw from this evidence is that Mills had done the same thing before, but that, if Cohen had the opportunity of knowing it, it had escaped his notice." And later on in his judgment he said: "I think that Cohen, though he did not know that the driver was in the habit of leaving the brougham unattended, ought to have known it." I cannot see the ground of the learned judge's decision. The proper view to take of the case seems to me to be simply this, that the contract involved an obligation upon the defendant that the driver he supplied should use ordinary care, not merely in driving, but in looking after the carriage when Cohen was away, and that he failed to carry out that obligation. Then it was said that the coming of the thief and his stealing the jewels introduced a new element, that the crime he committed intervened between the act of negligence on the part of the defendant and the loss suffered by the plaintiff, so that the chain of causality between them was broken. Reference was made to the case of *Cobb v. Great Western Railway Company* (*ubi sup.*), but in that case there was an obvious break in the chain between the company's negligence and the theft of the plaintiff's money. In that case the loss was caused by a fresh intervening act. In the present case the breach of duty was the direct cause of the loss. The very thing contemplated by the obligation on the defendant to take care of the carriage in Cohen's absence was the guarding against the possibility of a thief taking the jewels. If that was the object for which this duty was imposed on the defendant, it seems to me impossible to say that the stealing of the jewels by a thief was too remote a consequence of the defendant's breach of duty. For these reasons I think that the judgment of the learned judge was wrong, and that the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. It is clear from the two letters that have been read, that the defendant contracted to supply a careful driver. What, then, were the limits of the care to be shown by the driver? That question depends on the circumstances of the case. It was contended that the care to be shown by the driver was simply in driving the carriage properly, but the defendant knew the purposes for which the carriage was hired, and that the plaintiff's traveller would be frequently leaving the carriage with valuable jewels inside it. I think it was the duty of the driver to take care of the carriage when the traveller left it. It was suggested that even if the loss of the jewels was due to the carelessness of the driver supplied by the defendant, yet the driver ought to be considered as being the temporary servant of the traveller for the purpose of taking care of the jewels when the traveller left the carriage. That suggestion seems to me to be utterly remote from the real facts of the case. Then it was said that the damage suffered by the plaintiff was too remote. The answer to that is, that the loss of the jewels by theft was the very thing that was likely to follow from any omission by the driver to look after the carriage as he was bound to do. I agree that the appeal must be allowed.

COZENS-HARDY, L.J.—I agree, and have nothing to add.

Appeal allowed.

Solicitors for the plaintiff, *Hudson, Matthews, and Co.*

Solicitor for the defendant, *C. V. Whitgreave.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, May 7.

(Before KEKEWICH, J.)

BAERNARD v. GREAT WESTERN RAILWAY AND OTHERS. (a)

Railway — Compulsory powers — Right of way — Obstruction — Injunction — Compensation — Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 68 — Railway Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), ss. 16, 53, 54, 55, 58 — Great Western Railway Act 1899 (62 & 63 Vict. c. 187), ss. 5, 44.

Motion by the plaintiff to restrain the defendant railway company and their contractors from obstructing and interfering with the right of way of the plaintiff over a certain occupation road, and from permitting any railway to continue upon, and from running trains or locomotives along the road. The defendants had laid down a line which passed along the occupation road, and ran trains thereon for the purpose of carrying the plant and necessary materials for the construction of the lines authorised by the Great Western Railway Act 1899.

Held, that the plaintiff was not entitled to an injunction, but that he had his remedy by compensation under sect. 68 of the Lands Clauses Consolidation Act 1845, because his property had been injuriously affected.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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BARNARD v. GREAT WESTERN RAILWAY AND OTHERS.

[CHAN. DIV.]

THIS was a motion for an injunction to restrain the defendants, and their respective contractors, workmen, servants, and agents, from obstructing or interfering with the right of way of the plaintiff Barnard and persons authorised by him over a certain occupation road leading from Rockingham Road to Barnfield Place, in the parish of Uxbridge, and from permitting any railway line to continue upon, and from running trains or locomotives along the said occupation road.

Under the provisions of the Great Western Railway Act 1899 (which incorporated the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act 1845) the Great Western Railway are authorised to build certain railways in the neighbourhood of Uxbridge, and by sect. 5 of their Act the company are authorised to enter upon and take such of the lands delineated upon the deposited plans, and described in the deposited books of reference as may be required for the purposes of the undertaking.

Sect. 44 of the Act enacts that

All rights of way over or along the portions of roads, streets, footpaths, or highways, which shall under the provisions of this Act be stopped up, and all rights of way over any of the lands which shall under the compulsory powers of this Act be purchased or acquired, shall be and the same are hereby extinguished.

In pursuance of the powers of the Act, the defendants Pauling and Co., the contractors, laid down a line which passed along the occupation road, and ran trains thereon for the purpose of carrying the plant and necessary materials for the construction of the lines authorised by the Act.

The plaintiff, who is the owner of four houses in Barnfield Place, which leads into the occupation road, then brought this action against the railway company and the contractors.

The defendants alleged that the right of way was extinguished by virtue of sect. 44 of the Great Western Railway Act 1899, and that the plaintiff could not obtain an injunction, but must seek relief under sect. 68 of the Lands Clauses Consolidation Act 1845.

Warrington, K.C. and George Hart for the plaintiff.—Sect. 68 of the Lands Clauses Consolidation Act 1845 is not applicable to cases of temporary obstruction :

Ricket v. Metropolitan Railway Company, 16 L. T. Rep. 542 ; L. Rep. 2 H. L. 175.

The lands are not superfluous lands :

Hooper v. Bourne and Great Western Railway Company, 37 L. T. Rep. 97 ; 2 Q. B. Div. 339.

The works referred to in sect. 68 include not only the works authorised by the Great Western Railway Act 1899, but also the works authorised by the Railway Clauses Consolidation Act 1845. The construction of the line along the occupation road is not authorised by the Great Western Railway Act 1899, and the defendants can only justify their action under sect. 16 of the Railway Clauses Consolidation Act 1845, which authorises the company to do "all other acts necessary for making, maintaining, altering, or repairing and using the railway" ;

Reg. v. Wycombe Railway Company, 15 L. T. Rep. 610 ; L. Rep. 2 Q. B. 310 ;

Pugh v. Golden Valley Railway Company, 41 L. T. Rep. 30 ; 12 Ch. Div. 274.

The railway company must prove that the taking

of the land was necessary, and it is not sufficient to say that it was more convenient, and would save expense to take the land in question in preference to other land. There is no evidence that the taking of this land was necessary :

Fenwick v. East London Railway Company, L. Rep. 20 Eq. 544.

If what the defendants have done is not necessary, then the plaintiff has no remedy under sects. 53, 54, and 55 of the Railway Clauses Act 1845, and his only remedy is injunction.

Neville, K.C. and Howard Wright for the Great Western Railway Company.—The right of way was extinguished by virtue of sect. 44 of the Great Western Railway Act 1899. The railway company are doing what they are empowered to do by sect. 5 of that Act. The sections of the Railway Clauses Act 1845 cited on behalf of the plaintiff do not apply. The plaintiff, therefore, is not entitled to an injunction but to compensation under sect. 68 of the Lands Clauses Consolidation Act 1845 :

School Board for London v. Smith, 98 L. T. 424 ; (1895) W. N. 37 ;

Clark v. School Board for London, 29 L. T. Rep. 903 ; 9 Ch. App. 120.

P. O. Lawrence, K.C. and Martelli for the contractors.

Warrington, K.C. replied.

KEKEWICH, J.—This case was adjourned some weeks ago in order that the plaintiffs might have an opportunity of inspecting the title of the railway company, it being then suggested that it was possible that there was an objection to their legal title on the face of their conveyance. That objection has not been put forward now, and it is not necessary to say any more about that ; but it is necessary to say something about one or two other points that have been raised, so that we may clearly weigh and see exactly what has now to be determined. The railway company has a special Act called the Great Western Railway Act of 1899, by which they are authorised to make and construct certain railways, and by sect. 5, which is expressed in the ordinary form, they are authorised not only to make the lines but to enter upon, take, and use, such of the lands delineated on the deposited plans and described in the deposited books of reference as required for the purposes of their railway. The Lands Clauses Act is incorporated, and therefore that starts fairly to enable them to do what is necessary to acquire the lands for their railway and to construct it. But sect. 44 of the Act recognises the possibility, or one might say the high probability, of some of the lands which the company may acquire under that preceding power being subject to rights of way. And we know that as a matter of fact the particular land here in question has been conveyed to the company subject to such rights of way as existed. The landowner could only convey in that way—he could not bar the rights of way which were vested in strangers. The 44th section provides that all rights of way over the fields "which shall, under the compulsory powers of this Act, be purchased or acquired shall be and the same are hereby extinguished." Therefore the construction of those words is now reasonably plain, subject to a question as to how far the meaning of "compulsory powers" extends ; but if the lands which are now in

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dispute, or rather are the subject of litigation, had been acquired under the compulsory powers of the Act, then the right of way which the plaintiff claims would have been thereby extinguished. Now, it is common ground that in this case the land was acquired by agreement. The railway company could only acquire land which was mentioned in sect. 5, that is, described in their deposited plans and books of reference. But they could acquire it under the Lands Clauses Act in two ways—by agreement or otherwise than by agreement; and, as everyone who has had anything to do with matters of this kind knows very well, the two modes of acquiring it overlap one another—that is to say, the railway company probably, unless they have got already either what is vulgarly called a lobby agreement, or some agreement entered into immediately after the passing of the Act, serve notice to treat on all the landowners so far as they know them, of all the lands they require. Then the next question is: What has to be done towards acquiring that land? And it very often is unnecessary to fight it out to the bitter end. Either the agent of the landowner at once approaches the railway company or accepts a notice to treat; he nominates a surveyor or demands a jury, and then the two surveyors agree, or there is an agreement before the arbitrator even after the counsel have been instructed or even after the jury have been sworn. Now, what is acquired under the compulsory powers under such circumstances as I have just been mentioning I think must remain unsettled; but I have the conclusive authority of *Hooper v. Bourne* in 37 L. T. Rep. 97; 2 Q. B. Div. 339, where it was the decision of a very strong court, and where it was held that for the compulsory powers there must at any rate be a notice to treat. There was no notice to treat in this case. Here the acquisition was strictly according to the Lands Clauses Act by agreement and not otherwise than by agreement. The result is that this land was not acquired under compulsory powers, and sect. 44 does not apply, and the rights are not extinguished. It is not denied, as I understand it, that the plaintiff has a right of way, and therefore the question mainly is whether he is entitled to an injunction because he has not been paid anything for it, or whether he should not be remitted to his remedy under the 68th section of the Lands Clauses Act as being a person whose land is injuriously affected. Now, the argument on behalf of the plaintiff goes upon this, that the only way in which the railway company can properly do what they are doing, that is to say, disturb his right of way (it is not denied that they have disturbed the way), is to bring it within sect. 16 of the Railways Clauses Act 1845. That enables the railway company to do many things, including what they are doing here, and then, generally, it ends by enabling them to do "all other acts necessary for making, maintaining, altering, or repairing and using the railway." Now, it has been held in the case cited to me by Mr. Warrington conclusively that "necessary" there must be imported into the construction of the whole section, and that the railway company cannot do any of those things which they are thereby authorised to do unless they are necessary for the purpose of making, maintaining, altering, repairing, or using the railway. And it has further been held in the same case that

"necessary" means really necessary, in the strict sense of the term, not as being the most convenient thing to do, but that without which they cannot make, maintain, alter, and repair. It cannot be said here that what has been done is necessary, and therefore the plaintiff insists in that view that he is entitled to an injunction. But he says further that the same construction applies, and, as at present advised, I think the same construction must apply to sect. 53, which provides that the company, if it be found necessary to "cross, cut through, raise, sink, or use, any part of any road," they are bound to substitute another equally convenient road. If that is not done they suffer penalties under sect. 54, and there is a right of action for damages given by sect. 55. Again, in order to bring the case within those sections, it must be necessary, and it seems to me that the same construction as I say must apply to that as to sect. 16, and that the necessity is not proved. If that is the right view of the position the plaintiff is entitled to an injunction, there being no other remedy open to him. Now, the argument on the other side is a short one; but, if sound, is conclusive—namely, that these sections only apply to cases where the land is not only used by the railway company, and injuriously affected in the construction of the railway, but has been taken by the railway company, so that the railway company is really doing what it is doing on its own land so acquired. Now that seems to me to be the right view of sect. 68: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected, by the execution of the works"—I am not now dealing with any question of land having been taken; the question is injuriously affecting. Injuriouly affecting the right of way seems to me, on the face of it, to exclude the notion of the railway company having acquired the right of way, or being about to acquire the right of way. You have on one side possession, and on the other interference with possession. If the railway company are acquiring the ownership, as in this case, of an easement, they must pay for it; that will be done in the ordinary way. If, on the other hand, they are not acquiring it, and injuriouly affecting it, then there is a right of compensation under the Act, and that is the remedy which the plaintiff must pursue. The same reasoning applies to sects. 53 and 55, where it is obvious that we are dealing, not with lands acquired by the railway company, but with acts of the railway company in the construction of their railway affecting land which has not been acquired by them. Now, the answer to that is: not that these cases are not perfectly sound—of course it would be impossible to do otherwise than treat these authorities which were cited to me as doing anything else but settle the law, because Jessel, M.R. and Fry, J. really, as far as that is concerned, only followed the decision of the Court of Appeal. But what is said is this: that one of these very cases shows that a railway company is not in that happy position that they cannot plead ownership of the land as being a bar to an action. That is the case of *Fenwick v. East London Railway Company* (sup.). Now, what occurred there was this: the East London Railway Company had acquired

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some land on which they erected a mortar mill and that was held not to be necessary. That I need not further go into. But the plaintiffs were in the immediate neighbourhood of the railway and in the immediate neighbourhood of this mortar mill, and they alleged by their Bill "that the vibration and noise occasioned by the mortar mill were such as to destroy the comfort of the plaintiffs and of the occupiers of the premises and of the customers; that their manager and his wife, who resided in the house, were unable to sleep when the mortar mill was going; and that the plaintiff's business would be most seriously injured unless the mill was removed or the working thereof stopped," and they prayed for an injunction. In fact the injunction was asked according to the statement here from the Bill, in the ordinary form, to restrain them from working so as to be a nuisance. It was not a case of injuriously affecting land; it was an entirely different case of a railway company doing what they might or might not be entitled to do. The court held that they were not, because it was not necessary; but if they were doing it so as to be a nuisance the case was: "If this is necessary it may be that we are bound to submit to it, but we are not bound to submit to it if it is not necessary; therefore we are not bound to submit to the nuisance." It was a case of nuisance and not interference in any way with an easement such as I have in this case. Therefore I think that that case, so far from helping the plaintiff, shows what the distinction is, and that the general view is right. I preferred to deal with that case on that footing without referring to the case which was before myself, but really the exact point which I have now to decide was decided in *School Board for London v. Smith* (93 L. T. 424; (1895) W. N. 37). Mr. Neville called my attention to it, and remarked that it had not found its way into the Law Reports, and it is only fair to say of those who are responsible for such things that I am not at all surprised, because all I had to do was to follow the case of *Clark v. School Board for London* (29 L. T. Rep. 903; 9 Ch. App. 120) and some other cases, but particularly that case in which the very same law had been laid down. No doubt the case has some close application to this, and I am glad to think that it has been referred to here, but it adds nothing to the cases which are adapted to the precise case. There it was the School Board, and it became necessary to look at the position of the parties, because it is a little confusing; it was not a landowner coming in that case, or rather a person who claimed the right of way; he was the defendant, and he was vexed and annoyed by the School Board, who had acquired a site for a school and inclosed the site, and in inclosing the site, had cut off the defendant's right of way. The defendant of course was vexed, and the question was, What was his remedy? He thought his remedy was to pull the boarding down, which he did. Then the School Board came and wanted an injunction to prevent his pulling that boarding down, and they asked for it on the ground that the man had his remedy under the 68th section of the Lands Clauses Consolidation Act 1845, because he had been injuriously affected. That seems to me to be applicable to the present case. There the injunction went because the School Board was asking for it. Here it must be refused

because the owner of the easement is asking for it.

Motion refused with costs.

Solicitors: Woodbridge and Sons; R. E. Nelson; Slaughter and May.

Wednesday, March 26.

(Before EADY, J.)

GOPHIE DIAMOND COMPANY v. WOOD. (a)

Master and servant—Agreement not to be interested in a similar business—Servant at fixed salary—Breach of agreement.

By an agreement between a firm of jewellers and a manager at one of their establishments the latter agreed that after the determination of his engagement he would not become interested in, either directly or indirectly, a similar trade or business.

He afterwards entered the service of another firm of jewellers carrying on business in the same street as shopman at a fixed salary, not depending in any way upon profits or gross returns.

Held, that his employment as shopman at a fixed salary did not cause him to become interested, either directly or indirectly, in a similar business in breach of his agreement.

MOTION.

By an indenture dated the 12th April 1900 and made between the plaintiffs, the Gophir Diamond Company Limited, who were jewellers carrying on business at Nos. 95, 158, and 176, Regent-street, and the defendant, Algernon Hayford Wood, it was agreed that the defendant should serve the plaintiff company as manager at No. 158, Regent-street, for three years at a fixed salary, and that either of the parties might terminate the engagement at any time on giving to the other one calendar month's notice in writing, provided that the plaintiff company might terminate the engagement at any time on paying the defendant, in lieu of notice, four weeks' salary in advance; and the agreement provided as follows:

The manager will not after the termination by notice or otherwise of his engagement, either alone or jointly with, or as agent or otherwise for any other person or persons, directly or indirectly, solicit the custom of any of the customers of the company, or set up or become interested in, either directly or indirectly, a similar trade or business to that carried on by the company within a distance of twenty miles from Regent-street aforesaid, nor in anywise set up or become interested in, either directly or indirectly, any trade or business in opposition to nor in any way interfere with the trade or business of the company during the term of three years from the date of the termination of his engagement.

The defendant's engagement terminated on the 11th April 1901.

On the 17th March 1902 the defendant entered into the employment of Messrs. Goldstein and Company, jewellers, of No. 99, Regent-street, who carried on a business similar to that carried on by the plaintiff company, as assistant or salesman at a fixed salary, where his duties were to sell goods to such customers as entered the shop, but not to canvass or solicit orders from persons off the premises.

(a) Reported by J. TRUSTHAM, Esq., Barrister-at-Law.

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He received no percentage or commission on profits, and was not interested in that business in any way except as a paid servant.

On the 21st March 1902 the plaintiff company commenced an action against the defendant for an injunction to restrain him from being interested in a similar trade or business to that of the plaintiff company, and acting in violation of the agreement.

This was a motion in the action for an injunction to restrain the defendant from acting as manager, assistant, or salesman to Messrs. Goldstein and Co., or from otherwise being interested in a similar trade or business to that carried on by the plaintiff company, in violation of his agreement.

The question was whether the defendant was interested in the business of Messrs. Goldstein and Co. within the meaning of the agreement of the 12th April 1900.

Buckmaster for the motion.—The entry by the defendant into the employment of Messrs. Goldstein and Co. is a violation of his agreement with the plaintiff company, because it makes the defendant interested in the business of the former, which is in competition with that of the latter. He is interested in the success of his present employers, as if their business failed he would lose his employment, and if it succeeded his salary might be increased.

Martelli for the defendant.—The defendant is not interested in the business of his present employers within the meaning of the covenant. He is only a salesman over the counter for cash at a fixed salary, and has no pecuniary or proprietary interest in the success of the business. The agreement is not in the common form, which would prohibit the defendant from being "engaged or concerned or interested" in a similar business. It only prevents him from being "interested" in such a business, which must be construed to mean a proprietary or pecuniary interest in it:

Smith v. Hancock, 70 L. T. Rep. 578; (1894) 2 Ch. 377.

The agreement does not say interested in the success or failure of the business; and the defendant is a mere shopman at a fixed salary, and not interested in the business:

George Hill and Co. v. Hill, 55 L. T. Rep. 769.

Buckmaster in reply.—*Smith v. Hancock* (*ubi sup.*) is a case very different from the present, as there the defendant received no remuneration whatever, not even a fixed salary, from the business in question, but acted gratuitously.

EADY, J.—The question is whether the defendant has become directly or indirectly interested in the business of his present employers within the meaning of the covenant. It is conceivable that the acts of the defendant may be prejudicial to the interest of the plaintiffs, as it is open to him to injure their business by disparaging their goods when selling for his present employers. The rival shops are near one another, and the defendant's special knowledge of the plaintiffs' goods may enable him to make unfavourable comparisons. This, however, does not constitute a sufficient ground for the interference of the court unless it falls within the terms of the covenant. I ought not to strain the language of

the covenant because I think the defendant is acting improperly. The question is whether the covenant fairly construed covers the case. I am struck by the fact that the covenant departs materially from the common form. It does not provide that the defendant shall not be "engaged or concerned or interested" in a similar business to that carried on by the plaintiffs, but merely that he shall not "become interested in, either directly or indirectly, a similar trade or business"; nor does it contain the usual provision against accepting employment as a servant in a similar business. If it was intended to prevent the defendant accepting such employment, it would have been easy to say so. In *Smith v. Hancock* (*ubi sup.*) *Lindley and Smith, L.JJ.* regarded the word "interested" as referring to proprietary or pecuniary interest, and held that the husband, by assisting his wife to start a rival business to that which he had sold, had not broken his covenant not to "carry on or be in anywise interested in" any similar business, and *Smith, L.J.* says: "If the husband had performed similar acts in like circumstances for a stranger who was setting up business on his own account in my judgment it could not be said that he was in anywise interested in the business, though he had interested himself on behalf of the stranger." In other words, the mere performance of such acts of assistance was no break of the covenant. It is contended on behalf of the plaintiff company that the observations in that case apply only where the acts complained of are gratuitous, and that if they are performed for remuneration by a servant he becomes interested in the business, but I am unable to adopt that view. The covenant in the present case when fairly construed prohibits the defendant from being interested directly or indirectly in a similar business in the sense that he is not to have any pecuniary interest in the success or failure of the business. If he were remunerated by a share of the profits he would be interested in the business, but the mere fact that he is employed in it as a servant at a fixed salary gives him no such interest and does not bring him within the terms of the agreement. I must therefore refuse the motion.

Solicitors: *Downey and Linnell; E. W. Pheasant.*

KING'S BENCH DIVISION.

Tuesday, April 29.

(Before WRIGHT, J.)

TONG v. GREAT NORTHERN RAILWAY COMPANY (a)

Employer and workman—Injury owing to negligence of third person—Compensation—Action against third person—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 6.

A workman, having been injured in the course of his employment by the negligence of a third person, obtained an award under the Workmen's Compensation Act 1897 against his employer. He then brought an action against the third person claiming damages for pain and suffering, and the expenses he had been put to, and the balance of his wages.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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Held, that the action would not lie by virtue of sect. 6 of the Workmen's Compensation Act 1897.

THIS was an action brought by the plaintiff against the defendants to recover damages for personal injuries owing to the negligence of the defendants or their servants.

The plaintiff was a railway guard in the employment of the Lancashire and Yorkshire Railway Company, and the defendants, the Great Northern Railway Company, were the owners of a line between Manchester and Leeds.

On the 21st Dec. 1900 the plaintiff was on duty as a guard in the brake van of a goods train belonging to the Lancashire and Yorkshire Railway Company which was then running from Manchester to Leeds upon the railway line of the defendants.

It was alleged that by the negligence of a signman in the employment of the defendants another train belonging to the Lancashire and Yorkshire Railway Company, and running from Manchester to Leeds, came into collision with the goods train, and the plaintiff was permanently injured.

Before commencing the action the plaintiff took proceedings under the Workmen's Compensation Act 1897 against his employers, the Lancashire and Yorkshire Railway Company, in respect of the accident, and an award was made in his favour of 16s. 3d. a week, being one-half of his weekly wages and the maximum under the Act.

The plaintiff then commenced this action against the Great Northern Railway Company, claiming 1000*l.* damages, which included expenses for medical attendance, extra nourishment, travelling, extra fires and light, and for other matters, damages for pain and suffering, and also loss of wages from the date of the accident to the commencement of the action, less the amount received during that period under the award made under the Workmen's Compensation Act 1897.

The defendants pleaded in their defence that the plaintiff having taken proceedings and obtained an award in his favour against his employers the Lancashire and Yorkshire Railway Company, under the Workmen's Compensation Act 1897, by virtue of sect. 6 of that Act, the action was not maintainable.

By the Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) it is provided by sect. 6:

Where an injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may at his option proceed either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person.

It was contended on behalf of the plaintiff that although an action could not be maintained for loss of wages, yet a claim could be brought against the third person for damages for pain and suffering and expenses incurred owing to such third person's negligence.

Tindal Atkinson, K.C. (M. Lush, K.C. with him) for the defendants.—The question here is

whether the plaintiff, having made a claim under the Workmen's Compensation Act against his employers, can bring an action against the person who is alleged to have been responsible for the accident having happened. He referred to the

Workmen's Compensation Act 1897, s. 6.

[He was stopped.]

Longstaffe for the plaintiff.—I submit that the Workmen's Compensation Act deals only with compensation in respect of wages and nothing else. When one looks at how the compensation is to be arrived at, it is clear that it is based on weekly earnings. He referred to 1st schedule of the Act of 1897 (1) (b). That leaves untouched any claim that may exist for pain and suffering.

[WRIGHT, J.—Is there anything in the Act to show that the compensation given by it does not include compensation for pain and suffering?] There is nothing in the Act to show that it does, but the Act itself shows that the compensation given is for the loss of wages only.

[WRIGHT, J.—The 1st sched. (1) (a) (iii.) says: "If he leaves no dependants the reasonable expenses of his medical attendance and burial." That shows the Act deals with medical expenses.] That is in my favour. Those expenses are limited to 10*l.* and something over and above the loss of wages is expressly given in that particular case.

WRIGHT, J.—I shall require more assistance before I can give any other meaning to the section than it seems to me *prima facie* to express. Sect. 6 says that where there is a claim for compensation under the Act, and the circumstances are such as to create (now come words of the widest kind) "a legal liability in some person other than the employer to pay damages in respect thereof," the workman may proceed against either such person or his employer, but not against both. Certainly here, if the plaintiff is right in suggesting that there was negligence on the part of the defendants causing the accident, that circumstance did create a legal liability in the defendants, apart from the employer to pay damages in respect thereof. Therefore the case appears to be within the words of that part of the section used in their natural sense, and I see nothing to suggest any other meaning. Now, what is the consequence of that? The section provides that the workman may in such a case, at his option, proceed against that party to recover the ordinary damages the law allows, or he may proceed against his employer for compensation under this Act. It is quite clear that if he proceeded under this Act he would not get anything for some parts of his cause of action for which he could get something if he proceeded against these defendants. The words of the Act are "at his option proceed either at law against that person to recover damages or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person." It is quite clear that this Act does not appear to contemplate, in ordinary cases, compensation for anything but the loss of wages, but there is no hardship in holding a man to the option which this section gives him. If he is likely to get more under the ordinary law than he would get under this Act he will not claim under the Act; and if, on the other

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hand, he prefers to take his chance under the Act instead of going under the ordinary law, I see no reason why he should not be held to his option.

Judgment for the defendants.

Solicitors: *Scott Lawson and Palmer, for Arthur Willey, Leeds; R. Hill Dawe.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, Dec. 11, 1901.

(Before Sir F. JEUNE, President, and TRINITY MASTERS.)

THE PORT VICTORIA. (a)

Action in rem—Negligence—Putting out to sea to avoid collision—Loss of anchor and chain—Consumption of extra stores—Liability of wrongdoing vessel for losses incurred in consequence.

A steamship slipped her anchor and put out to sea in order to avoid a collision with another steamship, which had negligently been allowed to drag her anchor and cause danger of collision.

Held, in an action in rem, that the plaintiffs were entitled to recover the value of the anchor and chain lost, and the coals and stores consumed in consequence.

THIS was an action in rem brought by the owners of the steamship *Norman* against the owners of the steamship *Port Victoria* to recover the value of an anchor and chain lost, and of coals and stores consumed, by reason of their vessel having had to put to sea in order to avoid a collision with the *Port Victoria*.

The plaintiffs' case was, that on the 5th Oct. 1900 the *Norman*, a twin-screw steamship of 7537 tons gross register, belonging to the Union-Castle line, while on a voyage from East London to Durban with mails, passengers, and a general cargo, was lying at anchor in the outer anchorage ground, Port Natal. The *Norman* was in a safe and proper berth and was riding to a single anchor with seventy-five fathoms of chain, the weather was clear but threatening, and there was a strong breeze increasing to a moderate gale from the east with a rough and rising sea and a heavy swell. About three-quarters of a mile ahead of her the *Port Victoria*, a steamship of 3378 tons gross register, was lying with her port anchor down and forty-five fathoms of cable out, contrary to the provisions of art. 7 of the Port Regulations, which requires vessels to lay with not less than seventy fathoms of chain. About 3.20 p.m. it was noticed the *Port Victoria* was dragging her anchor and getting dangerously close to the *Norman*. The engines of the *Norman* were accordingly put slow astern and the cable veered out to 135 fathoms, but about two hours afterwards the *Port Victoria* fouled the cable of the *Norman*. Signals were then made to the *Port Victoria*, which had a tug in attendance, to slip her cable and keep clear, but nothing was done, and the *Port Victoria* continued to drift down upon the *Norman*. Eventually she came so close that the master of the *Norman* decided to slip his cable and put out to sea, where he remained until daylight the following day, when he considered it safe for him to return.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

It was agreed between the parties that the expenditure incurred for loss of anchor and chain and coals and stores consumed amounted to 308l. 1s. 6d.

The defendants admitted that the *Port Victoria* dragged her anchor and fouled the *Norman's* chain, but alleged that the *Norman*, when she arrived, anchored too close to leeward of the *Port Victoria*. As soon as the port anchor was found to be foul of the *Norman's* cable the starboard anchor was also let go, but this also fouled the cable. Both anchors were subsequently hove in again and the chains cleared, and the *Port Victoria* was manoeuvred under her own steam until this had been done. It was only after this had been done that the *Norman* slipped her cable and put out to sea. They contended that it was not necessary for the master of the *Norman* to have slipped and put out to sea, that there was no actual collision between the vessels, and that, under the circumstances, an action in rem would not lie to recover the loss.

By art. 7 of the Regulations of the Port and Harbour of Port Natal, issued in 1900 by the Natal Harbour Department:

Vessels should lay at single anchor with not less than seventy fathoms of chain out, having the second anchor ready for letting go. The anchor should be weighed and sighted occasionally, especially after bad weather. Should any accident occur by which a vessel may drift or lose an anchor, the facts of the case must be notified in writing to the port captain.

Scrutton, K.C. and Mackinnon for the plaintiffs.—The master of the *Norman* did the only prudent thing under the circumstances, and the plaintiffs are clearly entitled to recover the loss they have suffered. In an American case it has been held that where a vessel is obliged to slip her anchor in order to avoid a collision she is entitled to recover the value of the anchor and chain from the wrongdoing vessel:

The Perkins, cited in 2 Mar. Law Cas. O. S. Digest, No. 548.

Aspinall, K.C. and Lewis Noad for the defendants *contra*.—The master of the *Norman* was unduly apprehensive, and there was no real necessity for him to slip and put out to sea. The *Port Victoria* was under control, and was able to use her engines when it became necessary for her to do so. There was no collision, and under the circumstances an action in rem will not lie to recover the alleged loss.

Scrutton, K.C. in reply.

THE PRESIDENT.—I believe this is the first case exactly of this kind which has been brought in the Admiralty Court; but the principle governing the case appears to be clear, and, apparently, in America the principle has been applied in similar circumstances. It seems to me clear that if a vessel by negligence drags down towards another, and if it is a natural consequence that the other vessel is obliged to take a step which involves her in some expenditure, that is damage for which the first vessel is liable. Applying those principles to this case, the first question is, Was the *Port Victoria* negligent? Now, certainly the *Norman* was not negligent in taking up the position she did, because she appears to have given the other vessel a berth of three-quarters of a mile, and the Elder Brethren tell me that was a

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proper allowance to make, and that no fault is to be alleged against the *Norman* on account of the position she took up. Then the *Port Victoria* undoubtedly dragged down towards her. As regards negligence, I should have thought it was almost a case of *res ipsa loquitur*. It seems to me that the *Port Victoria* was driving because she had an insufficient scope of cable. She appears to have been violating the rule of the local authorities, which is that a vessel riding in that anchorage should not have less than seventy fathoms of chain—a rule no doubt prescribed on account of the knowledge possessed by the authorities of the locality, and the dangers to which vessels are there exposed. I do not inquire what exact legal force that rule has, but the *Port Victoria* chose to ride with forty-five fathoms of chain, and afterwards veered out to only sixty-five. Therefore she was not complying with that rule, and it is shown that she was using an insufficient scope of cable. Then there certainly was a bad look-out, because it was clear that nobody on board her was aware of her dragging until she had dragged a very considerable distance, indeed until she was tolerably close to the *Norman*. The result of that bad look-out was important, because the master of the *Port Victoria* may be right in saying that when he got so near to the *Norman* it might have been unwise to let go the starboard anchor, because it might bring him towards the *Norman* and prevent his going past her as he intended to do. But if those in charge of the *Port Victoria* had, in sufficient time, noticed her dragging, they could have used their starboard anchor and never have got near the *Norman* at all. That appears to me to show clearly that the *Port Victoria* was negligent in this matter. I do not say anything about the steam. No doubt the *Port Victoria* ought to have had her steam effectually available, but it is difficult to ascertain exactly what the fact was with regard to her steam; and it is not necessary to go into that question, because, on the other fact which I have mentioned, it is clear to my mind that the *Port Victoria* was negligent. Under these circumstances, was the expenditure which the *Norman* has been exposed to so far the consequence of the *Port Victoria*'s negligence as to make her liable? All that can be said against that is said in the phrase used in the evidence, that the master of the *Norman* was unduly apprehensive. That is a matter upon which I have consulted the Elder Brethren, and the view I take upon their advice is that the master of the *Norman* was, if anything, unduly patient. There was a vessel coming down towards him with the possibility, at any rate, to say nothing more, of the propeller fouling the chain in the same way as the anchor fouled the chain, and the wonder to me is that the master of the *Norman* did not take action sooner than he did. He appears to me to have exercised a great deal of patience, and to have abstained from taking any step until a time when it must have been getting on for dark, and it was high time, for the safety of the ship, to take some action. I do not see what action he could have taken except that which he did take—namely, slipping the cable and himself getting away out to sea. In those circumstances it seems to me that the *Port Victoria* is liable for what occurred, and the natural consequence appears to have been a loss of 308*l.* 1*s.* 6*d.* There will be

judgment for the plaintiffs for that sum with costs.

Solicitors for the plaintiffs, *Parker, Garrett, Holman, and Howden.*

Solicitors for the defendants, *W. A. Crump and Son.*

House of Lords.

May 12 and 13.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, and ROBERTSON.)

WILLIS AND OTHERS v. BARRON. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Solicitor and client—Variation of settlement—Duty of solicitor—Independent advice—Husband and wife.

By a post-nuptial settlement made in 1890 certain funds, the property of the husband, were settled subject to the life interest of the husband's mother, upon trust for the husband for life, and, after his death for the wife for life, and, after the death of the survivor, in trust for children, and in default of issue as the husband and wife jointly should appoint, or in default of such appointment as the survivor should appoint, and in default of appointment for the appellants, W. and S., absolutely.

The solicitor who prepared the deed, and was one of the trustees under it, was the father of S., one of the ultimate beneficiaries.

In 1891 the husband and his mother, wishing to prevent the possibility of the wife, if she survived, exercising her power of appointment in favour of a second husband, had a deed prepared by which the wife's interest, should she survive, was limited to her widowhood, and her power of appointment was excluded, and the husband was given a sole power of appointment.

This deed was prepared by the same solicitor, who stated that he explained its effect to the wife, and she was told that it was intended to correct a "mistake" in the previous settlement, and executed it in that belief, without any independent advice.

In 1893 the husband died without having exercised his power of appointment and without issue.

In 1894 a deed was executed by which the widow's interest was extended to a life interest, but in other respects confirming the deed of 1891.

In 1897 the widow married the respondent, and in 1898 commenced this action, claiming a declaration that the deed of 1891 was not binding upon her, so far as it deprived her of the power of appointment conferred on her by the deed of 1890, and that the deed of 1894 was not binding so far as it confirmed the deed of 1891.

Held (affirming the judgment of the court below), that under the circumstances the deed of 1891 must be set aside.

THIS was an appeal from a judgment of the Court of Appeal (Lindley, M.R., Rigby and Collins, L.JJ.), reported in 82 L. T. Rep. 729; (1899) 2 Ch. 578, who had reversed a judgment of Cozens-Hardy, J., reported 81 L. T. Rep. 321,

(a) Reported by O. E. MALDEN, Esq., Barrister-at-Law.

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in favour of the present appellants, the defendants in the court below.

The facts are set out in the headnote above, and appear fully in the reports in the courts below, and in the judgments of their Lordships.

Warmington, K.C. and *P. S. Stokes* appeared for the appellants.

Hughes, K.C. and *Ashton Cross*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: I have not the least doubt that this judgment ought to be affirmed, and I confess that I am a little surprised that the learned judge who heard the case originally entertained a different view, and I think that I should have treated the matter very summarily but for the learned judge having entertained that view. It seems to me that there are one or two grounds upon which the deed which it is sought to set aside by this proceeding might be impeached. I am by no means certain that, if the whole question had arisen in a court of law upon this state of the evidence, I should not as a jurymen have found upon an issue of *non est factum* that it was not her deed at all. It seems to me that she was in a position in which it was impossible to suppose that any lady under the circumstances of this case could form a judgment of her own as to what was the effect of all these settlements. And when she was told that it was for the purpose of rectifying a mistake which had been made in the deed of 1890, it seems to me that it was an untrue statement—whether consciously or unconsciously made, I will not say; but, at all events, it was not true. There was no mistake made in the deed. The deed was executed with unusual and extraordinary care. The discussions about it extended over months; corrections were made from time to time in the draft deed by the parties to it; and not until the parties began to think what different events might occur, so that the property would be held in a way which according to their then view would be unjust, did anybody dream that any mistake, in the popular and natural meaning of the word, had occurred at all. Now, let us see what the state of facts was. This young woman is told that there was a mistake in the deed. I will come presently to the mode and the circumstances in which she is told; but I assume for the present purpose, and I think it established, that she was told that there was a mistake in the deed. What must have been the condition of mind of a person who was told that? Whatever rights were given by the original deed, as I took occasion to say in the course of the argument, any self-respecting person, much more a person bound by endearing ties such as ought to exist between husband and wife, when she was told that a mistake had been made, would say at once: "If there was a mistake made I will give in at once, and I will put it right, and I will agree to anything you like to suggest." That seems to me to be the most natural and ordinary course, giving the person no extraordinary credit for virtue or self-denial. But suppose, instead of telling her that there was a mistake, they had said: "When we made this deed we gave you

certain rights, and it may happen hereafter that you will have such and such control and power over this property, which we did not think of at the time we executed the deed, but do not think that you ought to have now"; would not the attitude of mind of the person to whom such an observation as that was made be entirely different from the one which I suggested just now? It does not require argument, I think, to make that out. Now, this lady applies to a person, and the natural person to whom a wife would apply under these circumstances would be the person who had been the family solicitor, and was her husband's solicitor, apart from the question, which I cannot leave out of sight here, that he was her trustee. Then, the issue being, What was it that was said to her when she was induced to execute this deed? I find in her cross-examination—of much of which I disapprove, for from time to time words were put into her mouth as if she had said them, though she had not—what seems to me to be overwhelmingly conclusive about this matter; not a statement alone by her, but an assumption by the learned counsel who is cross-examining her: "Q.: Do you mean to tell his Lordship that you did not know perfectly well that the deed was altered in connection with what your husband had been saying? A.: No, I did not.—Q.: What do you think it was altered for? A.: To rectify mistakes that had been made.—Q.: What mistakes? A.: I do not know.—Q.: Did not you ask? A.: No, I expected it was all right.—Q.: You knew it was to alter the settlement? A.: Yes, of course it was altering it.—Q.: And you knew that after the settlement had been made your husband had complained and talked in this violent way to you about your family and about his money going to them—you knew that? A.: Only from what Mr. Skinner had said to him.—Q.: You knew it? A.: Yes.—Q.: Then you knew that according to your husband's view there was a mistake in this settlement, whatever the mistake was? A.: Yes.—Q.: And you knew that it was to rectify a mistake that he had found in the settlement. A.: Yes." Now it is manifest that what the lady is assenting to is what is actually put to her by the learned counsel who appears against her. He assumes as the result of the evidence before him—and I suppose upon his instructions that it was the state of facts—that that was what was told her. If so, it is impossible to doubt that it was a misrepresentation. It is all very well to say that the word "mistake" may be used in a popular and ambiguous sense. I am not quite certain that I understand what is meant by that. If it is meant that there was a mistake made at the time of the execution of the deed of 1890, it is not true. If it is meant that after full consideration and after the lapse of six months the parties had begun to think again what would be the effect of the deed which they had already executed with perfect knowledge and with great deliberation, and thought that the effect of it might be different from what they had at first supposed, then that is not a "mistake" in any sense, but it is something which shows that when they had considered the matter more maturely, or in view of some facts which afterwards happened, they thought, not indeed that it was a mistake at all, but that in view of events following the deed, peradventure the arrangement

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they had made in the deed might have a different effect from what they had anticipated that it would have. But what then? It was not a mistake at all. No mistake was made at the time of the execution of the deed in 1890; but they thought better of it. Suppose they had said to this lady, "We have changed our minds; we do not want to give you such rights as those we gave?"—I have already commented upon what would be the result of that. Now, with the utmost respect for the learned judge who found the other way, and for the Court of Appeal, whose judgment I think ought to be affirmed, I think that none of the courts have recognised what appears to me to be the accumulated force of all this. Here was a young woman without advice. She had begun, unfortunately, by reason of her husband's habits of drink, to contemplate a separation. She goes to this gentleman and asks him for advice. He says that he did not know that she came to him as a solicitor. He says that there was no entry in his book making her his client. It seems to me that that is really blinding one's eyes to the course of human events. She went to him as a friend. In one sense she did not go to him as a solicitor at all, I agree; but she went to him as the natural person to whom to apply for protection. He says that he stated the facts and did not advise her. I will not juggle with words. I know what she went for, from the statement of both of them—she went there to consult a friend. He was a solicitor too, and he was her trustee. Was he under no duty to his *cestui qui trust* to tell her what her rights were, and what the rights were which she was giving up? It seems to me, I confess, hardly susceptible of argument. He was under a duty as a friend, as a solicitor, and as her trustee to take care that she thoroughly understood what was the supposed error which had been made in the first instance, and to make her understand what was the effect of what she was doing. She says in the most natural way that she did not know what it was, she was told that there was a mistake, and of course he was to alter the settlement. Now, I venture to say that she did not know what the mistake was. There is not a single word from beginning to end throughout the course of the evidence given by this gentleman himself to the effect that he ever did explain to her what the "mistake," as he called it, was, and what the effect upon her rights would be. He says that he thoroughly explained the deed. We have seen the deed, and can form our own judgment of what sort of definite idea there would be in the mind of this young woman when this deed was read over to her and explained. I have thought it right to say so much out of respect for the learned judge who took a different view, although it appears to me to be abundantly clear what the judgment of the House must be. I move that this appeal be dismissed with costs.

LORD MACNAGHTEN.—My Lords: I am of the same opinion. Speaking for myself, I think this a very plain case. I do not at all concur with an observation that I find in one of the judgments of the Court of Appeal—that the case is very near the line. I think it is perfectly plain; and, although the cross-examination is somewhat protracted and diffuse and rather perplexing (I should think that it was as perplexing to the lady who was being cross-examined as it has been to

some of us who have heard it read), I think that the case lies within a very narrow compass. In my opinion it depends on some facts which have not been and cannot be controverted. In Sept. 1891 Mr. Joseph Willis, who is now dead, and his wife, who was the plaintiff (she is dead, I believe, also), afterwards Mrs. Barron, were living together. The relations between them were much strained, not on account of any fault of hers, but on account of the intemperate habits of her husband. He seems to have been drinking himself to death as fast as he could, and in his sober intervals he behaved to his wife very brutally and very coarsely. Now, at that time, under a deed made in 1890, property to the amount of about 15,000*l.* had been settled. The first life interest was given to Mrs. Ann Willis. Subject to that, there was a life interest to the husband with certain provisions intended to protect him from the consequences of his own misconduct, and then the wife had a life interest, and in the event of there being no issue, and in default of the exercise of the joint power of appointment, the survivor had an absolute power of disposition over the property. Then there was an ultimate trust for a cousin of Mr. Willis, and for Mr. Frederick Herbert Skinner. The settled property belonged entirely to Mrs. Ann Willis and Mr. Joseph Willis. The younger Mrs. Willis did not contribute anything to it, and so far as she was concerned it was a voluntary settlement; but the interest which she took under that settlement was as much hers as if she had provided or contributed to the fund. The settlement was prepared by Mr. William Moore Skinner, who seems to have been a solicitor in large practice. He was a very intimate friend of the Willis family, he was the family solicitor, and he was the father of Mr. Frederick Herbert Skinner. I do not attribute anything like dishonourable conduct to Mr. Skinner. I have read the whole of the evidence and all the letters, and I do not think that there is any ground for attributing anything dishonourable to him; but I do think that he neglected his duty on more than one occasion. I think that it was a very unfortunate thing that he permitted himself to take this gift in favour of his son without taking the ordinary precautions which the law requires in such a case. I cannot help thinking that a great deal of the difficulty in this case arises from his having neglected his duty on that occasion. As regards the plaintiff, I think that he neglected his duty over and over again—that is to say, he seems to have been under the impression that he had a duty to her, but he only fulfilled it in a sort of half-hearted manner; he did not fulfil it thoroughly. In Sept. 1891 there seems to have been a good deal of discussion between Mrs. Ann Willis and the husband and the solicitor about these unfortunate differences, as they are called, between the husband and the wife. In the course of those interviews the settlement came up for discussion, and then, apparently for the very first time, Mrs. Ann Willis and Mr. Joseph Willis expressed their dissatisfaction with the contents of the settlement, and they gave instructions to Mr. William Moore Skinner to have it altered. He laid instructions before counsel without saying anything to young Mrs. Willis, though only a few days before she had had an interview with him. She says that she was not consulting him; but I should say that

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she consulted him on a very delicate matter—that is to say, as regards her relations with her husband, and what her property was. But before he sent the instructions to counsel he did not take any instructions from her, or consult her, or even intimate to the husband and to the husband's mother that she ought to be consulted. He laid the instructions before counsel, and at the conclusion of the instructions he says: "If any difficulty should arise as regards the assent of Mrs. Willis, junior" (it is quite clear, therefore, that he had not got her assent at that time, and thought it quite possible that there might be some difficulty about it), "it is assumed the Court of the Chancery Palatine of Durham will be competent to rectify the settlement in the way desired, and that no court of law would hesitate to grant the relief asked from it." The counsel was of a very different opinion. He settled the deed as requested, and at the end of it he put this note: "As regards the action of the court, it does not appear to me that any alteration could be obtained, for, although the provisions are somewhat unusual, it seems to me clear that the settlement was made on full consideration, and the court would only interfere on the ground that the trusts were contrary to the intentions of the parties at the time of execution of the settlement. I cannot see how this could be proved to the satisfaction of the court." That is the opinion of the gentleman who was concerned in the preparation of the earlier deed, and had gone through it very carefully with Mr. Skinner. The deed was settled on the 22nd Sept. 1891. What did Mr. Skinner do then? He does not send it to the lady and explain it to her, or do anything of the kind, but he sends a fair copy of it to the husband with this letter: "Dear Sir,—We beg to inclose you a fair copy of the proposed deed to rectify your marriage settlement. Please read it over to your wife, and see if it meets her approval as well as your own. If it does, return same to us, when we will have it engrossed ready for the signature of all parties without delay." So that he seems to have considered even then that he had a duty to the wife; but he employs the husband—a very extraordinary medium considering what had passed quite lately at the interview between him and the lady—to explain to her the propriety of her losing the whole of her interest in the event of her marrying after his death. Then nothing takes place until the 30th Sept., and on that date Mr. Skinner seems to have chosen an extraordinarily inopportune time for explaining matters to this lady. He is called in to make a will for her mother, who was either on the point of death or, at any rate, in a most critical condition, and then he says that he explained it to her. She says that she does not remember anything of the kind. I think it extremely likely, considering the position in which she was at that time, that she paid very little attention to what was going on, and the whole thing may have vanished from her mind; but let us take Mr. Skinner's own account of it: "I saw the plaintiff in the dining-room of her mother's house, and I explained to her that Mrs. Willis and her son had called upon me in the way I have already stated, and that they desired to have the deed altered for the purpose of depriving her of the life interest which she took under the original settlement, to cut down that interest to an interest during her widowhood,

and depriving her of the power of disposing of the property provided she survived her husband without their having jointly executed it." Then come these words: "I explained it as clearly as it was possible for me to do, and as it was my duty to do." So that he plainly recognises that there was a duty cast upon him with regard to this lady. He had the duty, as he says, of explaining it; she did not go to him for explanation; he came to her. He felt that he had this duty; but what on earth was the use of explaining what was going to happen to her unless he had also explained to her clearly what her position was, and what course she ought to take under the circumstances. It appears to me certain that Mr. Skinner does not for a moment say that he had no duty to her, but what he says is that he had a duty, which he performed in a most perfunctory manner which misled her entirely. I am disposed quite to believe what she says, that she went through the execution of this deed under the impression that her husband certainly told her—and I think Mr. Skinner admits, or at any rate half admits, that he told her too—that it was merely to correct a mistake which had been made in the original settlement. Putting out of consideration the fact that by that alteration Mr. Skinner's son got a very great advantage, I think that, even if the person who was the ultimate remainderman had been no connection of Mr. Skinner, there would have been ample ground for setting aside this deed, considering that Mr. Skinner was her family solicitor, the person to whom she would naturally go for advice, and that he was her trustee. I must say that I think it makes it rather stronger when you come to consider that the effect of this alteration was to make certain, or almost certain, a gift which was contingent and doubtful until that deed was executed. I have no hesitation in concurring in the motion which has been proposed. I think that this appeal ought to be dismissed with costs.

LORD SHAND.—My Lords: I am entirely of the same opinion. I concur in all the observations that have been made by the Lord Chancellor and Lord Macnaghten, and I shall add only a few words to what they have said. It appears to me to be quite plain that it was the duty of Mr. Skinner on the occasion of the execution of the deed of 1891 to have required that the lady should put her interests into other hands, and that he should not have been the person to advise her upon those interests. I think, looking at the relations between the parties, looking to the fact that Mr. Skinner was a friend and was trustee in the administration of the funds upon which she was dependent for her subsistence through her husband, and that he was her agent, as I take it he was, in the circumstances which have been disclosed, that it was clearly his duty to require that she should get independent advice. It is said that he explained the matter to her. I agree with Lord Macnaghten in thinking that that explanation was not sufficient or satisfactory, even as stated by Mr. Skinner himself, as given to her in the evening at her mother's house, which is, however, disputed or denied by her; but, whatever explanation may have been given, I do not think that the explanation by him was enough. I think, looking at the circumstance that there was a great disadvantage to Mrs.

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Willis in the execution of this deed in which she was renouncing valuable interests—at the circumstance that at the same time a benefit was being given to Mr. Skinner's own son by that act of renunciation, and at the circumstance of Mr. Skinner's position as law agent, as I think she was entitled to take him as being at the time—looking at these circumstances, I am clearly of opinion that nothing short of putting the interests of this lady into other hands would have satisfied the case, or have avoided the legal result which now follows. An independent agent would, it may be assumed, have explained to her that the deed was not for the purpose of merely correcting a mistake, but was intended materially to alter her position, and to cut down, and on her part to renounce, important pecuniary rights; and even leaving out of view the advantage to be gained by Mr. Skinner, jun., as Lord Macnaghten has observed, the very observation of counsel in the note of the 22nd Sept. 1891, would in all probability have been forcibly laid before her. To this independent advice I think she was entitled. I am of opinion, therefore, that the judgment appealed from ought to be affirmed.

LORD DAVEY.—My Lords: I am of the same opinion, and I do not think it necessary to make any detailed examination of the facts of the case which are brought out in the examination and cross-examination of the witnesses, as I agree with what has been said on that point by the Lord Chancellor and Lord Macnaghten. The first question is to inquire what the deed of 1891, which it was sought to set aside by this action, did; and I find that it did two things, and two things only. In the first place, it cut down the life interest to which the plaintiff was entitled during her life, in case she survived her husband, to an estate *durante viduitate* only, so long as she should remain his widow, and not marry again; secondly, it made a material alteration as to her interest in the capital fund, and indeed it deprived her of any prospect of sharing in the capital fund; for whereas under the original deed she would have had a joint power of appointment with her husband during their joint lives, and if she survived him a separate power of appointment, she gave up both her joint power during their joint lives and also the chance of having a separate power of disposition in case she survived her husband. Now, it will be observed that those alterations in the deed were concessions which came entirely from her side, and that no alteration was made in her favour, and no consideration of any sort or kind, no *quid pro quo*, was provided for her by the deed. The next question I ask is, what was the position of Mr. William Moore Skinner? Mr. Skinner was her husband's solicitor, and indeed he was the solicitor for the whole family—and not only for the whole family, but it appears that he also attended Mrs. Brown, the plaintiff's mother, when she was on her death-bed, and I think made Mrs. Brown's will for her. But he was more than that. He was also a very intimate friend of the Willis family, including the plaintiff and her husband, and he was also a trustee under the original settlement. I think it a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think that she is *prima facie* entitled to look to her husband's solicitor, the solicitor of her

husband's family, for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman. Now, the result of the evidence upon my mind, without going into details, is that this lady did in fact rely upon Mr. William Moore Skinner to advise and assist her as her solicitor. I do not find that Mr. Skinner ever repudiated the obligation to advise the plaintiff. I am aware that he says that he was somewhat sore at the suggestion that he had made a mistake with regard to the earlier deed, and that he required not Mrs. Willis, not the plaintiff, but her husband and her, to go and consult another solicitor across the street. But that is a very different thing from advising the plaintiff to consult a solicitor separate from her husband. The suggestion which he says he made was that they should both go and consult another solicitor. What he ought to have done was to advise her to consult a solicitor separate from and independent of her husband. It is to be observed that the deed was in fact prepared by him on behalf of all parties, and I cannot find throughout this mass of evidence that any suggestion was ever made by anybody that it had been perused or settled by any person on her behalf. Therefore I take it to be clear that he was the only solicitor acting for her in the matter, and that he was the solicitor who prepared and perused and settled the deed on behalf of all parties. Indeed, Mr. Skinner seems to have accepted that situation, and to have taken some pains to explain the contents of the deed to the plaintiff. But, as Rigby, L.J., says, that was not enough. She required not only explanation of the meaning of the deed, but what she wanted was, or what she had a right to look for was, advice as to her rights. The next question I ask is, What was the knowledge of the plaintiff and the information given to her as to the circumstances and the purpose for which the deed was to be executed? On those points, again, I will not trouble to read long passages from the evidence, because I agree with the Lord Chancellor that the information given to her, and her belief founded upon that information, was that a mistake had been made in drawing up the previous deed, and that all that was asked of her was to put right or rectify a mistake which had been made—inadvertently made—by the parties. Now, it is of course a commonplace to point out the widely different position of a woman who is asked to put right a mistake made in a deed under which she derived very considerable advantages and that of a woman who is asked, the parties to a deed which conferred an advantage upon her having changed their minds, whether she will assist them to carry out, not their original mind and intention, but their new mind and intention. It is admitted by the learned counsel for the appellants (and the admission could not have been avoided) that there is no evidence that any mistake in fact had really been made in drawing up the previous deed. What we must understand is that the parties, having realised the effect of what they had done, had changed their minds and intention. Now, if she had consulted a separate solicitor, who would of course have advised her as to her real position, he would have told her that it was not a case of a mistake which any person of right feeling who was taking a gift from others might

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have considered himself under an obligation to put right. In such circumstances I should think most fair-minded persons would say: "I will not accept a gift which has been made to me under a mistake." If she had consulted a separate solicitor, he would have told her what her real position was, and what were the rights to which she was entitled under that deed; at the lowest, he would probably have succeeded in making a bargain and securing for her countervailing advantages in place of those which she was asked to give up. I therefore think that the judgment of the Court of Appeal in this case must be affirmed, on the ground that the plaintiff did not understand the purpose and intention or the true effect of the deed of 1891, and that such failure to grasp the true effect of the deed arose from Mr. Skinner, who had assumed the position and the obligation of advising her, having failed to give her proper advice. The alterations made in the deed made an important difference in the position of young Mr. Skinner, who was entitled to a moiety of the capital in default of the exercise of any of the powers of appointment which were given by the settlement. In the first place his prospect of succeeding to a share of the capital depended on the single contingency only of Joseph Willis dying without having exercised the power of appointment, instead of the double contingency of the joint power not being exercised and the wife being the survivor (which event actually happened) and her not exercising the power. He also gained a considerable advantage by his prospect of succeeding to the capital being accelerated by the plaintiff's life interest being out down to an interest during widowhood only. I therefore think that the decision of the Court of Appeal may also be supported upon the ground upon which the learned judges of the Court of Appeal based it—namely, that Mr. William Moore Skinner's son could not take a benefit from the plaintiff without showing the righteousness of the transaction, or, in other words, that she had independent advice and assistance as to her rights and real position. I therefore concur in the judgment which has been proposed.

LORD BRAMPTON.—My Lords: The deed of 1890 was all that the parties intended it to be, and no more. After the deed was executed the settlors changed their minds and desired to limit the benefits which it conferred on the plaintiff. This could only be done by getting the plaintiff to sign the deed in question to effect this alteration. The deed of 1891 was accordingly prepared and in order to obtain the plaintiff's execution of it she was told that it was to rectify a mistake in the original deed. There was no mistake—the parties meant all that was in the deed of 1890. It was in fact untrue to say that there had been any mistake at all. I agree in all that has been said by the Lord Chancellor and my other noble and learned friends who have expressed their views, and in the judgment proposed.

LORD ROBERTSON.—My Lords: I entirely agree.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors: for the appellants, *Balfour, Allan, and Co.*, for *Skinner, Church, and Michael*, Sunderland; for the respondent, *Wynne-Baxter and Keeble*, for *Beldon and Ackroyd*, Bradford.

June 13, 16, and 17.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN, SHAND, ROBERTSON,
and LINDLEY.)

FARQUHARSON BROTHERS AND CO. v. KING
AND CO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

Sale of goods—Wrongful sale by servant—Innocent purchaser.

The appellants were timber merchants, and kept large quantities of timber warehoused in their name at the docks.

The dock company were authorised to accept and act upon delivery orders signed by C., the appellants' manager, who had authority to sell timber in ordinary quantities to regular customers.

C. from time to time fraudulently transferred timber belonging to the appellants to a fictitious purchaser, and then sold it to the respondents in the assumed name of such purchaser.

The respondents bought and paid for the timber in good faith without any suspicion of fraud. They were not customers of the appellants, and did not know them in any way in the transaction.

Held (reversing the judgment of the court below), that there was no holding out of C. by the appellants to the respondents as a person having authority to dispose of the timber, and that the respondents acquired no better title to the timber than that of C., who had stolen it, and were liable for the value of it to the appellants in an action of detinue.

THIS was an appeal from a judgment of the Court of Appeal (Smith, M.R. and Williams, L.J., Stirling, L.J. dissenting), reported 85 L. T. Rep. 264; (1901) 2 K. B. 697, reversing a judgment of Mathew, J. in an action tried before him with a jury in the Commercial Court.

The action was brought by the appellants against the respondents for the wrongful detention, or alternatively for the wrongful conversion, of forty-five different parcels of timber, the total value of which was agreed at the sum of 1200*l*.

The appellants were timber merchants, and the respondents packing-case manufacturers.

The appellants were in the habit of warehousing large quantities of timber imported by them in the Surrey Commercial Docks. They had in their employ a confidential clerk named Capon.

On the 25th Jan. 1895 the appellants sent to the secretary of the dock company a letter as follows:

Dear Sir,—We have made arrangements whereby in future Mr. Capon will sign delivery orders on behalf of and in addition to the other members of the firm, and inclose our written authority for same.—Yours truly,
FARQUHARSON BROTHERS AND COMPANY.

Inclosed in the letter was the following authority:

We hereby authorise you to accept all transfer or delivery orders which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined, the company acting also on our signature as heretofore. This authority is to remain in force until expressly revoked in writing by us.—Farquharson Brothers and Company.—Signature of person authorised, Henry J. Capon.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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Capon had also a limited authority to sell timber on behalf of the appellants to certain recognised customers, as against each of whom they from time to time fixed a limit up to which they were willing to give them credit.

After Capon had obtained this power to sign transfer or delivery orders, he in Jan. 1896, commenced a series of frauds as follows:—He opened an account in the dock company's books in the name of Brown (who was a fictitious person). Into this account he from time to time transferred portions of the appellants' timber, concealing his fraud either by altering the entries in the appellants' stock books so as to make it appear that they had received less stock than they in fact had received or else by means of fictitious sales purporting to be to recognised customers, causing an apparent diminution of the stock.

The total value of timber so transferred was 1200*l.* to 1500*l.* spread over a period from Jan. 1896, to Nov. 1900, and the amounts being insignificant as compared with the size of the appellants' business, the frauds were not discovered until Nov. 1900.

Upon the discovery of the frauds it was found that the whole of the timber had been sold to the respondents by Capon, with the exception of about 50*l.* worth, in the following circumstances: Capon secured an address in Battersea under the assumed name of Brown, and from that address he entered into communication with the respondents, representing himself as a timber agent acting on behalf of Messrs. Bayley, a well-known firm of fire-escape and ladder makers, and eventually he sold to them the whole of the forty-five parcels of timber referred to in the appellants' claim at different times between Jan. 1896 and Nov. 1900.

It was admitted by the appellants' counsel that the purchases were so made by the respondents *bonâ fide* and without notice of any fraud.

The respondents gave evidence that in purchasing as aforesaid they believed that there was such a person as Brown, who really was a timber agent at Battersea, and was acting in these transactions as agent for Messrs. Bayley, and that they had absolutely no knowledge or suspicion that he was Capon or in any way connected with the appellants.

At the trial the judge left to the jury the question whether the appellants had so acted as to hold Capon out to the respondents as their agent to sell the timber to the respondents, all other questions of law or fact being reserved to the judge.

The counsel for the respondents asked him also to leave to the jury the question whether the appellants had by their conduct enabled Capon to hold himself out as the true owner or as entitled to dispose of the goods, but the judge refused to leave that question to the jury.

The jury answered the question left to them in the negative.

The judge gave judgment in favour of the appellants.

This judgment was reversed by the majority of the Court of Appeal.

Asquith, K.C., Danckwerts, K.C., and Whately for the appellants. The appellants had not by their conduct held out Capon as a person who had power to sell the goods, and thus enabled

him to commit the frauds. The facts do not bring the case within the rule as laid down in the authorities. See

- Johnson v. Credit Lyonnais*, 37 L. T. Rep. 657; 3 C. P. Div. 32;
Brocklesby v. Temperance Permanent Building Society, 72 L. T. Rep. 477; (1895) A. C. 173;
Cole v. North-Western Bank, 32 L. T. Rep. 783; L. Rep. 10 C. P. 354;
Colonial Bank v. Whinney, 55 L. T. Rep. 362; 11 App. Cas. 426;
Lamb v. Attenborough, 1 B. & S. 831;
Swan v. North British Australasian Company, 2 H. & C. 175.

The evidence shows that the respondents thought that they were dealing with Brown, who was selling Bayley's goods on commission. They only expected to get such property in the goods as Bayley had. They never thought that they were dealing with the appellants. See also *Root v. French* (13 Wend. N. Y. Sup. Ct. 570), an American authority, and sect. 21 of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71).

Lawson Walton, K.C. and Cababé, for the respondents.—The appellants gave authority to Capon, who had power to sell. [The LORD CHANCELLOR.—The respondents did not deal with "Capon," but with "Brown," who was not a person whose authority was held out to them.] "Brown" was Capon, the person whom the appellants employed to sell their goods and give delivery of them. It was not a case of "holding out" at all. The true owner empowered an agent to deal with the property. The right question was not left to the jury at all. There was authority to make a sale, which would have bound the appellants if made by Capon as their agent. He assumed the trade name of "Brown," and the appellants are estopped from denying the authority of their agent, whom they empowered to deal for their advantage. But if Capon had a disposing power, and an actual authority to sell from the appellants, there was a "holding out" to a *bonâ fide* purchaser, as he had the apparent dominion and sold the goods as his own, though there was no evidence of a "holding out" in express words. Capon had power to sell to a limited class of persons. [The LORD CHANCELLOR.—The purchasers knew nothing of Capon's power or authority from Farquharsons, the true owners.] It is enough if he had possession with power to sell in proper circumstances. The authorities go as far as this. See

- Dyer v. Pearson*, 3 B. & C. 38; 27 R. R. 286;
Ramazotti v. Bouring, 7 C. B. N. S. 851;
Pickering v. Busk, 15 East, 38; 18 R. R. 364;
Meggy v. Imperial Discount Company, 38 L. T. Rep. 309; 3 Q. B. Div. 711;
Babcock v. Lawson, 42 L. T. Rep. 289; 5 Q. B. Div. 284;
Henderson v. Williams, 72 L. T. Rep. 98; (1895) 1 Q. B. 521;

which is a decision really indistinguishable from this case. See also

- Vickers v. Herts*, L. Rep. 2 H. L. So. 113;
Brocklesby v. Temperance Permanent Building Society (*ubi sup.*);
Perry Herrick v. Atwood, 30 L. T. Rep. O. S. 367; 2 De G. & J. 21).

The purchaser bought under the exercise of Capon's power, and the fallacy of the appellants' argument is in treating him as a mere custodian.

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He was a custodian with a power of sale within limits. See

Johnson v. Credit Lyonnais (ubi sup.).

We do not base the estoppel on the purchaser knowing Farquharsons in the matter. The delivery order passed the property, and the purchaser paid on a transfer by the dock company, who were the actual custodians. The appellants are estopped as to the dock company, and also as to the respondents, whose title was derived from the dock company.

Aquith, K.C. was called on to reply on the point whether the respondents were misled as to the authority given to the dock company.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: I hesitate to speak all that is in my mind out of respect for the learned judges in the Court of Appeal, who have taken a different view. But so far as I can see this is a case in which no difficulty whatever arises. A servant has stolen his master's goods, and the question has to be decided whether the person who has purchased the goods innocently can set up a title to them as against the master from whom they have been stolen. That this timber was stolen there cannot be the smallest doubt, and I have very great difficulty in treating seriously the argument that it was not. What possible difference is there between this act of theft and the act of stealing a handkerchief from a person's pocket in the street? Because by a circuitous process the thief allows an innocent party to remove the goods from where they were stored by the owner the innocent party does not acquire a title. The thief, having no title, can give no title. That really disposes of the case, and I might well leave it there. But much argument has been used to establish the position that there was here an estoppel. I fail to see what estoppel has to do with the matter. By the innocent act of the dock company the timber has been taken away, but even as against the dock company there is no estoppel. All that the Surrey Commercial Dock Company did they were expressly authorised to do by the appellants. There would, therefore, not be an estoppel as between them and the Dock Company, who acted in pursuance of the direct and real authority of the appellants. If it could be argued that the appellants represented that their clerk Capon was vested with disposing power, and anyone had acted on that belief to his prejudice, then estoppel would have arisen, and the person who had negligently allowed Capon to be so apparently vested would be estopped from denying that Capon had that authority. But what in the world has that to do with the question in this case? Capon was unknown to the respondents, as also were the appellants. The respondents dealt throughout with a person whom they believed to be Brown. No one would dream of saying that the respondents acted upon the faith of Capon being vested by the appellants with authority to sell, for they had never heard of the appellants nor of Capon. The clerk who has committed this fraud availed himself of his power of signing delivery orders to transfer into the name of Brown, which

name he assumed, and in disposing of this stolen timber to the respondents he professed to act, not on behalf of the appellants, but on behalf of a third party named Bayley. I am bewildered at the absurdity of the suggestion that an estoppel arose in this case. As to the case of *Henderson v. Williams (ubi sup.)*, in which a judgment of my own has been relied upon by the respondents, I adhere to every word I said on that occasion; but that case has no relation to this, and the language I used on that occasion was the language of an American judge. What I said then was that, "When one of two innocent persons must suffer for the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud." No doubt anyone whose indiscretion had caused an innocent party to suffer ought, as was said in that case, to suffer. But where was the indiscretion here? No one outside the firm knew anything of the authority given to Capon. It is absurd to say that such an authority enabled the person invested therewith to give by his fraud or theft a good title to an innocent purchaser. I am a little surprised to find that two of the learned judges in the court below seem to be under the impression that what I said was that any person who enabled another by any means to commit a fraud must suffer. In a sense anyone who, for example, sold a pistol or dagger might be said to enable the purchaser to commit a murder. A strict analysis of the present case shows that such a case would be parallel to the present. Any notion of the respondents acting on a representation by the appellants is utterly absurd. The state of the law would have been perfectly clear even without the Sale of Goods Act, by which, when an agent is invested with authority to sell, the owner is precluded from denying the purchaser's title. Here, however, there was no authority to sell. The case is *lucis clarius*; it is simply that of goods stolen, and a buyer from a thief can acquire no better title than that of the thief who purported to sell the goods, which was none, and therefore the appellants are entitled to succeed, and I move your Lordships that the judgment of the Court of Appeal be reversed with costs.

LORD MACNAGHTEN.—My Lords: After what has fallen from my noble and learned friend on the woolsack I am almost ashamed to trouble your Lordships with any observations of my own. But the case is peculiar in one point of view. I cannot remember any case in which the wealth of learning and argument was so far beyond the value of the poor and commonplace material on which it has been expended. And, besides, the question is not unimportant. The decision under appeal, if it could be supported, would have very far-reaching and, in my opinion, very pernicious consequences. *Williams, L.J.* expresses an opinion to the effect that the case is difficult. The very learned judge who differs from him in the result agrees with him in this. Speaking for myself, in the view which I take of it, I must say that I cannot imagine a plainer or simpler case than this. Messrs. Farquharson Brothers and Co. are timber merchants in a large way of business with a turnover exceeding 200,000*l.* a year. They had a confidential clerk called Capon, whom they trusted implicitly. A short time ago they discovered that this man

had been robbing them for years, stealing small lots of timber from time to time, passing the timber out of their names in the docks by means of a written authority which they had given to him, and disposing of it for his own benefit. They trace the stolen timber to the hands of Messrs. King and Co. They demand restitution or compensation; the demand is refused, and then this action is brought. What is the defence? Not that the goods were bought in market overt, though that would be no defence now, after the conviction of the thief; not that Messrs. Farquharson led them to believe that Capon had their authority to sell what they supposed that they bought. That defence is out of the question. They never imagined that they were dealing with Messrs. Farquharson or buying Messrs. Farquharson's goods. They never even dealt with Capon to their knowledge. They never dealt with him in his own name and in his proper person. They dealt with a phantom broker—an imaginary being created, animated, and worked by Capon for his own purposes under the plain and unpretentious name of Brown—and from this Brown, whom they never saw in the flesh and about whom they never made a single inquiry, they supposed that they bought this timber. Whether Capon, who has apparently been convicted of forgery, could have been convicted of larceny or not—though I think he could—it seems to me absurd to suppose that by this juggle of Capon's—all sham and pretence so far as he was concerned—the property in the stolen goods passed to Messrs. King and Co. If it were permissible it would be interesting to inquire which of the two parties to this litigation were the more blameworthy in a moral point of view. The plaintiffs trusted a man whom they had long known and believed to be honest. The defendants trusted a man whom they had never seen, whom a breath of suspicion and the most ordinary inquiry would have unmasked. But we have nothing to do with this matter, though it seems to have entered into the consideration of the Court of Appeal. The real defence is a singular one. It must come to this: The defendants say to the plaintiffs, "You, Messrs. Farquharson, have conducted your business in such an unbusinesslike way that you ought not to have your own goods back again. This misfortune, common to you and to us, is all your fault. By your blind and foolish confidence in Capon, and by the written authority which you gave to him, you 'enabled' him to commit this fraud upon us. And so Ashurst, J.'s famous dictum in *Lickbarrow v. Mason* (2 T. R. 63; 1 Sm. L. C. 756, 7th edit.) comes in." This defence, in my opinion, has no foundation in principle or authority. To try the principle take a common case, a case which everybody understands. Nothing is better settled than this—that if a person buys a chattel and it turns out that the chattel was found by the person who proposed to sell it, the true owner can recover his property unless there has been a sale in market overt. The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been. If I lose a valuable dog, and find it afterwards in the possession of a gentleman who got it from somebody whom he believed to be the owner and paid for it accordingly, it is no answer for him to say

that he never would have been cheated into buying the dog if I had chained it up, or put a collar on, or kept it under proper control. If a person leaves a watch or a precious jewel on a seat in the park or on a table at a *café*, and it gets into the hands of a person who supposes that he has bought it from the rightful possessor, it is no answer to the true owner to say that it was his own carelessness that enabled the finder to pass it off as his own. If that be so, how can carelessness, however extreme, in the conduct of a man's own business preclude him from recovering his own property which has been stolen from him? Nor is the case without authority. In the case of *Governor and Company of the Bank of Ireland v. Evans's Trustees* in this House (5 H. L. C. 389) the trustees, who were a corporate body, called upon the bank to replace stock which the bank had sold under a forged power of attorney bearing the genuine impression of their corporate seal. The defence was that the carelessness of the trustees in the custody of their seal enabled their clerk to impose on the bank and disentitled them from requiring the bank to replace the stock. The judges were consulted. Their unanimous opinion, which this House adopted was delivered by Parke, B. He thought that the negligence, if there was negligence, in the custody of the seal was only remotely connected with the transfer which the bank set up as good against the trustees. A somewhat similar contention was raised in the more recent case of *Scholfeld v. Lord Lonsborough* (75 L. T. Rep. 254; (1896) A. C. 552). It was argued (and the argument found favour with some judges) that everybody who accepted a bill of exchange owes a duty which was defined as "the duty not to be negligent as to the form of the bill." That argument was rejected in this House; but in rejecting it both the Lord Chancellor (Halsbury) and Lord Watson made observations of much wider application. The rules of law applicable to this case are, in my opinion, well settled, and I would only venture to remind your Lordships of an observation made by Lord Cairns in this House to the effect that in cases of this sort, when your Lordships have to perform the disagreeable duty of determining which of two innocent parties is to suffer by the fraud of a third, all your Lordships have to do is to apply the settled and well-known rules of law and apply them rigorously.

LORD SHAND.—My Lords: I have come to the conclusion, without difficulty, that the principle in *Brocklesby v. Temperance Permanent Building Society* (*ubi sup.*) does not apply in this case for the reasons fully stated by the Lord Chancellor, and because no representation of Capon's authority was made to the respondents. This was a case of fraudulent appropriation, and the title to the timber, therefore, could not pass to Capon or to anyone who purchased from him. On these grounds I concur in the judgment of the Lord Chancellor.

LORD ROBERTSON.—My Lords: I concur. The facts of this case hopelessly shut out the respondents from the principles which they invoke. The respondents never heard of the appellants in connection with these purchases, never knew of Capon's existence, and, instead of dealing with Capon as agent of the appellants, dealt with

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Brown as the agent of Bayley; and the right which they expected to acquire was the right of Bayley and not the right of the appellants at all. The respondents rely on the fact that they paid their money in consequence of the dock company's registering a transfer in their favour executed by Capon in favour of Brown, in consequence of the general request of the appellants to the dock company to honour Capon's transfers. The place occupied, therefore, by this request to the dock company is merely that it was a *causa sine qua non* and not the *causa causans* of the respondents' being involved. In my opinion the term "disposing power" is wholly inapplicable to the authority conferred upon Capon. The case, in fact, is exactly the same as that of a servant having unrestricted access, for his master's purposes, to his master's goods, and misusing that access for the purpose of selling the goods. In this case the limited authority actually held by Capon can avail the respondents nothing.

Lord LINDLEY.—My Lords: I concur. The fact that the respondents bought the timber honestly did not confer on them a good title as against the real owners, who had done nothing which precluded them from denying, as against the respondents, Capon's right to sell it. What have the appellants done to mislead the respondents or to induce them to trust Capon? Absolutely nothing. There is nothing connecting the Surrey Commercial Dock Company with the respondents in this transaction. The respondents were misled, not by what the appellants did, or by any authority they gave to the dock company, but by the fraud of Capon. It is true in one sense that the appellants enabled Capon to occasion this loss by placing him in the position which he occupied; but this is an instance of the unsoundness of the doctrine that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This dictum has never, to my knowledge, been applied where nothing has been done by one of the innocent parties which has, in fact, misled the other. I agree that the appeal ought to be allowed.

Judgment of the Court of Appeal reversed.

The respondents to pay to the appellants their costs both here and below.

Solicitors for the appellants, Ward, Perks, and McKay.

Solicitors for the respondents, Anning and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

May 27 and 28.

(Before WILLIAMS, ROMER, and STIRLING, L.JJ.)

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APPEAL FROM THE CHANCERY DIVISION.

Administration—Insolvent estate—Withdrawal of proof by secured creditor—Application to establish claim after filing of certificate—Special circumstances—Judicature Act 1875 (38 & 39 Vict. c. 77, s. 10)—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), sched. 2, rr. 9-17—Order LV., rr. 44, 56, 57, 70, 71.

A testator having died insolvent in March 1889, an order was made in July 1889 for the administration of his estate.

In answer to advertisements, a bank carried in a claim in March 1890 for 47,000*l.* against the testator's estate, which amount was secured by certain shares and debentures of a foreign railway company mortgaged to the bank by the testator.

In Jan. 1891 an arbitration tribunal was appointed to determine certain questions concerning the railway which had been raised by a foreign Government.

In May 1891 the bank were served with a notice to prove their claim. The time was several times extended. In June 1892 the bank went into voluntary liquidation, and in Oct. 1892 the liquidator decided not to prove, preferring to rely upon the security which he held on behalf of the bank. In Dec. 1892 the liquidator formally withdrew the claim of the bank. In Nov. 1893 the chief clerk made the usual certificate, in which he disallowed the claim, due notice of the certificate being given to the liquidator. In 1900 the award in the arbitration was made. As the result of that award the shares and debentures of the railway company had enormously depreciated in value, and the liquidator received in Dec. 1900 only 1448*l.* in respect of the security which he held, that being, he was informed, the only sum that would be payable in respect thereof. Accordingly in Jan. 1902 the liquidator took out a summons asking that, notwithstanding the time for applying to vary the certificate and the time limited for making claims had expired, the certificate might be varied in so far as it disallowed his claim; and that he might be at liberty to make and establish his claim against the testator's estate. The estate had not been distributed. The summons was dismissed by the master. The liquidator then moved before Eady, J. to discharge the order of the master.

The motion was refused.

The liquidator appealed.

Held, that the practice in bankruptcy with regard to the right of a creditor to come in and prove at any time during the administration, provided that he did not thereby interfere with any prior administration of the estate, and subject to such terms as the court might think fit to impose,

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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applied to administration proceedings in the Chancery Division by virtue of sect. 10 of the Judicature Act 1875; that in the present case special circumstances had been shown why the liquidator should be allowed to come in and prove notwithstanding the certificate; and that therefore leave to do so would be granted to him upon certain specified terms.

Decision of Eady, J. reversed.

APPEAL by Thomas A. Welton, liquidator of the New Oriental Bank Corporation Limited, from a decision of Eady, J. (*ante*, p. 553).

Muir Mackenzie and *B. J. Parker* for the appellant.—Under the Bankruptcy Rules, a creditor is entitled to come in and prove his debt at any time so long as any assets remain undistributed, even after the certificate is made and the time to vary it has expired; but he cannot disturb dividends actually paid. Sect. 10 of the Judicature Act 1875 enacts that in the administration by the court of the assets of any person whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person may come in under the decree or order for the administration of such estate, and make such claims against the same as they may respectively be entitled to by virtue of this Act. We rely upon the words in that section, "the same rules shall prevail and be observed." The Bankruptcy Rules in point here are rules 9-17 in the 2nd schedule to the Bankruptcy Act 1883. The present rule 13 is different from what the rule was in 1869, and in view of the cases it is important:

Es parte Boddam, 2 L. T. Rep. 120; on appeal, *Ib.* 343; 2 De G. F. & J. 625;

Es parte Good; *Re Lee*, 41 L. T. Rep. 660; on appeal, 42 *Ib.* 450; 14 Ch. Div. 82.

The material rule is that a creditor before coming in to prove must deduct his security, and that is what the creditor has done in the present case. The judgment of Eady, J. is erroneous in that it ignores the old rule of Chancery that notwithstanding that a creditor of an estate knew of the advertisements for creditors and had not come in to prove, he had the right, so long as any part of the assets remained undistributed, to come in under a judgment for administration, and rank against those undistributed assets:

Brown v. Lake, 1 De G. & Sm. 144.

In the present case there has been no distribution of the estate and no order on further consideration. The certificate of debts at the time cannot affect the appellant's right, if the question is governed by the Bankruptcy Rules. The applicant has a right to come in and prove now unless there are special circumstances:

Gillespie v. Alexander, 3 Buss. 130; 27 R. R. 35.

Upjohn, K.C. (with him *Eastwick*) for the respondent, a creditor having the conduct of the cause.—The Bankruptcy Rules do not import bankruptcy procedure into Chancery administra-

tion. The point here is this: Has the appellant brought himself within the rule which relates to opening certificates? Attention is called in the judgment of Eady, J. to Order LV., rr. 44, 56, 57, 70, and 71. If a claim has been made, but has not been the subject of a certificate, it falls within rule 57. If, on the contrary, the claim has been the subject of a certificate, then it falls within rule 71. The rules are quite different. I do not dispute what the appellant says as to what was the old practice in Chancery according to *Gillespie v. Alexander* (*ubi sup.*). But the appellant has not produced and cannot produce any case in which the doctrine of *Gillespie v. Alexander* (*ubi sup.*) has been applied to a case like the present. [STIRLING, L.J.—*Re Metcalfe*; *Hicks v. May* (41 L. T. Rep. 572; 13 Ch. Div. 236) comes very near.] In that case the claim, which was upheld by the Court of Appeal, was never brought forward or adjudicated upon in the certificate. The appellant has got, therefore, to prove special circumstances, but that he has not done. He referred also to

Re Hopkins; *Williams v. Hopkins*, 44 L. T. Rep. 548; on appeal, 45 *Ib.* 117; 18 Ch. Div. 370.

Jenkins, K.C. (with him *Whinney*) for the respondent, the defendant in the action, and other persons beneficially interested in the estate. The notes to rule 17 in the 2nd schedule to the Bankruptcy Act 1883 contained in *Williams on Bankruptcy* (8th edit.) show that a creditor has four courses open to him: (1) He may rely on his security and not prove; (2) he may realise his security and then prove for the balance, rule 9; (3) he may surrender his security and then prove for the whole debt, rule 10; (4) he may state in his proof particulars of his security. The second course is that he may realise and come in to prove for the balance: but there is a distinction between realising and coming in and waiting to see what will turn up. [ROMER, L.J.—Cannot he, notwithstanding rule 9, come in at any time so long as he does not disturb assets?] The facts of this case show that the liquidator of the bank would not prove, preferring to rely upon the security that he held for the bank. His claim was sent in but not proved, and afterwards deliberately withdrawn. It would be giving him an unfair advantage over other creditors holding similar securities who came in and proved, to allow him to come in now after having relied upon his security until it has become of little or no value. It would be unfair to all interested in the estate. Here the appellant cannot make out a case for the assistance of the court such as was made out in *David v. Frowd* (1 My. & K. 200, at p. 209; 36 R. R. 308). The case of *Re Metcalfe* (*ubi sup.*) and the other authorities show that so far as the Chancery practice is concerned the person seeking to prove is only let in if there is no case of wilful default. But the present is not a case of inadvertence, nor a case in which delay does not prejudice. It is one of wilful default. [STIRLING, L.J. referred to sect. 61 of the Bankruptcy Act 1883.]

No reply was called for.

WILLIAMS, L.J.—This is an appeal against an order made on the 10th March 1902 by Eady, J. on a summons which was taken out on the 14th Jan. 1902. When one looks at the judgment

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of Eady, J. one finds a statement there of what took place prior to the taking out of this summons on the 14th Jan. 1902. The learned judge in his judgment says: "The next proceeding was an application that was made in Dec. and disposed of by an order of the master on the 16th Dec. 1901, and it was an application by the same claimants that, notwithstanding the time limited for making claims had expired, the claimants might be at liberty under the order for administration to make and establish their claim as creditors for the same amount as they claim now. That summons came before the master and was dismissed with costs on the 16th Dec. 1901, and there was no appeal from that decision. It is said that the point was that it was not a summons to vary, and that no application was made to vary the certificate. But apparently no leave was given or asked for to amend the summons by making it also a summons to vary. The next proceeding is the summons which I have now to deal with, and that summons was issued on the 14th Jan. 1902, that is to say, nearly a month after the previous order. In support of that summons"—and then the learned judge goes on and deals with the affidavit. Now, when this matter was argued by Mr. Upjohn he took the point that the question of the right of the applicants here to come in now and prove had really been raised upon this summons of the 16th Dec. 1901 and disposed of. It is said that the result is that this question has now passed into a *res judicata*, and that the applicants have no longer any right to come to this court or any other court and have that question adjudicated on again. That objection *prima facie* is a conclusive answer to this application. But it is an objection which can be got over if it is right and just so to do by extending the time for appealing against that order made on the summons of the 16th Dec. 1901. When one considers the very exceptional circumstances of this case it seems to me that it is right that this extension of time for appealing should now be allowed, and that we should treat this appeal for some purposes as if the time had been extended for appealing against that order on the summons on the 16th Dec. 1901. When one bears in mind the great length of time that has occurred since the commencement of this administration and that the time that has been necessary for administering the estate of Col. McMurdo has without the fault of anyone necessarily occupied this number of years, one cannot be surprised that there was a slip really made in procedure. When the summons of the 16th Dec. 1901 came on to be heard, it was quite plain that both the applicants and the respondents to the summons intended to deal with the substantial question—aye or no had the applicants, taking into consideration all the circumstances in the case, then a right to come in and prove on proper terms being imposed? When that question was intended to be raised on the present summons the objection was made that the old certificate stood and that there was no application to vary the former certificate. Under those circumstances I have very little doubt myself that if the hearing had been a hearing at which counsel were present an arrangement would have at once been made whereby a summons either should have been taken out or this summons treated as varied so as to include if necessary the application to vary the certificate.

But that was not done. Nobody's rights have been affected or injured in any way by the time that has elapsed since, and there being this substantial question raised between the parties it seems to us just that we should allow the extension of the time for appealing, and deal with this matter now, and thus shut out in effect this objection that the question as to the right to prove has been disposed of, and is *res judicata* by reason of the order made on the summons of the 16th Dec. 1901. Now, having said that, I will now proceed to deal with the merits of the case. It really is not denied in this case that the 10th section of the Judicature Act 1875 applies, and that we must, if it makes any difference, deal with this question as it would be dealt with upon a proof being rendered in bankruptcy. I say "if it makes any difference," because I myself am not at all sure that it makes any difference whatsoever. I will just deal with the matter as if the case were simply a case of a proof in bankruptcy. What were the circumstances of this case? The liquidator of the New Oriental Bank Corporation Limited was a secured creditor, and he held such securities, including Delagoa Railway bonds and some other securities, the names of which are not material here. But at the moment of the commencement of this administration it was very uncertain what the value of the Delagoa Bay Railway bonds might be. The question had been referred to arbitration as to what sum was to be paid by the Portuguese Government to the bondholders, and the value of these securities necessarily depended upon this—one might almost call it international—arbitration. It was not known what sum might be awarded, or how soon it might be awarded. In truth and in fact the arbitration occupied some eight or nine years. Under those circumstances it was not really for the interest of either the creditors of the estate of Col. McMurdo, or anybody else who was interested in that estate, that the administration should take place without the value of these bonds being ascertained. The liquidator, having carried in a claim, a certificate was made in which, to put it shortly, his claim was stated. At this moment the liquidator as creditor in the administration really was not—at all events, according to the bankruptcy code—in a position to prove at all. He could not prove without realising or valuing his security, and he had not done either one or the other, and therefore the claim was disallowed. No one suggests that this disallowance amounted to any adjudication upon the merits in respect of the right to prove. It was merely a declaration that *rebus sic stantibus* there was no right of proof. Then under those circumstances it does not seem to me an unreasonable time after the award had been made that the liquidator as creditor in the administration desires to prove. Now, according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor—whether he is a secured creditor or whether he is an unsecured creditor—to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the court may think it just to impose. And, of course, in every case in which there has been a time

limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards subject to the conditions which I have mentioned, he can only come in and prove with the leave of the court. If that is so, it must be upon such terms as the court may think just. That undoubtedly being the general rule, what is it that is said against it? It is said against it that by the 1st rule of the 2nd schedule every creditor shall prove his debt as soon as may be after the making of the receiving order, and it is suggested that the result of that rule is, that if the creditor does not come in as soon as may be after the making of the receiving order, his right of proof is gone. Now, in answer to that, there is first the section which Stirling, L.J. called attention to in the course of the argument—the 61st section of the Bankruptcy Act 1883, which provides as follows: “Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend,” and so on. Now, the difficulty of that section was put to Mr. Jenkins, and he seemed to my mind entirely unable to reconcile that section with the construction which he invited us to put upon the first rule of the 2nd schedule. And, moreover, if you take the rules with regard to proof in the 2nd schedule as a whole, to my mind it is perfectly plain that the 1st rule of the 2nd schedule cannot receive such a construction as is sought to be put upon it. It is a mere directory section, the non-compliance with which does not in any way deprive any creditor of a right or limit his right. Now, the next point that was made by Mr. Upjohn is one that affects the proof whether it is looked at as a proof in bankruptcy or whether it is looked at as a proof under an administration in Chancery. What he says is, that although it may be that there is a general rule that a creditor may come in and prove at any time provided he does not disturb prior distributions, and in some cases provided proper terms are imposed, yet all this is overridden because the creditor may subsequently to the commencement of the arbitration have so conducted himself as to estop himself from bringing in the proof. It is said that he may have so acted as practically to have irrevocably agreed that he never will bring in a proof. I am not prepared to say that that is not a possible state of things. I am not going to waste time by speculating exactly how it might arise. But the plain answer in this case is that although that may be theoretically possible, there is not any ground whatsoever for saying that by words or by conduct the liquidator ever did agree, or did lead those who were interested in the administration to suppose that he agreed that he would never carry in a proof. Then it is suggested further that these securities while they were in the control of the creditor might have been dealt with by him, and at one time were of greater realisable value than they are now. I say nothing about that fact; I daresay that it is so in truth. But it seems to me that it is impossible to say that because the securities have altered in value that that in any way estops the creditor from carrying in a proof here. I have not got to decide at the present moment, and I shall not express any opinion as to whether it is possible when the proof

is carried in that in some way or other this altered value may be taken into consideration. But for the purpose of to-day I must deal with that question as I will presently do. I have now said all that I have to say about the proof, looking at it as a proof in bankruptcy. Now, then, let us look at the proof as a proof in an administration. I shall say very little upon this part of the case because my brethren are so much more competent to deal with it than I am. But I wish to say for myself that, having regard to the authorities that have been cited to us in reference to the practice in administrations, it seems to me that there is not the slightest ground for saying that the disallowance in a certificate like this of the claim to prove—a disallowance which it is not suggested was based in any way upon an adjudication on the merits of any sort or kind—is a fact which interferes with the right to carry in a proof subsequently in the administration. It is quite true that the effect of the certificate is that the creditor not having come in within the time limited, has no longer any right to the benefit of the order or decree without some subsequent order by the court, some supplementary certificate. But in effect upon the application here what is being asked for is a supplementary certificate. I say again that upon the authorities that have been cited to us, including the authority of Lord Eldon in *Gillespie v. Alexander* (3 Russ. 130; 27 R. R. 35) it is plain that the right to apply for leave to prove—I will call it for short “out of time”—is a right which has been recognised again and again in administrations. Under those circumstances, I really do not think that it makes very much difference whether one looks at this proof as if it were carried in in bankruptcy or carried in in the administration in Chancery. In either case it seems to me that by the machinery of what is in effect a supplementary certificate upon proper terms the court would allow the creditor to come in. As to the other points that were raised as to there being some estoppel, or some alteration in circumstances, which should prevent the creditor from proving now, the observations that I have made upon this subject with regard to the proof in bankruptcy apply equally to the proof in the administration. It seems to me that the whole argument to the contrary—the argument I mean which sought to treat the certificate as if it was something binding which prevented the proof now—was based upon a misapprehension of what the certificate was intended to do. It should, to my mind, be remembered that *prima facie* the object of the certificate is not to decide a question as to the rights of the creditors. *Prima facie* the object of the certificate is to protect those who have to administer the estate. Of course there may be cases in which in truth and in fact merits have been adjudicated upon before the certificate is given, and in that case a supplementary certificate I will take it would certainly be refused. But according to my judgment the view which seems to have been taken by the order upon the summons of the 16th Dec. 1901, that the certificate which was issued early in these proceedings raised some fatal objection to the proof of the creditor, an objection which could not be removed by a supplementary certificate, has no justification whatsoever either in theory or practice. Now, there is only one other matter which I ought to mention, but there again I feel that it

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can be so much better dealt with by my brethren than by me, with their greater familiarity with the Chancery practice, that I propose to put my view very shortly. Mr. Upjohn relied upon two rules in Order LV. Rule 57, as I understood him, he said only applied to cases arising before the actual certificate had been given, and then he said that that threw one upon rules 70 and 71. His contention was that the moment you have got the certificate, that was binding upon all parties, and could only be got rid of by the exercise of the powers given to the judge under rule 71, which provides that "The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied," and so on. Then he said that in the present case there were no such special circumstances. It does seem to me that one need not really take any exception here to the argument of Mr. Upjohn upon this point, although I must not be regarded as entirely agreeing with it. But I think one need not take any exception to it on the circumstances of this case. If it be true that under rule 71 there must be special circumstances and that this certificate, which really adjudicated upon nothing whatsoever, is binding upon the creditor just as if it had been an adjudication in substance, —I do not know whether it is true yet—we have got special circumstances here. We have got them by reason of what Romer, L.J. called attention to in the course of the argument. We have got a state of things where by the lapse of time it would be right to exercise the powers under rule 57, and that itself is a state of circumstances which falls in with the words "special circumstances." The view we take, therefore, is that the leave ought now to be given as asked for in this summons of the 14th Jan. 1902, it being taken that by our order the time for appealing against the summons of the 16th Dec. 1901 is extended, and that this summons is dealt with as if framed upon such an extension of time for appealing. Under those circumstances the only question that has to be dealt with is the question of terms. With regard to that question of terms, I do not mean at the present moment to say anything final, because it seems to me that to a very large extent the terms can be and ought to be dealt with when the claim is carried in—that is, when the proof is carried in. Nor do I define the terms, so far as we have to impose them at the present moment, because this will be much more satisfactorily done after my brethren have given their judgments, so that at present my judgment only is that the leave ought to be given upon proper terms, and the proper terms will be dealt with after my brethren have given their judgment. In the meanwhile I want to say with regard to an omission in the judgment which I have just delivered, that I spoke of and read rule 1 of the 2nd schedule. I meant also to have spoken of and read rule 16 of the same schedule, but I omitted to do so.

ROMER, L.J.—I also think that on terms the appellant here should be allowed to come in and prove. I will first consider what took place in the early days of the proceedings in this administration action. The appellant intimated his intention to prove the debt in question for its full amount. He was then asked and required by

the administrator to prove the debt. He then had to consider his position, having regard to the fact that the estate here was insolvent, and that he held security. Now what ensued appears to me to be in substance this: The appellant found, what was obvious, that in accordance with the Bankruptcy Rules which applied to this case, he could not come in and prove without valuing the security, and at that time he appears to me to have come to the conclusion that the security was equal to, or greater in value than, the amount of the debt, and that thereupon he announced his intention of not proving, and withdrawing the claim to prove. That was assented to, and then before the master the claim was, as it is said, disallowed. Thereupon, when the certificate came to be made by the master, he entered in the certificate this claim as having been made and having been disallowed. We now know, therefore, what the meaning of the word "disallowed" is in this certificate. It means what I have stated and no more. It does not amount to an adjudication on the question of debt or no debt. It is not a matter of adjudication in the true sense. This is not a case of *res judicata* being pleadable as against the appellant. Indeed, it is not contended on behalf of the respondents that the appellant is estopped upon that ground. Then if he is not prevented from asking for leave to prove on that ground, I next will consider whether his then determination not to prove because of what he then considered to be the value of the security was to be taken as against him as final and irrevocable, so that when he subsequently found that the security did not realise what he had hoped it would, and did not suffice nearly to pay the debt, he should be held debarred from all opportunity under that change of circumstances from coming in and proving for the balance of the debt. I think that what then took place could not be held to so prevent him. To my mind, it was a mere case of a secured creditor at the time resolving not to prove because at the time he valued his security as being equal to or greater than the amount of his debt. And, no doubt, at that time he probably did not contemplate that there would be any necessity at any time thereafter for his having to come in and prove because of any possible change in the value of the security or in the amount it would realise. But that is a very different thing from saying that he must be thereby taken to have resolved and elected to never come in and attempt to prove, even if it should turn out that, contrary to his anticipation, the property realised less than the amount of his debt. It seems to me you cannot and ought not to draw such a conclusion from his acts on that occasion. That being so, I pause to consider whether upon any other ground he ought to be estopped by his then determination of withdrawing his proof from coming forward now under existing circumstances and asking to be allowed to prove. I think not, for I wish to point out that this was not a case of a bargain between the administrator and the creditor—nothing of the sort. It was not as if anything in the nature of a contract had been made, express or implied, whereby the creditor withdrew his proof on the terms of retaining his security—nothing of the sort. He simply did not prove for the reason I have stated, and for no other reason. The rights

of the parties remained wholly unchanged by what he then did, for, as I have pointed out in the course of the argument, the administrator could at any time have redeemed on paying the amount of the debt, had the value of the assets gone up even beyond the then expectation of the creditor. The administrator could at any time have come forward and called on him to hand over all the securities on being paid the amount of his debt. Now, that being so, let us treat this in the first place as if it had been a case of bankruptcy pure and simple. To my mind, having regard to the 2nd schedule to the Bankruptcy Act 1883, the Legislature clearly contemplated the right of a creditor, on any alteration during the bankruptcy in the value of his security, by realisation of that security or otherwise to be allowed to readjust his claim—of course not by so doing thereby creating any injustice to the other parties, and of course not interfering with anything that had been done as to dividends or otherwise prior to the change of proof. And apart from any other sufficient circumstances justifying the Court of Bankruptcy in a case like the present somewhat special circumstances, it could not be said that merely because the creditor had originally valued his security as being greater than his debt or equal to it he was thereby for ever prevented from coming in and proving when it turned out by realisation or otherwise that his security was insufficient to pay his debt. Of course the Court of Bankruptcy would have had power to impose terms if terms had been necessary, and of course he would not have been allowed to disturb as I have said any prior dividends in the bankruptcy. But, in such a case, as I have indicated, in the absence of any special circumstances, which would render it unjust to allow the creditor to come in, he would have been allowed in bankruptcy, and ought to have been allowed in bankruptcy to come in. And the Bankruptcy practice would clearly have allowed him to do so. As a general rule he could have come in, of course such terms being imposed as might to the court under any special circumstances have appeared just. It is said that rule 1 of the 2nd schedule would have stopped the creditor in such a case from coming in and proving. That rule to my mind has not such a hard and fast effect as the respondents here would seek to attribute to it. That rule must be read with the other rules. Rule 1 is a very general rule. It applies to all creditors, and of course was not dealing with the secured creditor more than it was with any other creditor. Clearly no one could reasonably contend that by reason of rule 1 of that 2nd schedule an ordinary creditor by mere delay in coming in and proving his debt would thereby altogether lose his right of coming in at all as against undistributed assets in a case where otherwise no injustice would be done. As a rule no injustice is done when a creditor comes in, for the Bankruptcy Court could always impose terms which would prevent any unnecessary delay in the administration of the estate in bankruptcy being caused by the lateness of the creditor coming in. And, of course, the court could make such terms as would be right as to the creditor coming in not disturbing prior dividends or otherwise. As a rule, subject as I have said to care being taken as to no injustice being done, by special order the Bankruptcy Court would undoubt-

edly allow a creditor, notwithstanding rule 1, and notwithstanding his delay in coming in to prove, a share in undistributed assets. I will not say that there may not be special circumstances that might justify the Bankruptcy Court in refusing to admit a creditor who came in late. But I have stated what I conceive to be the general rule and practice of the Bankruptcy Court. Now, are there any special circumstances in the present case which would have justified the Bankruptcy Court—and so far as I am dealing with this part of the case the same reasoning applies to the application though it is made in Chancery—which would render it proper that the court should say to the creditor, "You ought not to come in and prove at all"? I think not. In the first place as to the delay, no doubt there has been considerable delay; but this is a very peculiar case. The principal security consisted of debentures and shares in the Delagoa Bay Railway Company. That railway as we know was seized by the Portuguese Government, and a fund was found by the Portuguese Government; and the parties entitled to share in it had to be ascertained by arbitration. What the secured creditor, the appellant, here did was this: He waited the result of the arbitration; he waited to see what sum would be awarded to him in respect of his holding in the railway under the award of the arbitrator. Was that an unreasonable course for him to take? I think not. Was it a course which a mortgagee acting reasonably and properly would be entitled to take? I think it was. And, indeed, curiously enough, in this very case the very same course has been adopted—and I think rightly so—by the administrator, acting of course under the direction of the court. For part of the assets of the testator in this case were holdings in this very railway, and we have been told, and I have no doubt accurately, that the delay that has arisen in winding-up this estate is partly if not chiefly due to the fact that the award had to be waited for, and the funds awarded in respect of the testator's holdings in the railway being sent over here before the estate could be finally wound-up. Under those circumstances can it be said that, by reason of the delay, the creditor, here the appellant, ought not to be allowed to come forward now when the funds in court have not been distributed, and ask under the circumstances that he, as a creditor who has not been paid by his security, should be allowed to share as against the undistributed balance? I think not, assuming always that care is taken by terms not to allow the winding-up of this estate to be further delayed by reason of the delay in the appellant making his present application for leave to prove. If the appellant is allowed to come in and prove no injustice will be done. There has been no change of parties which would have rendered it unfair to allow the appellant now to come in and prove. Here the only thing that can be said which would require the court's attention in dealing with the matter specially is, as I have already said, the question of the delay of the appellant not leading to further delay in the administration of the estate, and that can be properly guarded against. Now, there was one other point taken on behalf of the respondents here which must be alluded to, though I do not think that it amounted to the essence of the case. It was said that the liquidator, as the representative of the creditors, had

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other securities besides the securities of the Delagoa Bay Railway Company, to which I have referred. It is said on behalf of the respondents that one of those securities, consisting of shares, might have been sold at some time during the administration for some substantial sum. That is the only case made in respect of the other securities. The appellant has not thought it necessary to deal specifically with that allegation on behalf of the respondents. No doubt, of course, if those securities have realised anything, if they are not now valueless, the appellant on being allowed to come in and prove must give a proper account of those securities, and either value them, or, if they are valueless, state that they are valueless and offer to give them up. But the mere fact that the secured creditor as mortgagee might possibly have sold some shares ought not to be in itself alone fatal to him on this application. A mortgagee holding shares is not bound as mortgagee to be looking about for every turn of the market to see whether he can sell, and to be bound to sell at the highest price the market can give. I can see no sufficient reason myself in many a case why a mortgagee of shares should not be acting prudently and rightly in not attempting to sell the shares, but to try and realise moneys in respect of them by dividends or otherwise. And certainly I do not think that a case is made against a mortgagee fatal to him in circumstances like the present by merely stating that he had as security some shares, and possibly might have sold them at a value during the period which has elapsed before he comes in to prove. I do not think, therefore, that the respondents have made a sufficient case on this head to justify us in peremptorily refusing to allow the appellant to come in and prove. That deals with practically the whole of what I may call the special circumstances in this case, which are said to render it unjust to allow the appellant to come in and prove now. And I have pointed out, I think, why I consider that there are no such circumstances which on the merits would enable us to say that the appellant ought not now to be allowed to come in to prove. But now I come to an objection which has been taken—and which, to a great extent, may be said to be almost the principal objection which has been taken—on behalf of the respondents, and that is really a technical objection when the matter is looked at carefully. It is said that this is not an administration in bankruptcy, and it is said that the appellant here is in a very much worse position because it is an administration in the Chancery Division and a certificate has been made. To my mind that is not in any way fatal to the appellant. Sect. 10 of the Judicature Act 1875 undoubtedly applies to this case. I do not say that that has done away with the Chancery practice in administration actions, or that, for the purposes of the present case, we are to treat the Bankruptcy practice as incorporated with or overruling the Chancery practice. Nothing of the kind. But sect. 10 all the same applies; and so far as they are consistent with the Chancery practice the Bankruptcy Rules apply and ought to be applied. If the appellant, as a secured creditor in bankruptcy, would have been allowed now to come in and prove, to my mind he ought to be allowed to come in in the Chancery administration, the estate being insolvent, unless there is some

Chancery practice which prevents it. Is there any Chancery practice which prevents it? Is it prevented by the certificate? Not so. I have pointed out, so far as the certificate is concerned, what its effect and meaning is, and what in particular the word "disallow" means in this certificate. And on the general question, I wish to point out that, according to the Chancery practice, a creditor after a certificate has been made as to debts, and notwithstanding the certificate, is as a rule allowed to come in when there are assets undistributed and to share in the administration of those assets—of course in each case on such terms as to the court seems just. And, as I have pointed out, I think that the appellant here ought to be allowed to come in. I think it is just that he should be allowed to do so on such terms as I have already indicated. There is no difficulty in the present case. In the first place it appears to me that the certificate here, having regard to what we now know to be the meaning of the word "disallow," need not to have been varied. I think that it would have been quite sufficient to say that the creditor should be allowed to come in and prove notwithstanding the certificate. But, even if it had been formally necessary here to vary the certificate, I should still have felt no difficulty, for under Order LV., r. 71, I certainly am of opinion that there would have been special circumstances which would have justified and bound the court to have varied the certificate, of course taking care always to cause no injustice in the way I have previously referred to. That disposes of this case. I need not go through the authorities. The only one I need say a word upon is *Re Hopkins; Williams v. Hopkins* (*ubi sup.*). That case to my mind is clearly distinguishable and does not apply to the present case. In *Re Hopkins* (*ubi sup.*), under the Bankruptcy Act and Rules then applying, the creditor who in that case wished to come in and change his proof could not have amended his proof in bankruptcy, and in bankruptcy would not have been allowed to do so. When he came, and was obliged to confess that in bankruptcy he could not have been allowed to change his proof, he was met by the unanswerable objection in Chancery: "Where is your special circumstance?" There is no special circumstance in the Bankruptcy Rules, for the Bankruptcy Rules as they then stood were against him. Accordingly, it was held that, not being allowed to change his proof in bankruptcy, there were no special circumstances entitling the court to allow him to amend the certificate or alter his proof in Chancery. That is the whole case, and is clearly no authority on the case now before us. With regard to the application made to the master by the appellant, that occasioned some little difficulty in my mind. First, when I look at the peculiar circumstances of this case, I have also come to the conclusion that what then took place was a slip in practice, and that under the circumstances it ought not to be held fatal to the appellant here. I think that what my Lord has pointed out is the proper course to be adopted—namely, to extend the time in which to appeal from the decision of the master; to treat the present application as amended in that respect; and thus to give the court necessary jurisdiction to make the proper order which, I think, ought to be made here. The result will be that the appellant should be allowed, notwithstanding the certificate, to come in and prove.

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The terms with regard to detail will be mentioned in a moment.

STIRLING, L.J.—I have arrived at the same conclusion as my brethren, and after what they have said there is very little for me to add. I should like, however, to say a few words on the point which was mainly urged before us, and which, as I read the judgment, was adopted by the learned judge in the court below as the ground of his decision there. The argument and the judgment, as I conceive, are rested upon Order LV., r. 70, which provides, reading it shortly, that every certificate shall be transmitted to the central office to be there filed, and shall thenceforth be binding on all the parties to the proceedings unless discharged or varied upon application by summons. A certificate has been made in the present case by which the claim of the present appellant, the creditor, was disallowed, and it is said that that certificate is binding. That is quite correct. It is binding; but what is the meaning of "binding"? The contention is that it is binding in this sense, that the creditor is thereby precluded from again bringing forward the claim, notwithstanding any change in the circumstances which have occurred since that certificate was made. Now, undoubtedly the certificate might be a complete bar to the creditor. If, for example, the debt had been contested, and it had been adjudicated before the master at the time when he made his certificate, on the ground that either the debt did not exist or that it had been satisfied. That, I conceive, the adjudication not having been set aside within the proper time, would be a complete bar to the claim being brought forward. But it seems to me that we are entitled to go behind the certificate to this extent—to ascertain the circumstances in which the disallowance took place. Now, when that is done it is clear upon the evidence that the claim, being originally brought in in answer to an advertisement issued under the direction of the court, the creditor when called upon to prove his debt thought fit to withdraw the claim relying, as he said, upon the security which he held. There was therefore—and this indeed was not disputed at the bar—no adjudication whatever upon the debt itself. *Res judicata* could not be pleaded by any party to the proceedings. It seems to me that all that was meant by the certificate is that the claim was disallowed because in the circumstances existing at the date of the certificate the claim was inadmissible, the creditor electing to rely on his security. If, then, the circumstances have so altered that the creditor might legally bring forward the claim at the present time, it appears to me that the certificate ought not to prevent him from so doing; and in my judgment the case of *Re Metcalfe*; *Hicks v. May* (*ubi sup.*) is an authority for that proposition. It does not in its circumstances govern the present case. But it is an authority to this effect, that notwithstanding a certificate in which a claim is allowed at a certain amount, a further claim may be brought in without that certificate being varied. There a claim was made for a sum of 525*l.*, being principal 500*l.* and 25*l.* interest, and the certificate found that that was the amount due to the creditor. The creditor afterwards discovered from documents which came to his knowledge that the amount of interest which was allowed from the estate of the deceased was too small, and he applied to be

allowed to prove for the additional interest which had not been allowed, and the Court of Appeal allowed the claim. James, L.J., who gave the judgment of the court, said that the case could not be distinguished from the ordinary case of a creditor coming in after a lapse of time. He said that the interest in question had never been the subject of decision; that they were not reviewing any decision; and that it was merely a question of carrying in a claim which the applicant by mistake had omitted previously to prove. It appears to me that the Court of Appeal there considered that the procedure which is authorised by rule 57 of Order LV. was applicable, and that upon a simple application by summons without any variation of the certificate of claim might be received if the judge was satisfied that it was just; but upon such terms and conditions as to costs and otherwise as the judge might think fit. Now, the question whether in the present case the creditor ought to be admitted to prove appears to me to depend upon the rules that prevail in bankruptcy at the present time which are made applicable to administration actions in such a case as this by sect. 10 of the Judicature Act 1875. With reference to that it seems to me that the creditor would in bankruptcy be entitled to come in. He might, as it seems to me, come in in two ways. Either because he is a secured creditor who has realised his security and therefore entitled to come in under rule 9 of the 2nd schedule of the Act; or it may be that he ought to be treated as a creditor who has valued his security as equal to the amount of his debt, and in that case the provisions of rule 13 of the same schedule would be applicable, and would enable him in the changed circumstances to come in and prove in bankruptcy. It appears to me that the case of *Re Hopkins* (*ubi sup.*), which was referred to, cannot govern the present case, because in that case, as has already been pointed out, the rules which were enforced in bankruptcy at the time that that case was decided were different from those which now exist, and precluded the creditor from bringing in any such claim as is now brought forward here. I agree with what has been said by the other members of the court on the various points which I do not think it necessary for me to enter into in detail, and on the whole I come to the conclusion that this appeal should be allowed on proper terms.

As finally settled the terms were as follows:

Leave to prove notwithstanding the certificate. But the creditor is to comply with such orders as the judge may think fit with regard to the securities (if any) held by him other than the debentures and shares in the Delagoa Bay, &c., Railway Company, and the creditor is also to account on the footing of a mortgagee in possession in respect of his dealings with all the securities. And this order is not to delay any proceeding in the action so far as concerns the other creditors. But the creditor is to be at liberty in case of any contemplated distribution of assets before his claim is ascertained to apply for a sum being set apart to answer his claim to share in the distribution. The creditors to pay the costs of the proceedings by him other than the costs of this appeal. No costs of the appeal.

Appeal allowed.

CHAN. DIV.] ATTORNEY-GENERAL, &C. v. RURAL DIST. COUNCIL OF LUNESDALE. [CHAN. DIV.]

Solicitors for the appellant, *Hollams, Sons, Coward, and Hawksley.*

Solicitors for the respondents, *Harston and Bennett; Hurford and Taylor.*

ERRATUM.—*Chapman v. Browne*, ante p. 748.—In last line but one in first column for *Sweet* read *White*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 4 and 5.

(Before FARWELL, J.)

ATTORNEY-GENERAL AND THE RURAL DISTRICT COUNCIL OF SETTLE v. RURAL DISTRICT COUNCIL OF LUNESDALE. (a)

Inclosure Act—Action for breach of duty to repair roads—Canon of construction to be applied in construing Act.

By an *Inclosure Act* passed in the 7 Geo. 3 with reference to the inclosure of certain commons and waste grounds known as B. Moor, after reciting that the persons interested were owners and proprietors of messuages, &c., in the several townships therein mentioned, including, amongst others, the township of W., it was enacted that the commissioners should appoint and undertake the repair of (inter alia) two roads mentioned in the statement of claim.

The plaintiffs alleged that these roads were duly made in accordance with the award, and were for many years kept in repair by the surveyor of the township of Wennington, and that the said township was included in the defendant urban district, and that the defendants were liable to repair them.

There was no evidence, that the inhabitants of W., taken as a body, had ever in fact repaired or paid for the repair of the roads in question since 1767, although it was shown that since 1859 certain of the inhabitants of the township had contributed towards the repair of the roads for their own convenience. It was contended by the plaintiffs that liability to repair the roads in question was imposed upon the defendants.

Held, in the circumstances, that the court was justified in reading in after the words "in such manner as other public highways are by law directed to be repaired by such of the said townships respectively" the words "within whose district such public highways are situated"; that the doctrine of contemporanea expositio did not apply; that the defendants were not liable to repair the roads in question as the same were outside their district; and that in construing an *Inclosure Act* it is right to take the whole of the document as one complete document. It is not sufficient to take out one section and disregard others which are germane to the same subject.

Rex v. Inhabitants of Cottingham (6 T. R. 20) followed.

ACTION for a declaration that the defendants, the Rural District Council of Lunesdale, were liable to repair two roads, coloured red upon a plan annexed to the statement of claim, situate in the township of Bentham, in the West Riding of the

county of York, and for a mandatory injunction to compel the defendants to repair them.

According to the statement of claim it appeared that by an Act of Parliament of 7 Geo. 3 intituled "An Act for dividing, allotting, and inclosing such part of certain commons and waste grounds called Bentham Moor as lieth within the Manor of Ingleton, in the West Riding of the county of York," after reciting that the several persons therein mentioned were owners and proprietors of ancient messuages, lands, tenements, or hereditaments in the several townships therein mentioned including (inter alios) the township of Wennington, it was enacted (inter alia) that the commissioners therein named, or any three of them, should and might, and were thereby directed and required to set out and appoint such public highways and private roads or ways and also such hedges, ditches, bounds, walls, fences, drains, watercourses, tanks, bridges, gates, and stiles in, over, or upon the common and waste grounds intended to be inclosed by virtue of the Act, or any of them as they in their discretion should think requisite. And that all such public highways, roads, and ways should be made and at all times for ever thereafter repaired and kept in repair in such manner as other public highways were by law directed to be repaired by such of the townships respectively as the commissioners or their successors or any three or more of them should direct or appoint.

By their award dated the 28th Dec. 1767, and made in pursuance, as the plaintiffs alleged, of the authority given to them by the Act, the commissioners set out and appointed the two roads over Bentham Moor in dispute in this action, and directed that both roads should be made and for ever afterwards repaired and kept in repair by the inhabitants of the township of Wennington in manner as the public highways within the township of Wennington were maintained and kept in repair.

The plaintiffs further alleged that the roads in question were duly made in accordance with the award, and were for many years kept in repair by the surveyor of the township of Wennington; that the township was now included in the Lunesdale Urban District; and that repairs had not been effected since 1894.

The defendants by their defence contended that if the award in question imposed upon the inhabitants of Wennington any liability to keep the roads mentioned in the statement of claim in repair, the same was *ultra vires* of the commissioners and was not binding upon the defendants. They also denied that the roads in question were made in accordance with the award.

Upjohn, K.C. (*MacSwinney* with him), having opened the case for the plaintiffs, and witnesses having been called,

MacSwinney for the plaintiffs. — The actual width of the highways was in the discretion of the commissioners. It has been held that, affirmative words used in a statute are merely directory

Cole v. Green, 6 M. & G. 872; 7 Scott (N. R.) 682.

In that case it was provided by a private Act that contracts should be signed by the commissioners, or any three of them, or their clerk; it did not say that they should be void unless so signed. It appeared to the court therefore (see

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

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p. 890) that the part of the section containing these words was directory only. He also referred to

Maxwell on Interpretation of Statutes, 3rd edit., p. 528;

Reg. v. Ingall, 35 L. T. Rep. 552; L. Rep. 2 Q. B. Div. at p. 208.

In construing this Act it is necessary to strike a balance of convenience. It would seem extraordinary that if this direction were not complied with the whole Act should be void. No objection has ever been taken by anyone impeaching the conduct of the commissioners. Further, this is not a case where the result of not following the exact words of the statute imposes an increased burden upon the inhabitants. There is clear evidence that since 1854 this road has been kept in repair by the defendants; and within twelve months after the Local Government Act 1894 (i.e., on the 25th Nov. 1895) there is an entry made in the books of the district council to the effect that the surveyor should be directed to effect repairs of the Raven's Close Road, which is one of the roads referred to. Such a minute can be used in evidence:

Public Health Act 1875 (38 & 39 Vict. c. 55), sched. 1, pt. 1, s. 10.

There is also negative evidence to the effect that the Settle Rural District Council have not done the repairs.

Jenkins, K.C., R. C. Glen, and Bethune for the defendants.—It is submitted that the commissioners had no right under the Act to make the inhabitants of Wennington liable to repair the ways in question. It is said that repairs were done for thirty years; but they were only voluntary repairs effected by some of the inhabitants privately for their own convenience. The Act is loosely drawn. The words "ways" and "roads" are used interchangeably. All highways made under the Act should have been 60ft. wide:

R. v. Wright, 3 B. & A. 681.

It has been held that commissioners appointed by a local Act, which enacted that the private roads set out by them should be repaired by such person or persons as they should award, had no power to impose on the parish at large the burden of repairs:

Re v. Inhabitants of Cottingham, 6 T. R. 20.

The Act creates a power in the commissioners and a corresponding liability upon those affected. It is submitted that this creates a position contemplated by Maxwell on the Interpretation of Statutes, 3rd edit., p. 521, where he says: "A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty, and where they relate to a privilege or power: (see per Denman, J. in *Caldow v. Pixell*, 36 L. T. Rep. 469; L. Rep. 2 C. P. Div. 562).

June 5.—*FARWELL, J.*—I have come to a conclusion in my own mind, although this case is very obscure. The point in question between the plaintiffs and the defendants is who is liable to pay for the repairs of a piece of road which is in the district of the plaintiffs, but which is said to be repairable by the defendants by virtue of an award under an Inclosure Act. The Act was passed in 1767. It was an Act for the inclosure of a large tract of common or waste ground in Bentham Moor, all or part of which is situated

within the Manor of Ingleton. The persons interested appear in the second recital to the preamble. They are certain persons named, and they are described as "owners and proprietors respectively of ancient messuages, lands, tenements, or hereditaments in the several townships of Ingleton and Bentham within the said manor of Ingleton in the said West Riding of the said county of York and in the township of Wennington in the county of Lancaster." These "have severally for themselves and their respective leases and tenants for and in respect of the several estates within the same manor and townships right of common upon the said commons and waste grounds called Bentham Moor." The persons applying for the Act, and interested in it, are the owners of the soil, and certain persons including certain inhabitants of Wennington and of another county not within the manor at all in respect of tenements of theirs in Wennington. They have certain rights which include turbary and there may have been others. I do not know. These persons come together and agree, and subsequently apply to the Legislature to get and succeed in getting one of the usual old-fashioned Inclosure Acts enabling the moor to be inclosed. I now come to a passage on p. 6 of the print of this Act upon which the argument in this case to a great measure turns, and I may say that, if the argument rested on this clause alone, I should have considerable difficulty in coming to the conclusion at which I have arrived. I think, however, that in construing an Act of this description, and indeed all Acts, it is only fair to take the whole of the document as one complete document. One must not take out one section and disregard others which are germane to the same subject. I have also to bear this in mind, that it is an Act passed, as was pointed out in the case of *Re v. Inhabitants of Cottingham* (*ubi sup.*), which has been referred to, for the private emolument of the persons who desire to divide up the common, and the only interest which Wennington has is first of all in respect of those inhabitants of Wennington who by reason of their tenements have rights of common over this moor, and also somewhat indirectly because under the award the owner of the soil chose to permit a certain quarry to be used for the making of roads and the repairing of roads, not only in the other townships, but also in Wennington. I cannot regard that as bringing Wennington in "as a party to the Act," but I regard it as the court did in the *Cottingham* case as something put forward by persons who are themselves interested. So far as I can see, all that Wennington had to do with it was limited to the individuals, who are stated to have rights of common over the moor in question. That being so, I find first of all at page 6 a clause for the setting out of the roads. It is followed a little later (after certain intervals) by a clause enabling the award to be made, which is expressed on the face of it to be for preventing all differences and disputes relating to the intended inclosure and division, and is followed by an express provision as to the costs and charges of certain specified matters in respect of these roads. On p. 6 the provision is as follows (reading it shortly): "The commissioners shall meet and they are hereby directed and required to set out and appoint such public highways and private roads

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or ways and also such hedges, ditches," and so on, "in, over, or upon the commons and waste grounds intended to be inclosed by this Act or any of them"—that is to say, the moor in question not being in Wennington—"as they in their discretion shall think requisite, so as all such public highways be 60ft. at least in width between the ditches, and that all such public highways, roads, and ways shall be made and at all times for ever thereafter repaired and kept in repair in such manner as other public highways are by law directed to be repaired by such of the said townships respectively as the said commissioners or their successors or any three or more of them shall direct or appoint." Then after certain provisions, which I need not refer to more particularly, because they only show that there is a certain want of care in the preciseness of the language used, the section goes on: "And that all private ways, hedges, ditches, walls, fences," and so on, "to be set out, erected, and appointed as aforesaid shall be made and provided, and at all times thereafter repaired, cleansed, maintained, and kept in repair by such person or persons, and in such manner as the said commissioners or their successors or any three or more of them, shall by their award or instrument hereinafter mentioned direct and appoint." That is followed up by the award section at p. 10: "And for preventing all differences and disputes relating to the said intended inclosure and division, it is hereby further enacted by the authority aforesaid that immediately after the said commissioners or their successors, or any three or more of them, shall have completed or finished the respective partitions, allotments and divisions of the said commons and waste grounds, pursuant to the purport and directions of this Act, they the said commissioners or their successors or any three or more of them, shall form and draw up, or cause to be formed and drawn up, an award or instrument in writing which shall express, specify, and contain the quantity in the measure hereinbefore mentioned, of acres, roods, and perches contained in the said commons and waste grounds, and the quantity of each and every parcel thereof assigned and allotted to every of the parties entitled to and interested in the same respectively; and an exact description of the situation, abutments, and boundaries of the said parcels and allotments respectively, with orders and directions for and concerning the laying out and making the public roads, and the breadth thereof, and for and concerning laying out, making, maintaining, cleansing and keeping in repair, the private roads and the ways, hedges, ditches, walls, fences, banks, drains, watercourses, bridges, gates, and stiles, in, upon, and over the said commons and waste grounds intended to be closed by virtue of this Act; and also such other orders, regulations, and determinations as shall be necessary or proper to be inserted therein, according to the tenor and purport of this Act." Then there comes a provision on p. 12: "That the charges and expenses incident to, or attending the passing of this Act, and of the surveying and valuing the said messuages, tenements, and inlands within the said manor and townships respectively; and of the surveying, planning, measuring, dividing, allotting, and setting out the said commons and waste grounds so intended to be divided and inclosed as aforesaid, and of the preparing, making, and executing

the said award and of setting out and making the said public and private ways and roads and of all charges and expenses incident to or attending the execution of this present Act shall be borne and defrayed by the several persons to and amongst whom the same commons and waste grounds shall be respectively allotted, in proportion to the real value of their respective allotments," &c. Now, under the first provision at p. 6, in my opinion, the generality of the statement "that all such public highways, roads, and ways shall be made and at all times for ever thereafter repaired and kept in repair in such manner as other public highways are by law directed to be repaired, by such of the said townships respectively as the said commissioners or their successors or any three or more of them shall direct or appoint," is really to be limited in the same manner or in an analogous manner to the mode in which the generality of the expression at the end of the section "by such person or persons as the commissioners shall direct" is to be limited in accordance with the authority of the case of *Rex v. Inhabitants of Cottingham (ubi sup.)*. I think the true rendering of the section is this, and it is one which avoids the difficulties suggested by Mr. Upjohn, which perhaps were applicable to the transposition which Mr. Jenkins suggested. The real way to solve the difficulty is to read in after the words "in such manner as other public highways are by law directed to be repaired, by such of the said townships respectively," the words "within whose district such public highways are situated." That seems to me to be what was really intended having regard to the subsequent provisions in the Act, and it is also in accordance with the principle of construction adopted by the court in the case of *Rex v. Inhabitants of Cottingham (ubi sup.)*. I have here to consider Wennington as a township, and it is to be distinguished from such of the inhabitants of Wennington as might by virtue of certain tenements therein have rights of common over the moor, who have no concern whatever with this matter; and to assume that the Legislature meant to give authority to the commissioners to cast the burden of keeping in repair a public highway outside the district on the inhabitants of the district of Wennington seems to me to be a very strong thing, and one which is to be avoided if possible. Now, I have not only got the considerations which were present in the case of *Rex v. Inhabitants of Cottingham (ubi sup.)*, but I have also the assistance of Grave, J.'s statement on that same section as to the meaning of the words "in such manner as other public highways are by law directed to be repaired." The words are exactly the same "in such manner as other public highways are by law directed to be repaired." He says: "With respect to the former, it directs that they shall be repaired in such manner as other public roads, that is, by the parish." The *prima facie* meaning, therefore, of the words I have got here "in such manner as other public highways are by law directed to be repaired" is by the parish. In order to make that which I take to be the *prima facie* meaning on Grave, J.'s authority consistent with the rest of the section, I must read in the words that I have suggested unless I adopt Mr. Jenkins' suggestion of transposing the sentences, I think I should be justified by *Key v. Key* (4 De G. M. & G. 73), and

cases of that class, in making the transposition if necessary, but I prefer to put it in the way I have done because it avoids the difficulties which Mr. Upjohn suggests, although I confess I am not very much pressed by them, because one must assume that the commissioners would do what was sensible, and would not direct one township to make a road in another township's district for the mere pleasure of changing over the authority to do the work. In this particular Act of Parliament, which is certainly very ill drawn, I am assisted by the fact that when I come to the award, there is an express provision distinguishing between the public highways and the private ways. The orders are to be for and concerning the laying out and making of the public roads and the breadth thereof, and for and concerning the laying out, making, maintaining, cleansing, and keeping in repair of the private roads. On reading these two sections fairly together, I cannot help coming to the conclusion that there is no intention on the part of the Legislature to displace the common law liability to repair the roads, but to authorise the commissioners to make awards in accordance with such pre-existing common law liability. I think it would be unreasonable to construe the Act so as to enable the commissioners to throw upon the inhabitants of Wennington, who have no concern with the Act at all, the liability to repair the roads in another district. Then it is said that there is a *contemporanea expositio*. So far as regards the award, there is no doubt the commissioners took the view that they had power to direct the Wennington township to do these repairs. The award is explicit that public highways in the township of Wennington shall be made and for ever afterwards repaired and kept in repair by the inhabitants of the township of Wennington Manor. I think the true meaning of that is that the commissioners construe the Act of Parliament in a way different to the way I have construed it. Now if there had been evidence to convince me that, during the period of 150 years since the Act was passed, the inhabitants of Wennington had, in fact, repaired and paid for the repair of this road, I should then consider I had a case of *contemporanea expositio*. The best statement of the law upon this subject is to be found in a speech of Lord Watson in the House of Lords in case of *Trustees of the Clyde Navigation v. Laird* (8 App. Cas. 673). He says: "I have only to add that, in my opinion, such usage as has in this case been termed *contemporanea expositio* is of no value whatever in construing a British statute of the year 1858." This was in 1883. "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period." Now, if I had found, in the present case, a long course of dealing evidencing the unanimous consent of all persons interested throughout the years since the Act and the award, I should undoubtedly have given effect to it; but so far from holding that, I do not think that the onus which is certainly on the plaintiffs of showing that Wennington has paid for these repairs has been discharged at all. The most material piece of evidence to my mind is

supplied by those curious books put in evidence by Peter Bramwell from 1859 to 1865. There is no evidence whatever to show whether this road was ever repaired at all or by whom it was repaired down to 1859. I should infer that it was in fact repaired by somebody, but I had unmistakable evidence in 1859 that the road was then repaired, and had been repaired as I gather for some little time before, to what exact extent has not been shown, by a voluntary rate collected from the persons in Bentham who had occupied land adjoining the road. They found the road useful, and they repaired it for their own benefit. The book which proves this is perfectly explicit. It shows that a 6d. rate was levied on those particular persons and those only, and this levy went on down to the year 1865. As to what happened between 1865 and 1873 does not seem clear. I do not think the evidence really assists me, but from 1873 down to 1895 I think it is pretty plain that so far as the repairs were actually carried out they were carried out by this man Peter Bramwell. I also think it is plain, and I find as a fact so far as it is possible to come to an opinion on the evidence I have seen, that if and so far as they were paid out of the Wennington rates they were so paid by Peter Bramwell wrongfully, and without the knowledge of the persons who were really made liable for those payments. Peter Bramwell's evidence comes to this in effect. He was the surveyor; he lived in a house which abutted on the road in question; he used the road; he wanted it repaired, and he used money from the rates from time to time in order to repair it, but he says, "I never put down the expenses of repair of this road," which he called Bentham-road (I need not say anything about the dispute as to the name of the road), "in my highway account books. If I had the auditor would have disallowed it; from my books nobody could have told that I had been repairing the road. The reason I repaired the road was that I was the surveyor of Wennington. I repaired it before, and liked to do it before. I was not bound to repair that road; I did it from my own free will; I personally used the road a good deal." The evidence before me amounts to nothing down to 1859; there is no evidence at all one way or the other from 1859 onwards, but there is indisputable evidence that it was not repaired by Wennington, but repaired privately. There is evidence that repairs were done unwittingly by Wennington, not to their knowledge, but in fact in spite of them and to their detriment; but such evidence is comparatively modern, and to my mind does not come within the meaning of the words *contemporanea expositio*, as pointed out by Lord Watson. There is no unanimous consent over a long unbroken period; in fact, the earlier date is the most material for the *contemporanea expositio*, and although if I had evidence that in 1865 Wennington had been repairing, and that afterwards there had been a charge, I should attach little importance to the charge, and I might be able to throw back, by way of inference, the actual repairs to 150 years ago, as to which, of course, positive evidence would be difficult to obtain at this period. Still, when I find that the earliest record I have is of repairs not by Wennington, but by voluntary rate, it seems to me that what was done subsequently is of very little avail for the purpose of displacing that

voluntary payment, or rather of overleaping that voluntary payment, so as to get back by way of inference to a contemporaneous payment, which is the only thing that would be useful as contemporaneous *expositio*. The result is that to my mind the evidence is really not in favour of the plaintiffs so far as the facts go. There is only one other thing which I need refer to. It is that I do not think that public highways of at least 60ft. in width is a condition precedent, or essential to the setting out of the roads. I think it is only directory for the reasons which appeared in the various cases cited. I think the setting out of the various highways is a duty to the public within the definition given by the case of *Steele v. Ashwell*, and I might also adopt the view of Lord Tenterden—and it is a strong one—that in an Act of this sort you do require negative words if you want to make a provision of that kind something more than directory. The result is that in my opinion the plaintiffs have failed to show that there is such a liability as they contended for, and that the liability is really cast upon themselves. In fact I need not say that. It is enough to say that it is not cast upon the defendants. I shall dismiss the action with costs.

Solicitors: *Ridsdale and Son*, for William Hartley, Settle; *Gibson, Weldon, and Bilborough*, for Johnson and Tilly, Lancaster.

June 5, 6, and 11.

(Before FARWELL, J.)

BRITISH HOMES CORPORATION LIMITED v. PATTERSON. (a)

Partnership—Liability of member of firm for default of his co-partner—Election to charge partner alone—Partnership Act 1890 (53 & 54 Vict. c. 39), ss. 9, 10.

The plaintiffs in the year 1899 appointed one F. A., who carried on business alone under the name of A. and A., to act as their solicitor in connection with certain mortgage transactions, one of which is hereinafter referred to as the Coleman mortgage.

On the 31st Dec. 1900, and while the business in question was being carried out, F. A. entered into articles of partnership with the defendant P.

On the 5th Feb. 1901 F. A. gave the plaintiffs notice in writing to the effect that he had taken defendant into partnership, and that the style of the firm would in future be A. and P. The plaintiffs ignored this notice.

On the 28th Feb. 1901 the plaintiffs sent a cheque, payable to A. and A., in settlement of the Coleman mortgage. The proceeds of this cheque were misappropriated by F. A., who subsequently absconded.

In an action against P. for the amount of the cheque:

Held, on the evidence, that the plaintiffs had elected to abide by their original contract with F. A., and had not adopted the new firm as their solicitors to act for them in the particular transaction; that sect. 11 (b) of the Partnership Act

1890 had no application, as it could not be said that the firm of A. and P. did in fact receive money or property of the plaintiffs.

Per cur., following Lord Blackburn in Scarf v. Jardine (47 L. T. Rep. 258; 7 App. Cas. at p. 360): "Where A., knowing B. and C. to be partners, refuses to contract with them jointly, and insists on contracting with B. alone, he cannot afterwards treat B. as liable."

ACTION to recover the sum of 360l. money alleged to have been paid by the plaintiffs to the defendant as solicitor for the use of the plaintiffs.

The plaintiffs were a limited company, whose chief business was to advance money on the mortgage of house property. The defendant was a solicitor carrying on business at Hastings and Bexhill, under the firm name of "Atkinson and Atkinson."

On the 28th Feb. 1901 the plaintiffs forwarded to the firm as agents on their behalf a cheque for 360l. for the purpose of completing a mortgage known as the Coleman mortgage. The cheque was duly received by the firm, but they did not carry out the purpose for which it was sent, nor return it.

On the 23rd March 1901 the defendant dissolved partnership with Frederic Atkinson, who was subsequently adjudicated bankrupt.

The defendant in his defence denied that he ever was a member of the firm of Atkinson and Atkinson. He averred that on the 5th Feb. 1901 he did enter into partnership with Frederic Atkinson under the style of Atkinson and Patterson, and that it was provided by the articles that neither partner should enter into any engagement on the part of the firm except in the said name. He further alleged that the cheque in question was received and applied by Frederic Atkinson for his own purposes; and that he had no knowledge of the receipt of the cheque, and that the cheque was not received by Frederic Atkinson in the scope of his apparent authority as partner with the defendant.

The manager to the plaintiff company admitted in cross-examination that he had notice on the 5th Feb. to the effect that Patterson was a partner, and that in spite of this letter he continued to write to the firm as Atkinson and Atkinson.

The manager of Lloyd's Bank at Hastings stated in his evidence that the cheque for 360l. was paid into Frederic Atkinson's account at his bank. On the day before the payment in of this cheque there was an overdraft of 330l. and when the account was closed on the 11th March there was a deficit of 327l.

Frederick Thompson (Upjohn, K.C. with him) for the defendant.—It is clear that the plaintiffs elected to contract with Atkinson only, although they had notice that he was a partner on the 5th Feb. The letters continue to show that their business was with him. The plaintiffs urge that the money is in the custody of the firm, and defendant has to discharge himself. The onus of showing that there was novation is upon the plaintiffs

Jacobs v. Morris, 84 L. T. Rep. 112; (1901) 1 Ch. 261;

March v. Keating, 1 Bing. N. C. 198.

Jenkins, K.C. and Poley for the plaintiffs.—If the cheque in question was received on autho-

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

rised partnership business, then one partner was agent for the other:

Jacobs v. Morris (ubi sup.).

It is provided by sect. 9 of the Partnership Act 1890 that every partner in a firm is liable jointly with the other partners . . . for all debts and obligations of the firm incurred while he is a partner. The reason why a dormant partner is sometimes liable is that the other partner acted as his agent. [FAREWELL, J.—Suppose I contract with A., and he says, "I am agent for B." and I reply, "I have nothing to do with B." Could I then sue B., if I failed in an action against A.?] This case is on narrower grounds. There was no refusal to deal with anyone; the plaintiffs merely continued their former course of business. It is submitted that the money was sent to be dealt with by the firm. The plaintiffs have not precluded themselves from saying it was business of the defendant's firm:

Blair v. Bromley, 5 Ha. 542; 2 Ph. 354;

St. Aubyn v. Smart, 17 L. T. Rep. 439; L. Rep. 5 Eq. 183; L. Rep. 3 Ch. 646.

[FAREWELL, J.—Could the defendant have sued the plaintiffs for the costs?] It is submitted that he could. The plaintiffs are not precluded from bringing this action, as nothing short of a judgment against the principal precludes an action against an agent:

Kendall v. Hamilton, 41 L. T. Rep. 418; 4 App. Cas. 504.

Thompson referred to

Curtis v. Williams, 31 L. T. Rep. 678; L. Rep. 10 Q. B. 58.

Cur. adv. vult.

June 18.—FAREWELL, J.—This is one of those unfortunate cases in which the court has to determine which of two innocent parties must suffer for the defalcations of a rogue. The plaintiffs are a limited company whose chief business is to advance money on the mortgage of house property out of the funds of the company as and when available to the holders of house property certificates. The defendant is a solicitor. In the year 1899 the plaintiffs appointed one Frederic Atkinson, who carried on business as a solicitor at Hastings and Bexhill under the firm of Atkinson and Atkinson, to act as their solicitor in their mortgage transactions on certain special terms. The plaintiffs knew that Atkinson was in business alone, although trading under the style of Atkinson and Atkinson. In the early part of the year 1900 the plaintiffs instructed Atkinson as their solicitor to carry out a mortgage to be made to them by one Coleman. The business was somewhat protracted, and the money to complete the mortgage was not sent by the plaintiffs until March 1901. In the meantime—namely, on the 31st Dec. 1900, the defendant entered into partnership with Atkinson. No books of any sort were produced to him, but accountants on his behalf examined the affairs of Atkinson and gave a satisfactory report. The deed of partnership was dated the 31st Dec. 1900, and it recited that it had been agreed that the defendant should purchase a third share of Atkinson's business, including profits of offices and appointments held by Atkinson, for 1500*l.*, to be paid on the execution of the deed. It then provided that Atkinson and the defendant should become partners in the

profession of solicitors and conveyancers in continuation of the business carried on for many years by Atkinson from the 1st Dec. 1900, during their joint lives under the style or firm of Atkinson and Patterson, and that neither partner should enter into any engagement on behalf of the firm except in its name. Under this deed the benefit of the contract between Atkinson and the plaintiffs *re Coleman* would form part of the partnership profits. On the 5th Feb. 1901, Atkinson gave notice in writing to the plaintiffs that he had taken the defendant into partnership and that the style of the new firm would be Atkinson and Patterson. The plaintiffs received this notice but paid no attention to it. Their house property manager was called and said that he continued to correspond with Atkinson and Atkinson, and ultimately sent them the money to complete Coleman's mortgage because he had no instructions to act otherwise. The money to complete the Coleman mortgage was in fact sent by a cheque dated the 23rd Feb. 1901, payable to Atkinson and Atkinson, *re Coleman* on order, in a letter dated the 28th Feb. 1901, and addressed to Atkinson and Atkinson. The cheque was indorsed "Atkinson and Atkinson, by F. Atkinson," and a receipt signed "Atkinson and Atkinson" was sent to and accepted by the plaintiffs. The money was paid by Atkinson into his own private account, and was embezzled by him. The defendant first heard of this Coleman transaction on the 15th March 1901, and Atkinson absconded shortly after. No books of the new firm were in fact ever kept, and no partnership account in the name of the new firm was ever opened with any banker, and no payments were made out of Atkinson's account to or for the benefit of the partnership. The nameplate on the door of the office at Hastings was altered, but that at Bexhill was left untouched; but the defendant commenced to attend regularly at Hastings only on or about the 5th Feb. 1901, so that little more than five weeks elapsed before Atkinson's dishonesty was discovered. When the cheque for 360*l.* was paid in to Atkinson's account that account was overdrawn to the extent of about 330*l.* and the balance of 30*l.* by which the account was put in credit was drawn out again in a few days. The defendant had nothing to do with and had no power to draw on this account of Atkinson's. In these circumstances the plaintiffs allege that the defendant is liable as a partner, and rely on sects. 10 and 11 of the Partnership Act. Sect. 10 provides that where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act. Sect. 11 provides as follows: "In the following cases—namely, (a) where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and (b) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss. Now, the liability of partners which is declared

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by these sections is merely a branch of the law of principle and agent. "Each partner is agent of the firm and other partners for the purposes of the business of the partnership" (sect. 5), and all the partners are liable because the individual partner has acted or contracted as agent for them as either disclosed or undisclosed principals, if disclosed, because the act or contract is avowedly with them or on their behalf, if undisclosed, because the law gives the other contracting party the option of proceeding against the undisclosed principal where discovered. But where A., knowing B. and C. to be partners, refuses to contract with them jointly and insists on contracting with B. alone, he cannot afterwards treat B. as liable. "Where a man has an option to choose one or other of two inconsistent things, once he has made his election, it cannot be retracted. It is final and cannot be altered *Quod semel placuit in electionibus amplius displicere non potest*": (per Lord Blackburn in *Scarf v. Jardine*, 47 L. T. Rep. 258; 7 App. Cas. at p. 360). The several liability of B. is a totally distinct thing from the joint liability of B. and C. A. had his option which he would accept, and he elected to accept B.'s several liability. The same principles apply to a contract made between A. and B. where B. subsequently takes C. into partnership and gives A. notice thereof. The question then becomes one of novation. Has the original contract been discharged by the acceptance of the new liability? I take the law to be as stated by the author of *Lindley on Partnership*, 5th edit., at p. 239, where the following passage appears: "In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution. If A., being indebted to B., transfers his liability to C., and B. does not assent to the transfer, his rights are wholly unaffected; he will neither acquire any right against C. nor lose his former right against A. As regards B., the agreement between A. and C. is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B. assents to the arrangement come to between A. and C., and adopts C. as his debtor instead of A., then A.'s liability to B. is at an end, and B. must look for payment to C., and to him alone: (see per Buller, J. in *Tatlock v. Harris*, 3 T. R. 180). A. is, of course, not bound to accept the liability of B. and C. in discharge of that of B., and if he gave express notice that he refused to do so he would have finally elected to abide by the original agreement; but "he is not bound to elect at once. He may wait and think which way he will exercise his election so long as he can do so without injuring other persons": (*Scarf v. Jardine*, *ubi sup.*). The questions that I have to decide are—(1) Did the plaintiffs before action elect either to abide by their original contract or to adopt the new firm as their solicitors in Coleman's matter in lieu of Atkinson; and, (2) if not, can they so elect by the writ or now at the Bar? In my opinion the plaintiffs prior to the writ elected to stand by their original contract. They knew of the change in the firm, but they did not merely continue to address their letters to Atkinson and Atkinson, but they actually sent the money to

Atkinson and Atkinson, payable to Atkinson and Atkinson, and accepted a receipt from Atkinson and Atkinson. Indeed, it was hardly contended that they had novated before action, but it was urged that it was still open to them to elect, and that the issue of the writ was an election to novate. In my opinion this is not so, but the payment of the whole money to Atkinson operated as an election to abide by the original contract, and being once made could not afterwards be retracted. But even if this were not so, they could not, in my opinion, now elect to make the defendant liable. The principle applicable is the same as that which is applied by the courts in the case of an undisclosed principal. It is true that the party who contracted with the agent can sue the principal when discovered, but this is subject to the qualification that nothing has occurred in the meantime to make it unjust. "If the principal has paid the agent, or if the state of the accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment on such state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent": (per Bayley, J. in *Thompson v. Davenport*, 9 B. & C. at p. 89). It would, in my opinion, be manifestly unjust to allow the plaintiffs to deal with Atkinson alone so long as any payment was to be made by them, and to allow them to elect to deal with Atkinson and Patterson, when the liability for the sum so paid to Atkinson alone came in question. The plaintiffs relied on the sections of the Partnership Act, to which I have referred, but the Act is declaratory only. It states the law as it affects partners in relations to third persons under ordinary conditions and in the absence of special circumstances. It in no wise affects the acts or defaults of third persons contracting with the partners or any individual member of the firm. It is said that the case of the defendant falls within the exact terms of sects. 10 and 11 (a), inasmuch as Atkinson was "acting in the ordinary course of the business of the firm" (sect. 10), and "acting within the scope of his apparent authority" (sect. 11 (a)); but even if this were so, the plaintiffs' contention would involve the introduction of some such words as these: "Notwithstanding that the person complaining has declined to contract with or recognise the partner as partner." But the words of the Act do not refer to the rights and liabilities of the partners *inter se* in the abstract, but only in relation to contracts made with or acts done to the detriment of third persons, and those third persons must be persons who are dealing with the partner as such, or who are in a position to elect to deal with the partner as such or to treat his wrongful act as the act of a partner. In my opinion, the defendant does not come within the words of the Act, because I do not think that it is open to a third person to assert that the individual with whom he has intentionally contracted as an individual on his several contract, or with whom he has elected to continue as on a contract with an individual, was acting in the ordinary course of the business of the firm, or was acting within the scope of his apparent authority. He knew that he was not acting, or appearing to act, for the firm at all, and he preferred to have it so. Further, in my opinion, sect. 11 (b) has no application,

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because in the circumstances I think it impossible to hold that the firm of Atkinson and Patterson did, in fact, receive money or property of the plaintiffs. The cheque was, as I have said, drawn payable to Atkinson and Atkinson, was intentionally sent in a letter addressed to Atkinson and Atkinson, and was paid into the account of Atkinson alone, and was received and dealt with by Atkinson alone. The plaintiffs' action fails and must be dismissed with costs.

Solicitors for the plaintiffs, *E. C. Rawlings and Butt*.

Solicitors for the defendant, *Field, Roscoe, and Co.*

Wednesday, March 19.

(Before EADY, J.)

Re HUNLOKE'S SETTLED ESTATES; FITZROY v. HUNLOKE. (a)

Lease—Surrender—Fines—Tenant for life.

The legal tenant for life under a will of certain estates granted a mining lease under a power in the will for a term of twenty-two years from the 1st July 1898, receiving a dead rent and royalties which were to cease when the minerals were worked out.

The lessees under a power in the lease determined the lease, and paid the dead rent for the whole of the unexpired term.

Held, that the money belonged to the tenant for life.

THIS was an adjourned summons to determine who was entitled to the money paid on the surrender of a lease.

By a will made in 1845 certain hereditaments were devised on certain limitations under which A. was legal tenant for life.

The will contained a power for any adult life tenant in possession to grant mining leases for terms not exceeding sixty years in possession at such yearly rent, or reserving such royalties, and upon such terms and under such stipulations as should be thought reasonable, but without taking any fine or foregift or anything in the nature of a fine or foregift.

There was a power of sale with the consent of the tenant for life, but no provision as to the application of moneys paid by a lessee as the consideration for obtaining a surrender.

The testator died in 1856, and in Dec. 1899 the tenant for life granted a lease of certain seams of coal for the term of twenty-two years from the 1st July 1898, subject to certain royalties and a dead rent of 430*l.* per annum for the first two years of the term, and a dead rent of 75*l.* per annum for the remainder of the term.

There was power for the lessees to determine the lease at the expiration of any half-year of the term on giving six months' notice and paying the dead rent for the residue of the term.

The lessees gave six months' notice determining the lease on the 1st July 1901, and paid 37*l.* 10*s.* for the half-year then expiring and 1425*l.* for the dead rent for the remaining nineteen years of the term.

Beaumont for the trustees.—The 1425*l.* should be treated as capital money, or, at all events,

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

apportioned as if the money was derived from the sale of settled leaseholds :

Hood and Challis' Conveyancing and Settled Land Acts, note to Settled Land Act 1882, s. 13.

The cases cited by Mr. Wolstenholme do not show that the money belongs to the tenant for life:

Wolstenholme on Settled Land Act 1882, s. 13, note.

Vaughan Hawkins for the tenant for life.—The legal tenant for life has a common law right to accept a surrender of a lease, and, if he acts *bonâ fide*, is entitled to any consideration paid for such surrender. A tenant for life is not a trustee of an ordinary power of leasing :

Wilson v. Sewell, 1 W. Bl. 617.

Money paid for the surrender of a lease is a mere casual profit, like fines, or heriots, or damages for breach of covenant :

Brigstockes v. Brigstockes, 38 L. T. Rep. 760 ; 8 Ch. Div. 357 ;

Earl Cowley v. Wellesley, 14 L. T. Rep. 245 ; L. Rep. 1 Eq. 456 ;

Noble v. Cass, 2 Sim. 363 ; 29 R. R. 115.

Beaumont replied.

EADY, J.—It is conceded that the case is outside the Settled Land Acts, as the lease was made under a power in the will and determined by the lessees under a provision in the lease. As the tenant for life had no option in the matter, there can be no doubt that he acted *bonâ fide*. The question is whether the tenant for life can retain the 1425*l.* as a casual profit. Money paid to a legal tenant for life as the consideration for accepting a surrender belongs, according to the common law rule, to the tenant for life. What is there to take the 1425*l.* out of the rule? The trustees say it is merely the future dead rent paid in advance. But it is none the less a money payment for the right to determine the lease, and is quite different from a fine paid on the granting of a lease, for there the inheritance is burdened with a lease. As there is no ground for raising an equity against the tenant for life, under which she must hold the money as capital, the ordinary common law rule applies.

Solicitors : *Tyles and Co.*

KING'S BENCH DIVISION.

Feb. 15 and March 1.

(Before WALTON, J.)

FEYERBICK AND OTHERS v. HUBBARD. (a)

Foreign judgment—Action on—Contract between British subject and foreigner—Agreement to refer disputes to foreign jurisdiction—Judgment against British subject—Binding effect of judgment.

A clause in a contract made between a British subject resident and domiciled in England and a foreigner that all disputes relating to the agreement and its fulfilment should be determined by the jurisdiction of the foreign country, gives the courts of the foreign country jurisdiction to deal with such disputes, and to bind the British subject by a judgment of the foreign court duly given against him in default of his

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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appearance, where all the requirements of the law of that foreign country as to citation, service of process, and otherwise, have been complied with; and an action upon such judgment may be maintained in the courts of this country against the British subject.

Copin v. Adamson (31 L. T. Rep. 242; L. Rep. 9 Ex. 345; 33 L. T. Rep. 580; 1 Ex. Div. 17) and *Rousillon v. Rousillon* (42 L. T. Rep. 679; 14 Ch. Div. 351) considered and followed.

ACTION on a foreign judgment tried before Walton, J., without a jury, as a short cause under Order XIV., r. 8.

The action was brought to recover a sum of 1208l. 19s. 1d. for money due from the defendant to the plaintiffs under a final judgment of the Tribunal of Commerce of Ghent in the kingdom of Belgium, bearing date the 15th Nov. 1900.

The cause of action on which the above judgment was founded arose out of an alleged breach by the defendant of a contract between the plaintiffs and the defendant, dated the 9th Sept. 1895.

The plaintiffs were Albert Feyerick and two others, a Belgian firm carrying on business as merchants at Ghent, and the defendant Hubbard was a merchant in London, and was a British subject domiciled in England and resident in London.

A contract in writing was made and executed by the defendant at Ghent on the 9th Sept. 1895 between the defendant and the plaintiffs. The contract recited that the defendant was the inventor and owner of certain letters patent granted in Belgium in respect of patents for improvements in cooking ovens. It also recited that the plaintiffs were desirous of buying these letters patent and all improvements and extensions in the matter for Belgium and Holland, and that the defendant had agreed to the sale of the patents to the plaintiffs. It was then agreed by the contracting parties that the price for the letters patent should be the sum of 4000l., payable in the sums and in the manner therein provided, and the defendant thereby duly sold and assigned his patent rights to the plaintiffs.

The contract contained several articles. Art. 11 provided:

All disputes relating to this present agreement and to its fulfilment shall be submitted to the Belgian jurisdiction.

On the 28th July 1900 the defendant was sued by the plaintiffs in the Tribunal of Commerce in Ghent for alleged breaches of the contract. The citation or summons of the Belgian court was not served upon the defendant in Belgium, but was served in the way required by Belgian law, namely, by registered letter posted in Belgium and addressed to the defendant at his address, where he carried on business in London, and it was delivered in London and a receipt for the letter, purporting to be signed by the defendant, was produced, though the defendant denied that the signature was his, or that he ever received the summons.

The service of the summons and of the other documents and all the other proceedings in the Belgian court were strictly regular according to Belgian law.

On the 15th Nov. 1900 final judgment for 1208l. 19s. 1d. was given by the Belgian court for

the plaintiffs against the defendant in default of appearance, and upon this judgment the present action was now brought, the four months allowed for appealing having expired.

The last recital in this Belgian judgment was as follows:

Whereas it appears from the recital that all the legal formalities have been complied with, and particularly that it has been sufficiently established by law that Hubbard has admitted the receipt of the citation.

The question was whether, by reason of clause 11 of the contract, the judgment given by the Belgian court in the absence of the defendant, was binding on the defendant, who was not a Belgian subject, and was not domiciled or resident in Belgium, and who had not been served within the jurisdiction of that court.

Montague Shearman for the plaintiffs.—The question is whether the clause in the contract that all disputes should be submitted to the Belgian jurisdiction gave the Belgian court jurisdiction. The service of the summons and the whole proceedings were perfectly regular according to the procedure of the Belgian courts; and, although the defendant was not within the jurisdiction of those courts, he had agreed to submit to their jurisdiction. By agreeing to the clause in the contract that all disputes arising under the contract should be submitted to the Belgian courts, he thereby submitted to their jurisdiction, and was bound by their proceedings when regularly taken. The judgment was by default, and the defendant would not have ordinarily been bound by it unless he had submitted to the jurisdiction, but by this term in the contract he had submitted to the jurisdiction of the Belgian court, and he is bound by the judgment, and the present action can now be maintained on it:

Copin v. Adamson, 31 L. T. Rep. 242; L. Rep. 9 Ex. 345; affirmed on appeal, 33 L. T. Rep. 580; 1 Ex. Div. 17;

Bank of Australasia v. Harding, 9 C. B. 661.

D. Ward for the defendant.—The foreign judgment was obtained against the defendant in default of appearance; the defendant was not at the time of such judgment a subject of nor resident in Belgium where the judgment was obtained. The judgment so obtained is not binding on him and no action can now be maintained on it. The case comes within the decision in *Schibsby v. Westenholts* (24 L. T. Rep. 93; L. Rep. 6 Q. B. 155), in which the considered judgment of the court was delivered by Blackburn, J. There it was held that a judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English court, where the defendant at the time the suit was commenced was not a subject of nor resident in the country in which the judgment was obtained, as there was nothing to impose any duty on the defendant to obey the judgment. It is not enough to say that the defendant had agreed to submit all disputes to the Belgian jurisdiction. Unless there had been actual disputes, and such disputes had been submitted to the Belgian jurisdiction, the clause would not be sufficient to take the case out of the general law that a judgment obtained in such a case in default of appearance, would not be binding on the defendant. Such a judgment would be contrary to natural justice. Agreeing to submit to

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the jurisdiction is not enough; there must be an actual submission to the jurisdiction to bind the defendant.

Cur. adv. vult.

March 1.—WALTON, J.—In this case the plaintiffs sue the defendants for 1208*l.* 19*s.* 1*d.*, being money due, as they allege, from the defendant to the plaintiffs under the final judgment in the Tribunal of Commerce of Ghent, in Belgium, bearing date the 15th Nov. 1900; and the question which I have to decide is whether the judgment, first, is properly proved, and, secondly, is binding upon the defendant. The defendant is not a Belgian subject, nor was he at the time of the judgment, nor, as far as I can see, had he ever been domiciled in Belgium, and he was not served with any process within the jurisdiction of the Belgian court. But it has been proved to my satisfaction that the judgment in question was delivered regularly by the Belgian Tribunal, that it is a final judgment, and that all the requirements of the Belgian law with regard to citation, service of process, or otherwise have been complied with. My attention has been drawn to the recital at the end of the judgment, from which it appears that the Belgian Tribunal found that all legal formalities had been complied with, and particularly that it had been sufficiently established by law that the defendant had admitted the receipt of the citation. At any rate, the judgment is a regular judgment duly obtained in Belgium. The question is, whether that judgment is binding upon the defendant. The ground upon which it is said to be binding is, that by the terms of the contract made between the defendant and the plaintiffs upon which the action was brought in Belgium, it was provided in art. 11 that "All disputes relating to this present agreement and to its fulfilment shall be submitted to the Belgian jurisdiction." The contract was made in 1895, and it appears to have been executed in Ghent, in Belgium, by the defendant on that date. It is said that as by the terms of the contract upon which the claim in Belgium was made, and for the breach of which the plaintiffs seek to recover the sum which has been found to be due by the Belgian Tribunal, the defendant agreed to submit all disputes under the agreement to the Belgian jurisdiction, and therefore the defendant is bound by the decision of the Belgian court. At the trial the question arose as to whether the defendant was served with a Belgian citation. The citation or summons was served in the way required by Belgian law by registered post. It was posted in Belgium, and it was delivered in London, and a receipt was produced purporting to be signed by the defendant. The defendant was called and he denied that the signature was his, and he denied that he ever received the summons. It does not appear to me to be necessary to decide that question. It seems to me to be irrelevant. If the defendant is bound by the decision of the Belgian court, then, providing the proceedings in the Belgian court were regular, and providing the service was given in accordance with the regulations of the Belgian court, the fact that, by some accident, the particular document did not reach the defendant, would not be any answer to this action. On the other hand, if the defendant is not bound by the jurisdiction of the Belgian tribunal, it seems to me quite irrelevant whether

he had notice of the proceedings or not—whether the summons was served or not. Therefore it does not appear to me to be necessary to determine whether the defendant did in point of fact sign the receipt; or whether he in fact received the summons or did not receive it. It was addressed, although some question was raised about it, to the place where he carried on business, and undoubtedly the signature on the receipt is very much like his handwriting. I do not, however, think it necessary to decide that question. Then the general question arises—and upon that I took time to consider the law—whether the defendant is bound by a foreign judgment where he has contracted to submit himself to the forum in which the judgment has been obtained. I think that there is no case which is directly in point; that is to say, I think that it has never been decided in any case that the mere fact that the contract, on which the proceedings arose, contains a stipulation that the parties would submit to the foreign tribunal, is sufficient without more to make the decision of the foreign tribunal binding. But I find that in the case of *Rousillon v. Rousillon* (42 L. T. Rep. 679; 14 Ch. Div. 351), Fry, J. in his judgment reviewed all the cases on this subject very fully and stated the conclusions at which he arrived. He said (42 L. T. Rep., at p. 685; 14 Ch. Div., at p. 371): "What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to that case"—that is, the case of *Schibsby v. Westenholz* (24 L. T. Rep. 93; L. Rep. 6 Q. B. 155), which he was then considering—"and to *Copin v. Adamson* (31 L. T. Rep. 242; 33 L. T. Rep. 560; L. Rep. 9 Ex. 345; 1 Ex. Div. 17), they may, I think, be stated thus: The Courts of this country consider the defendant bound, where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and, possibly, if *Becquet v. MacCarthy* (2 B. & Ad. 951), be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose while he was within that jurisdiction." That is a classification by Fry, J. of the several cases in which a defendant is bound by the judgment of a foreign tribunal, and one of those cases is "where he has contracted to submit himself to the forum in which the judgment was obtained." If that is the law, then the judgment in the present case is binding upon the defendant, and the plaintiffs are entitled to judgment in this case. It was not absolutely necessary for Fry, J. to decide that point in his judgment in the case of *Rousillon v. Rousillon* (*ubi sup.*). He refers there to the case of *Copin v. Adamson* (*ubi sup.*). That was a case in which, to an action brought on a French judgment, the defendant had pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the court, or subject to French law; that he was never served with any process, nor had any notice or opportunity of defending himself. To that plea there was a

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replication to the effect that the defendant was a holder of shares in a French company, having its legal domicile at Paris, and became thereby subject, by the law of France, to all the liabilities, &c., belonging to holders of shares, and in particular, to the conditions contained in the statutes or articles of association; that by these statutes it was provided and agreed that all disputes arising during liquidation between shareholders should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicile, and, in default, election might be made for him at the office of the Imperial Procurator of the Civil Tribunal of the department in which the office of the company was situated, and that all summonses &c., should be validly served at the domicile formally or impliedly chosen; that the company became bankrupt, and that unpaid calls became payable to the plaintiff as assignee; that he made default and provoked a contest; that he never elected a domicile, and thereupon the plaintiff caused summonses, &c., to be served at the office aforesaid; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon judgment by default was recovered against him. And it was held by the court (consisting of Kelly, C.B. and Amphlett and Pigott, BB.) that that replication was good. In delivering the judgment of himself and Pigott, B., Amphlett, B., discussing the judgment of Blackburn, J. in *Schibdey v. Westenholz* (*ubi sup.*), said (L. Rep. 9 Ex. at p. 354; 31 L. T. Rep. at p. 257): "But independently of that question"—referring to another question which he had been discussing—"I apprehend that a man may contract with others, that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision. It is upon this ground that I decide the demurrer to the first replication in the plaintiffs' favour." Although I think that the facts in that case of *Copin v. Adamson* (*ubi sup.*) might possibly be distinguished from the facts in the present case, and although I think it is possible that the decision might have been put upon another ground, it apparently was put by Amphlett and Pigott, BB., and the Chief Baron did not disagree with this, upon the ground that a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and by reason of such a contract, not of any allegiance, absolute or qualified, he would become bound by the tribunal's decision. Therefore *Copin v. Adamson* (*ubi sup.*) is practically a decision that a defendant in an action on a foreign judgment who has made a contract in which he agrees that he would be bound by the jurisdiction of a foreign tribunal upon any question arising under the contract, is bound by a subsequent decision of the tribunal, although he is not domiciled within the jurisdiction of the tribunal, was not served within the jurisdiction of the tribunal, and was not resident within the jurisdiction of the tribunal, at the time the proceedings commenced. I feel that I am bound by the decision in *Copin v. Adamson* (*ubi sup.*), as it was interpreted by Fry, J. in

Rousillon v. Rousillon (*ubi sup.*). Here the defendant did contract that he would submit all disputes relating to the agreement in question to the Belgian jurisdiction. That means not merely that he will submit to the Belgian jurisdiction, but that he is bound by the decision of the Belgian tribunal. Upon that ground, it seems to me, if the cases I have referred to are right, the judgment which has been obtained in Belgium is binding upon the defendant, and inasmuch as the proceedings in the Belgian court were perfectly regular, and the service required by the Belgian law was sufficient, I do not think it is open to him even to raise the question that by some accident or mistake the summons did not really reach him in England. It cannot be said, and certainly I cannot and I do not find, that there is anything in the nature of the Belgian proceedings or in their law of procedure, with regard to service, which is contrary to natural justice. For these reasons I think that the plaintiffs are entitled to judgment for the amount which they claim, with costs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Leighton and Savory*.

Solicitors for the defendant, *Metcalf and Storr*.

Tuesday, April 8.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MASKELYNE AND COOKE v. SMITH; PALMER (Claimant). (a)

Fraudulent conveyance—Deed of arrangement—Registration—Affidavit—Exclusion of creditor from operation of deed—Omission of creditor's name and address in affidavit on registration—Validity of deed—Deeds of Arrangement Act 1887 (50 & 51 Vict. c. 57), ss. 5, 6, sub-s. 1—13 Eliz. c. 5.

A deed of arrangement is not necessarily void under sect. 5 of the Deeds of Arrangement Act 1887 merely by reason of the intentional omission of the name and address of a particular creditor in the affidavit required upon the registration of the deed under sect. 6, sub-sect. 1 of the Act, and because it reserves some benefit to the debtor.

A deed of arrangement, being an assignment by a debtor of his property to a trustee for the benefit of creditors, is not necessarily void under 13 Eliz. c. 5, by reason only of the intentional exclusion of a particular creditor from the operation of the deed.

Spencer v. Slater (39 L. T. Rep. 424; 4 Q. B. Div. 13) commented on.

APPEAL from the Westminster County Court in an interpleader issue sent from the High Court to try the right to goods seized in execution by the plaintiffs under an execution against John Smith (the defendant) and claimed by the claimant Palmer, who claimed as trustee under a deed of assignment executed by the defendant Smith for the benefit of his creditors.

The issue was tried in the Westminster County Court on the 19th July 1901 by the deputy judge of that court, who found for the plaintiffs (the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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execution creditors) holding that the deed of assignment was fraudulent and void as against them.

The defendant was a florist and nurseryman carrying on business at Windsor.

On the 11th May 1900 the defendant, being then in embarrassed circumstances, executed a deed of composition or arrangement for the benefit of his trade creditors. The claimant was the trustee under this deed.

The deed was expressed to be made between the defendant of the first part, John A. Palmer (the claimant) of the second part, and the several persons, companies, and partnership firms (being creditors of the debtor) whose names were set out in the schedule thereto and who were therein called the creditors of the third part. It recited that it had been agreed by the parties thereto of the third part (the creditors) to accept an offer made by the debtor for payment to the creditors of the composition of 20s. in the pound upon the amount and in full discharge of their respective debts due from the debtor and set out in the schedule, such composition to be paid by monthly instalments of 10s. by the debtor to the trustee commencing on the 1st June 1900, and that it had been further agreed that the composition should be secured by the assignment of the estate of the debtor to the trustee.

The deed witnessed that in pursuance of the agreement the defendant covenanted with the trustee and with the scheduled creditors respectively to pay to the trustee the sum of 10s. each month, so that the trustee should every three months divide the sums so received from the debtor amongst the creditors entitled thereto *pro rata*; and that the debtor thereby conveyed and assigned all his real and personal estate (except leaseholds) to the trustee upon trust, until default should be made by the debtor in payment to the trustee of any of the instalments so agreed to be paid, to allow the debtor to use, employ, deal with and dispose of the estate for the purposes of his business, or for such other purposes as the trustee might think proper, but subject to the control and supervision of the trustee, and from and after such default upon trust to take possession of and realise the estate, and to apply the net proceeds towards immediate payment to the creditors of so much of the composition as should be then unpaid, and to pay the surplus (if any) of such proceeds, and assign or deliver the remainder of the estate to the debtor; and there was a proviso that the trustee should not be bound in any way to interfere with the debtor in the conduct of his business, or dealing with his estate further than he should think necessary or proper, and should not be liable for any losses which the estate might sustain by reason of the acts or defaults of the debtor, but that if during the continuance of the time during which the instalments were payable the trustee should be of opinion that it would be expedient to forthwith wind-up the estate and realise and divide the same, the trustee should with all convenient speed wind-up and realise the estate, and apply the net proceeds thereof as if they had been moneys arising from the exercise of the trust for sale; and in consideration of the premises the creditors thereby released the debtor from the debts due to them, and from all actions and demands in respect thereof.

At the date of this deed the debtor was indebted to the plaintiffs in the sum of 12l. 12s., in respect of an entertainment given by them, but the deed, being for the benefit of the debtor's trade creditors who did not include the plaintiffs, did not apply to, and was not intended to apply to, the plaintiffs, and the plaintiffs were not inserted in the schedule of the list of creditors, as the debtor considered that two other persons, who were joined with him in inviting the entertainment, were the proper persons to pay for it.

The deed of arrangement was registered on the 17th May 1900 under the Deeds of Arrangement Act 1887, s. 5, and an affidavit was made upon such registration as required by sect. 6, sub-sect. 1, of that Act, but this affidavit verifying the list of creditors did not contain the names or addresses of the plaintiffs.

In June 1901 the plaintiffs brought an action in the Mayor's Court for their debt of 12l. 12s., and recovered judgment for the amount. This judgment was removed to the High Court for the purpose of execution.

A writ of *fi. fa.* was subsequently issued, and the sheriff of Barks seized the defendant's goods, stock, &c., on his premises.

The claimant on the 8th June 1901 gave notice that he claimed the whole of the goods seized under the deed of arrangement. The sheriff interpleaded, and on the 24th June an order was made that the interpleader proceedings should be transferred to the Westminster County Court, and that the issue should be tried in that court as between the claimant (the trustee under the deed) and the plaintiffs, the execution creditors.

At the hearing before the deputy judge, it was contended for the claimant that there was nothing on the face of the deed to exclude any particular creditor from coming in and assenting; that although the plaintiffs' names were admittedly not inserted in the affidavit required under sect. 6 of the Deeds of Arrangement Act 1887, that did not invalidate the deed, and that the intention of the deed was not to defeat the plaintiffs; that the deed was therefore valid, and the title of the claimant under it good.

For the execution creditors it was contended that the deed was not for the benefit of all the creditors; that, as the plaintiffs' names were omitted from the affidavit verifying the deed the registration was not a proper registration under sect. 6, sub-sect. 1, of the Act, and that, therefore, the deed itself was void under sect. 5.

The learned deputy judge, in giving his judgment, said that the deed of arrangement was somewhat suspicious on its face, and that certain only of the creditors—namely, executing and assenting creditors, were of the third part, and none were scheduled, and yet the deed recited an agreement between the debtor and such non-existent creditors for a composition. He found as a fact that there was no collusion between Smith and Palmer to defraud or delay creditors by the deed. He thought that the motives of the debtor were honest, but with respect to Maskelyne and Cooke (the plaintiffs), he thought and found as a fact upon the evidence that the debtor deliberately intended to treat them as not on the same footing as the rest of his creditors, and to exclude them from the benefit of the deed of arrangement. The debtor said that they were not his "business creditors," and he therefore

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deliberately did not give their names as those of creditors to Palmer, and deliberately omitted their names from the list required under the Deeds of Arrangement Act 1887, s. 6.

The judge then held that the deed was fraudulent and void under the statute of Elizabeth; and that it was also rendered void under sect. 5 of the Deeds of Arrangement Act 1877, by reason of the omission from the affidavit verifying the list of creditors required under sect. 6, sub-sect. 1, of the names of the plaintiffs; and he gave judgment for the execution creditors (the plaintiffs) with costs.

The claimant appealed.

The Deeds of Arrangement Act 1887 (50 & 51 Vict. c. 57) provides:

SECT. 5. From and after the commencement of this Act a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof, and unless the same shall bear such ordinary and *ad valorem* stamp as is under this Act provided.

SECT. 6. The registration of a deed of arrangement under this Act shall be effected in the following manner: (1) A true copy of the deed, and of every schedule or inventory thereto annexed, or therein referred to, shall be presented to and filed with the registrar within seven clear days after the execution of the said deed (in like manner as a bill of sale given by way of security for the payment of money is now required to be filed) together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors.

Herbert Reed, K.C. (Pritchett with him) for the appellant.—The learned judge was wrong upon both points. The mere fact that the plaintiffs were excluded from the deed of arrangement does not make the deed void. Upon that point the case is really concluded by the case of *Alton v. Harrison* (21 L. T. Rep. 282; L. Rep. 4 Ch. 622). That case decides that the mere fact that the whole of the debtor's property is conveyed for the benefit of some of the creditors only does not render the deed fraudulent and void under 13 Eliz. c. 5. Apart from the Bankruptcy Acts there is nothing to prevent a person preferring certain creditors to others, so long as there is *bonâ fides*; and if the person does so by assigning his property by deed, that does not make the deed void. In *Alton v. Harrison (ubi sup.)*, Giffard, L.J. says: "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." This deed was made *bonâ fide* and for valuable consideration, and it therefore was not void under 13 Eliz. c. 5. Even if there were an intention to defeat these particular creditors (the plaintiffs), that

would not of itself constitute a fraud, or render the deed void under the statute of Elizabeth:

Wood v. Dixie, 5 L. T. Rep. O. S. 286; 7 Q. B. 892.

Secondly, the deed was not void under sect. 5 of the Deeds of Arrangement Act 1887, by reason of there not being a sufficient registration under sect. 6, sub-sect. 1. There was a sufficient affidavit to satisfy that section. A complete list of the creditors in the affidavit to be made under sect. 6, sub-sect. 1, is not necessary to the validity of the deed. Few deeds would be valid if that were necessary. The information to be given by the registration need not include information as to all the creditors:

Re Batten; Ex parte Milne, 22 Q. B. Div. 685 per Fry, L.J., at p. 699.

Macaskie, K.C. (Thorn Drury with him) for the execution creditors.—The deed is void under the statute of Elizabeth, though not on the ground taken by the judge. The mere fact of the exclusion of the plaintiffs would not necessarily render the deed void; but it is void because of the benefits which it reserves to the debtor himself and by means of which it tends to defeat and delay the creditors. The deed gives no information how long it would take to pay off the debts, and the effect of it is that so long as the debtor pays the instalments of 10l. a month, he is to have possession of the estate, and he may sell or dispose of it as he likes for the benefit of his business, and the property is taken out of the hands of the creditors whether they assent or do not assent, and the whole creditors are thereby delayed. Though the deed may be good, although it excludes a certain class of creditors, yet this deed is bad on the ground that it reserves a benefit to the debtor himself. The deed is more mischievous than that which was held void in *Spencer v. Slater* (39 L. T. Rep. 424; 4 Q. B. Div. 13), where the objection to the deed was that the creditors had to indemnify the trustees. Upon that point *Spencer v. Slater (ubi sup.)*, concludes the case in favour of the execution creditors. Secondly, the deed is also void in consequence of the omission of the plaintiffs' names in the affidavit made under sect. 6, sub-sect. 1 of the Act. It is clear that at the date of the deed the plaintiffs were creditors, that it was known to the debtor that they were creditors, and that they were intentionally omitted from the affidavit. Sect. 6 shows what the registration means. It includes an affidavit setting out "the names and addresses of his creditors." This provision goes far beyond the requirement under the Bankruptcy Act 1869, under which (sects. 125, 126) it was necessary that the debtor should set out a list of his creditors and the amounts due to them, and it has been many times held that unless that were done the creditors would not be bound. In the case of *Re Batten; Ex parte Milne (ubi sup.)*, Lord Esher (22 Q. B. Div. at p. 694), speaking of this Act, says: "Then the Act provides for another affidavit to be made by the debtor stating, not the number of creditors who have assented or executed, but the total estimated amount of property and liabilities included under the deed . . . and the names and addresses, not of the creditors, parties to the deed, or who have executed or assented thereto, but 'of his creditors,' that is, of all his creditors." That is a dictum

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only, but it is a dictum in favour of the view that "his creditors" means not a part or a class of his creditors, but all his creditors. To read the section in the way contended for by the appellant is really to repeal a part of the section. It is at all events necessary to set out the names and addresses of all the unsecured creditors, and the omission to do so renders the deed void:

Chaplin v. Daly, 71 L. T. Rep. 569.

The plain language of the Act requires that the names and addresses of the plaintiffs should have been set out in the affidavit, and, that not having been done, the deed is void.

Herbert Reed, K.C. in reply.—There is no other case which proceeds on the same lines as *Spencer v. Slater* (*ubi sup.*), because, although it may be good law, it went on the particular words of that particular deed, and is not an authority in this case. The deed there was a very peculiar deed, and was really intended to put into the pockets of the debtor what ought to have gone to the creditors. [CHANNELL, J.—*Alton v. Harrison* (*ubi sup.*) was not cited in that case; it was cited in the next case and made a difference.] The principle is that if a deed reserves a substantial benefit to the debtor, or is to protect the debtor, then it is void under the statute of Elizabeth. That is to be determined by looking at the deed itself; it is not necessary to go outside the deed to decide that. But the deed is perfectly good if made to protect creditors or the property for the purpose of paying a composition. [DARLING, J. referred to *Boldero v. London and Westminster Loan and Discount Company Limited* (42 L. T. Rep. 56; 5 Ex. Div. 47).] That case and *Alton v. Harrison* (*ubi sup.*) are enough to show that *Spencer v. Slater* (*ubi sup.*) cannot be regarded as of general application. [He was stopped on the second point.]

Lord ALVERSTONE, C.J.—This case is not without difficulty. It is an appeal from the decision of a County Court judge, who gave judgment in favour of the execution creditors, the judge having held that the claimant, the trustee under this deed of arrangement, was not entitled to say that the deed was valid as against the execution creditors. I think in the first instance I ought to deal with the two grounds on which the learned County Court judge decided in favour of the execution creditors. The first ground upon which he so decided was that the debtor, in executing the deed, had not in his mind and did not include or intend to include the plaintiffs, who at the date of the deed must be taken to have been creditors, although not trade creditors. The learned judge decided against the claimant on the ground that the fact that the debtor intended to exclude the plaintiffs from the operation of the deed made the deed void. That conclusion seems to me not to be right, and since the case of *Alton v. Harrison* (*ubi sup.*) it cannot be supported. Therefore, on that particular ground, the reason given by the learned judge was not sufficient. The next ground upon which he decided against the claimant was that the deed was bad, because the affidavit required on its registration by sect. 6, sub-sect. 1, of the Deeds of Arrangement Act 1887 omitted the names and addresses of the execution creditors. It has been argued that the deed is therefore void under sect. 5. I cannot agree with that argument. It seems to me to go too far. I think

that there is nothing in the statute which states that an honest omission—an omission which is not a fraudulent one—from the list of creditors makes the deed void. The language of Lord Esher, M.R. and Fry, L.J. in *Re Batten*; *Ex parte Milne* (*ubi sup.*) shows that it was not the intention of the Legislature that the names of the creditors should appear in the register, and that some limitation must be put on the words "his creditors" in the affidavit required under sect. 6, and that those words do not necessarily mean "all his creditors." Take, for instance, the case put during the argument. If two partners in a firm, wishing to make a composition with their creditors, execute a deed of arrangement, it could not be said that the deed would be void unless the affidavit contained the names, not only of the joint but of the separate creditors of the partners. Therefore I cannot think that the mere omission of a creditor's name and address in the affidavit required on registration renders the registration void. I think, therefore, that the judgment of the learned judge was wrong, and that it ought to be reversed. A third point was raised by counsel for the execution creditors—namely, that the deed was void on the face of it as tending to defeat and delay creditors within the meaning of the statute of Elizabeth. That point was not taken or argued before the County Court judge, and as to it there are no further facts than the deed itself and the intentional omission of the execution creditors. It was contended by counsel for the execution creditors that looking at the deed itself, the deed was void under 13 Eliz. c. 5, as tending to defeat and delay creditors, because on the face of it it reserved a benefit to the debtor himself, and in support of that contention he cited the case of *Spencer v. Slater* (*ubi sup.*), where a deed which was precisely framed for the purpose of defeating any execution, was held by the court to be void under 13 Eliz. c. 5, as tending to defeat or delay creditors. I think it is quite clear that that case of *Spencer v. Slater* (*ubi sup.*) cannot be regarded as laying down any general principle apart from the particular facts of that case. That it cannot be so regarded is clear from the case of *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*). Another reason why I think that *Spencer v. Slater* (*ubi sup.*) was not intended to be of general application, is the fact that *Alton v. Harrison* (*ubi sup.*) was not cited in that case, and it is difficult, to reconcile it with *Alton v. Harrison* (*ubi sup.*), and many others, if it decides that any benefit reserved to the debtor makes the deed void. I think that the real question in such cases is that stated by Giffard, L.J. in *Alton v. Harrison* (*ubi sup.*), where he says: "If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." Therefore the question is, is the deed *bonâ fide*, and not a mere cloak for obtaining a benefit for the debtor? If so, it is a good deed, and not void under the statute of Elizabeth. Many composition deeds provide for the carrying on of the debtor's business and reserve some ultimate benefit to the debtor. We are asked to say that we ought to hold the deed bad on the face of it under the statute of Elizabeth. I am not prepared to go so far as that. Having regard to the cases of *Alton v. Harrison* (*ubi sup.*) and *Boldero*

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v. *London and Westminster Loan and Discount Company Limited* (*ubi sup.*), if the deed were going to be set aside on that ground further hearing would be necessary. We must assume *bona fides*, and we ought not to decide the point raised by counsel for the execution creditors without further evidence in the matter. I think that this is a deed which is not void on either of the two grounds on which it was held by the County Court judge to be void, and I further think that there is not enough evidence before us to deal with it on the ground raised by counsel for the execution creditors. For the reasons I have stated I think that the deed ought not to be held void on a ground not taken before the County Court judge, but upon the two grounds which were taken before him I think the appeal should be allowed.

DARLING, J.—I am of the same opinion, and I merely wish to add that I cannot reconcile the principle of *Spencer v. Slater* (*ubi sup.*) with that of *Alton v. Harrison* (*ubi sup.*). *Spencer v. Slater* (*ubi sup.*) has already been distinguished in *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*), and unless our decision be reversed it must take its place in the Apocrypha.

CHANNELL, J.—I agree. I venture to think that the explanation of *Spencer v. Slater* (*ubi sup.*) is that there were things said in that case which would not have been said if *Alton v. Harrison* (*ubi sup.*) had been cited to the court, and which perhaps cannot now be supported. But yet there were things said which in that case might still be supported with considerable force. However that may be, I prefer to put my judgment, so far as that point is concerned, on the ground, not that *Spencer v. Slater* (*ubi sup.*) is wrong, but that there is not enough in this deed itself to show that the deed is bad under the statute of Elizabeth.

Appeal allowed. Leave to appeal.

Solicitors for the appellant, Wood and Sons.
Solicitors for the respondents, Seal and Edgewell.

CROWN CASES RESERVED.

May 10 and June 4.

(Before Lord ALVERSTONE, C.J., WRIGHT, BRUCE, DARLING, AND JELF, JJ.)

REX v. PLUMMER. (a)

Conspiracy—Joint indictment—Plea of guilty by one defendant—Acquittal of co-defendant—Withdrawal of plea of guilty—Practice—Stating case notwithstanding plea of guilty—11 & 12 Vict. c. 78.

One person cannot be convicted of conspiracy by himself.

If on a joint indictment for conspiracy one defendant pleads "guilty," but his co-defendants plead "not guilty" and are acquitted, the defendant who pleaded guilty must be allowed to withdraw his plea and must also be acquitted.

The court has jurisdiction to consider a case stated where a defendant has pleaded guilty.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

Reg. v. Brown (61 L. T. Rep. 594; 24 Q. B. Div. 357; 16 Cox C. C. 715) followed.

CASE stated for the consideration of the court by the chairman of the Berkshire Quarter Sessions.

The defendant Plummer was indicted with Fenton and Wheeler on a joint indictment which charged that they had conspired together to obtain certain sums of money by false pretences from the Conservators of the river Thames.

Plummer pleaded "guilty," Fenton and Wheeler pleaded "not guilty," were tried and acquitted. It was then contended on behalf of Plummer that he could not be convicted of conspiracy because his co-defendants had been acquitted.

The chairman overruled this contention, and counsel for Plummer then applied for leave to withdraw his plea of "guilty" and to plead "not guilty." The chairman, being of opinion that he had no jurisdiction to grant leave, refused to allow the withdrawal of the plea, and passed sentence, reserving the following points for the consideration of the court: (1) Whether under the above circumstances a conviction could be recorded and judgment passed against Plummer; (2) whether the Court of Quarter Session had jurisdiction to permit him to withdraw his plea and plead "not guilty"; (3) if the Court of Quarter Sessions was wrong in giving judgment and passing sentence, what course ought to have been taken?

Dickens, K.O. (with him A. J. David).—If Plummer had not pleaded guilty he could not have been convicted, for the jury found that the other defendants had not conspired with him. A man cannot be guilty of conspiring by himself, any more than he can be guilty of a riotous assembly by himself.

Harrison v. Errington, Poph. 202;

Faus case, 4 Co. 45a;

Reg. v. Manning, 51 L. T. Rep. 121; 12 Q. B. Div. 241.

Here Plummer was not indicted for conspiring with any persons except those who were acquitted. If he had been convicted for conspiring with persons who were not tried or with persons unknown, the conviction would stand:

E. v. Sudbury, 12 Mod. 262.

But directly the other defendants were tried and acquitted Plummer's conviction would have been annulled, as in the case of an accessory where the principal offender was acquitted:

Lord Sanquhar's case, 9 Co. Rep. 211;

Reg. v. Ahearns, 6 Cox C. C. 6.

The Court of Quarter Sessions should, directly the co-defendants were acquitted, have permitted the plea of guilty to be withdrawn:

Reg. v. Cooke, 5 B. & C. 538; 7 D. & R. 673.

A plea of guilty does not act as an estoppel. In *Reg. v. Brown* (61 L. T. Rep. 594; 24 Q. B. Div. 357; 16 Cox C. C. 715) the prisoner had pleaded guilty to something which it was argued could not be an offence; and the court held that notwithstanding the plea of guilty, it had jurisdiction to entertain a case stated for its consideration. *R. v. Clark* (1 C. C. R.) was brought to the notice of the court and distinguished. As to the second point, the court had jurisdiction to allow the withdrawal of the plea.

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Biron (with him *Frampton*), for the Conservators of the river Thames, did not argue.

Cur. adv. vult.

WRIGHT, J.—The appellant and two other persons were indicted together upon an indictment which contained five counts charging the obtaining of money by false pretences, and also a sixth count alleging a conspiracy between the three defendants to defraud the prosecutors. The sixth count did not allege that there were any other or unknown parties to the conspiracy. All three defendants were included in one arraignment. All pleaded “not guilty” to the five counts; the appellant pleaded “guilty” to the sixth count, the other defendants pleading “not guilty” to that count as well as to the five. Thereupon, it is stated in the case, a verdict of “not guilty” was returned in favour of the appellants on the first five counts, and the trial of the other defendants proceeded, and the appellant was called as a witness against them. We must therefore infer that the appellant was given in charge to the jury upon the five counts in order that, no evidence being offered against him upon these counts, the jury might find a verdict in his favour upon them. The jury acquitted the other defendants upon all the six counts. Counsel for the appellant therefore claimed that no judgment could pass upon the appellant in respect of his plea of guilty to the count for conspiracy, inasmuch as the jury by their verdict in favour of the only other alleged parties to the conspiracy had negatived any conspiracy. So far as we have been able to discover, there is no reported precedent which on the facts is exactly in point. There is much authority to the effect that if the appellant had pleaded “not guilty” to the charge of conspiracy, and the trial of all these defendants together had proceeded on that charge, and resulted in the conviction of the appellant and the acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant because the verdict must have been regarded as repugnant in finding that there was a criminal agreement between the appellant and the others and none between them and him. See *Harrison v. Errington* (Popham, 202) where upon an indictment of three for riot two were found “not guilty” and one “guilty,” and upon error brought it was held a “void verdict” and said to be like to cases in 11 H. 4, 2. “Conspiracy against two and only one of them is found guilty, it is void, for one alone cannot conspire.” So in *R. v. Sudbury* (1698, 12 Mod. 262) when only two out of three were found guilty of riot and no allegation of *cum alius* the judgment was arrested. So in Chitty’s Criminal Law, vol. 3, p. 1141, on the authority of those cases, “the conviction will be invalid, and no sentence can be passed.” So in *Reg. v. Thompson* (16 Q. B. 832), per Lord Campbell, “the acquittal of two involves the acquittal of the third.” In *Reg. v. Manning* (51 L. T. Rep. 121; 12 Q. B. Div. 241) this doctrine was perhaps somewhat extended. There two persons were put on their trial together at Nisi Prius for a conspiracy, no other parties being alleged. The jury convicted one with the sanction of the judge, although they were unable to agree, and were discharged as to the other; and upon a rule moved for a new trial it was held by Lord Coleridge, C.J., and Mathew and Stephen, JJ.

that there had been a misdirection. The issue, Mathew, J. said, was whether both were guilty; and the jury had not agreed on that issue. It is true that the judgment in *Reg. v. Manning* purports to be based mainly on the opinion of the judges in *O’Connell v. The Queen* (1844, 11 Cl. & F. at pp. 236-7), which does not seem to us to affect the present question; but the decision itself is in accordance with the previous authorities, which appear to establish that the mere possibility of the one defendant having been acquitted by reason of evidence not being forthcoming or admissible against him which was forthcoming or admissible against the other who has been tried with him, is not enough to cure the inconsistency apparent on the record. It is equally clear, on the other hand, that if the appellant had been arraigned and tried alone for the conspiracy and had been convicted, his conviction would have been good at the time, and judgment could have been pronounced against him, although the other persons included in the indictment had not appeared, or were dead, or the trial of them had been postponed. See Bro. Abr. Conspiracy, 21; *R. v. Nichols* (1742, 13 East 412, n.), *R. v. Scott* (1761, 3 Burr. 1262), *R. v. Cooke* (1826, 5 B. & O. 538), *Reg. v. Ahearne* (1852, 6 Cox C. C. 6), in which case, however, it is difficult to see how the question really arose at all, since the indictment was not for a mere conspiracy to murder, but for actual murder, though laid into an averment of conspiracy, as appears from the sentence of death reported in H. C. L. 381. It is, however, not clearly settled whether, in such a case of separate trials, a subsequent acquittal of the other defendants upon their separate trial would or would not avoid the effect of the previous conviction of the appellant. So if, in the present case, the appellant had been sentenced, as he might have been, immediately upon his pleading guilty to the charge of conspiracy, the sentence would have been right when passed, but it is not certain whether, upon the acquittal of the other defendants, the sentence upon him must have been vacated or treated as erroneous, just as judgment against an accessory passed during the attainder of the principal was good during the attainder, but was *ipso facto* avoided when the attainder was removed (1 Hale 523, etc., *Lord Sanquhar’s* case, 9 Rep. 207, 215-6). In *R. v. Cooke* (sup.) Littledale, J. suggested that a similar consequence might follow from an acquittal of the alleged co-conspirators at his own separate trial, and the same suggestion is made in the headnote to *Reg. v. Ahearne* (sup.), though not so distinctly in the judgments. This suggestion is questioned by Mr. Greaves (Russell on Crimes, vol. 3, p. 146, 4th edit.), but on grounds which would be to a large extent equally applicable to the case of a joint trial, and are therefore insufficient upon the authorities which have been cited. The present case may be regarded as intermediate between the case of a wholly joint trial and the case of separate trials of the alleged co-conspirators. The appellant and his co-defendants were jointly indicted; they were arraigned together; they all pleaded “not guilty” to the five principal counts; there was only one *venire*; they were all apparently given in charge (as we have pointed out) to the same jury. If error had been brought, one record would have been made up (as in *Lord Sanquhar’s* case (9 Rep. 207), where the plea of

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guilty by one prisoner, and the verdict of the jury as to the other, are set out), and the same record would have shown the inconsistent plea and verdict. We think that under the circumstances the trial ought to be regarded in substance as joint, and that the plea of guilty ought not to be followed by judgment. There is an authority to this effect which, although it has not the effect of a decision, we cannot disregard. The very case is put in *Robinson v. Robinson*, (1859) 1 Sw. & Tr., at p. 392, where Cockburn, C.J. says: "The case of an indictment against two persons for conspiracy suggested an apparent analogy; and as in such a case a plea of guilty by the one, if followed by the acquittal of the other, would not have supported a judgment of guilty against the defendant confessing and pleading guilty, so it may be said," &c. This passage is indeed treated by one of the judges in *Reg. v. Manning* as a "mere dictum," but in truth it was this very analogy that the court in *Robinson v. Robinson* had to consider and reject or adopt, and it forms part of a considered judgment of Cockburn, C.J., Wightman, J., and Sir C. Creswell—no mean authorities on the criminal law. It seems also to be supported by the language of Lee, C.J. in *E. v. Nichols* (sup.), who said: "On being acquitted on record, the conviction of his companions on the same record must be directly repugnant and contradictory to the other"; and there is nothing in the context to exclude the application of this language to a conviction on a plea of guilty. Even apart from the conclusion of strict law at which we have arrived, we think that the unfettered power the statute 11 & 12 Vict. c. 78 confers upon this court to make such order as justice may require might in this case be exercised in favour of the appellant who has been acquitted of the more serious charges alleged in the indictment, and who, in pleading guilty to the minor charge, may have done so under misapprehensions of various kinds, and who certainly did not plead guilty to any separate offence. And so before the statute, in *R. v. Waddington*, (1800) 1 East, at pp. 146 and 159, it was said that even where a convicted prisoner waived his motion in arrest of judgment, the court would not pass sentence if they could see that no crime was shown. Another point is raised in the case—namely, whether the court had power to allow the appellant to withdraw his plea of guilty. There cannot be any doubt that the court had such power at any time before, though not after, judgment: (see, e.g., *Reg. v. Clouter and Heath*, (1859) 8 Cox C. C. 237, *Reg. v. Sell*, (1840) 9 C. & P. 346.) And as we infer that, but for the erroneous opinion that there was no such power, the withdrawal would have been allowed, this might of itself be a ground for a *venire de novo* (*Reg. v. Yeadon* (5 L. T. Rep. 329; 9 Cox C. C. 91; 1 L. & C. 81), the indictment being for a misdemeanour. Lastly, it is necessary to observe that, in entertaining this case, notwithstanding that the appellant pleaded guilty, we adopt the construction of the Act which commended itself to the court in *Reg. v. Brown* (61 L. T. Rep. 594; 24 Q. B. Div. 357) in preference to the decision in *Reg. v. Clark* (15 L. T. Rep. 190; L. Rep. 1 C. C. R. 54), where it was held that a question arising upon a plea of guilty was not a question arising upon a trial.

BRUCE, J.—I agree with the judgment of Wright, J. and with the reasons he has given. I

do not propose to go through the authorities cited by him, but I wish to make a few observations of my own tending to the same conclusion on somewhat different grounds. I think that the statement in Chitty on Criminal Law, vol. 3, p. 1141, is correct, and is fully supported by the authorities. The statement in Chitty is as follows: "And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him." That passage seems to me to apply exactly to the present case. The point of the passage turns upon the circumstance that the defendants are included in the same indictment, and I think it logically follows from the nature of the offence of conspiracy that where two or more persons are charged in the same indictment of conspiracy with one another, and the indictment contains no charge of their conspiracy with other persons not named in the indictment, then, if all but one of the persons named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person, whether he has been convicted by the verdict of a jury or upon his own confession, because, as the record of conviction can only be made up in the terms of the indictment, it would be inconvenient and contradictory, and so bad on its face. The gist of the crime of conspiracy is that two or more persons did combine, confederate, and agree together to carry out the object of the conspiracy. To quote from Sir William Erle (the Law Relating to Trade Unions, p. 31) "with respect to the crimes classed under the term conspiracy, the external act of the crime in concert by which mutual consent to a common purpose is exchanged." Where the indictment charges that A., B., and C., combined, confederated, and agreed together to do a certain thing, and A. and B. are acquitted by the verdict of a jury from the charge, it is inconsistent with that finding that there could have been any combination, confederation, and agreement between them and C., and unless they combined, confederated, and agreed together with C., C. cannot be found guilty of the charge. It seems to me it matters not whether the trial of A., B., and C. took place at the same time or not, so long as they are charged upon one indictment. Only one record can be drawn up based upon that indictment; if the proceedings have taken such a course as to negative mutual consent to a common purpose by all but one of the parties who are alleged to have conspired together, no valid record of a conviction against that one can be drawn up. If the record finds that A. and B. are acquitted of a charge of agreeing together with C., the same record cannot without inconsistency find that C. agreed together with A. and B. As to the note by Mr. Greaves in Russell on Crimes, vol. 3, p. 146, 4th edit.; p. 276, 6th edit., referred to in the judgment of Wright, J., where it is suggested that a verdict of "not guilty" is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove his guilt, I think it is a very dangerous principle to regard a verdict of "not guilty" as not fully establishing the innocence of the person to whom it relates. If it is to be

applied at all it would apply to persons tried at the same time, and yet it is perfectly clear upon the authorities that if two persons are tried together upon a charge of conspiracy with one another, and one is acquitted by the jury and the other convicted, the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply upon the ground that there was a failure of evidence to establish the charge against the person who was acquitted. There is another point in the case. It is clear that the court had power to allow the appellant to withdraw his plea of "guilty." The court no doubt had a discretion in the matter, and if the court had exercised its discretion, it may be that that would be final and we should have no power to interfere with the exercise of its discretion. But the court, acting upon the erroneous opinion that it had no power to allow the withdrawal of the plea, never did exercise its discretion. If it had exercised its discretion, it is quite possible that it might have allowed the withdrawal of the plea, and if had allowed the withdrawal of the plea of "guilty" and allowed the appellant to plead "not guilty," and he had been tried by the same jury who acquitted the other defendants or by another jury, it is quite possible that he would have been acquitted. The appellant has been deprived of this chance of acquittal by reason of a mistake of the court. I think every intendment should be made in favour of an accused person, and as the court, by reason of a mistake as to the extent of its powers, did not exercise a discretion which it might have exercised in favour of the appellant, the appellant is, I think, entitled on that ground alone to have the conviction set aside.

DARLING, J.—I agree with the judgments which have been delivered.

LORD ALVERSTONE, C.J.—Jelf, J. and I concur in the judgment which has been delivered by our brother Wright. But we have not come to this conclusion without much hesitation as to the first point in the case, for we feel that the course which we cannot hold to be illegal might be used to defeat the ends of justice. We concur, because we can find no reason for dissenting. We place great reliance on the fact that this was a joint indictment, and a failure of justice can be guarded against in drawing the indictment. On the second point, the question of the withdrawal of the plea, we entirely agree.

Conviction quashed.

Solicitors: *Rooke and Sons*, for *Brain* and *Brain*, Reading; *Bunting*.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, June 23.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

REX v. FARNHAM JUSTICES; *Ex parte* SMITH. (a)
APPEAL FROM THE KING'S BENCH DIVISION.

Licensing—Renewal of licence—Notice of objection given by justices—Disqualification of justices—Bias—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 42.

In consequence of a suggestion that the number of licensed houses in a certain district was needlessly large, the licensing justices appointed a committee out of their number to inquire into the condition, position, and circumstances of each licensed house in the district. The committee, as the result of their inquiries, drew up a report in which certain recommendations were made. The licensing justices then, by their clerk, served on all the licence-holders in the district notices of objection to the renewal of their licences.

At the hearing of the applications for renewals the justices, upon the evidence which was given on oath before them, refused to renew nine of the applications.

Held, that the giving of the notices of objection by the licensing justices did not of necessity debar them from afterwards hearing and determining the applications for the renewal of licences.

Held also, that as what was done by the justices in connection with the inquiry and the report by the committee was honestly done to enable them to secure a full investigation of the facts with no other motive than the desire of discharging properly their duties as licensing justices, and as all the formalities of sect. 42 of the Licensing Act 1872 had been complied with, there was nothing to invalidate their decisions.

THESE were nine appeals from a decision of the King's Bench Division (Lord Alverstone, C.J., Darling and Channell, JJ.) discharging rules *nisi* for a *mandamus* which had been obtained by nine licence-holders at Farnham against the Farnham licensing justices.

The licensing justices had refused applications for renewals of their licences made by the nine appellants.

The appellants thereupon obtained rules *nisi* for a *mandamus* to the justices to hold an adjourned licensing meeting to deal with the applications for renewals.

The circumstances of the case were as follows:

In May 1901 a special meeting of the justices of the Farnham division was held to consider a letter from the clerk of the peace of the county of Surrey, addressed to the clerk of the justices of the Farnham division, stating that the attention of the county licensing committee had been called to the large number of licences in the parishes of Farnham Urban and Farnham Rural; that there appeared to be one licensed house for every 155 of the population, which was largely in

(a) Reported by E. MANLEY SMITH and W. W. ORR, Esqrs., Barristers-at-Law.

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excess of any other parish in the county; and that the committee were of opinion that some steps should be taken whereby the licences of a substantial number of such houses should be discontinued.

At this special meeting of justices a committee of five justices, including the chairman, Mr. Howard, was appointed to consider the letter and report upon the subject referred to in it.

The committee met from time to time and considered certain comparative statistics as to population, number of licences, and other information of a general character tending to show how the Farnham division compared with other divisions in the county, and how the county compared with neighbouring counties in the matter of ratio of population to licences.

On the 13th July 1901, at a meeting of the justices, the committee made a report, which was adopted, and the committee were empowered to obtain further information as to the condition, position, and other circumstances of each licensed house in the Farnham urban district.

The committee then directed the clerk to the justices to send to the owners of licensed houses and the licence-holders in the division the following letter:

The attention of the justices of the Farnham Petty Sessional Division having been called by the county licensing committee to the excessive number of licences in the division, a fact which cannot, in the opinion of the justices, be disputed, and the justices having appointed a committee to make inquiries in connection with the matter with a view to a reduction, in the first place, of licences in the Farnham urban district where such excess is most pronounced, I am directed by the justices to so inform you, and to suggest that anything you may desire to say upon the subject addressed to me will receive their best consideration.

The committee held further meetings, and unanimously decided to inspect the fully licensed houses in the Farnham urban district. Members of the committee did inspect all the licensed houses accordingly.

Except in one instance the inquiries were made and information was obtained only from the licensee or the person actually in charge of the licensed premises at the time of the inspection, which person was in every case the wife or daughter of the licensee.

The committee made a report to the justices in which the information obtained in the inspection of the houses was included.

On the 6th Feb. 1902 the report was presented to the justices and adopted by them. Certain recommendations by the committee upon the proposed procedure at the then forthcoming general annual licensing meeting were also adopted with some modifications.

On the 1st March 1902 the general annual licensing meeting was held. The justices present included certain members of the committee above mentioned.

Before the meeting no notice of objection to the renewal of any of the licences in the division had been given.

When the first application for a renewal was reached, a Mr. Hayes rose in court and stated that he objected to the renewal of all the licences in Farnham Urban.

The chairman of the justices thereupon directed Mr. Hayes to give the requisite seven days' notice

of his objection for the adjourned meeting on the 12th March. The chairman then, on behalf of the majority of the justices, made objection to the renewal of the forty-five alehouse licences in the Farnham urban district, and the applications for renewals of such licences were directed to stand adjourned to the adjourned meeting.

The chairman stated publicly that the reason why the majority of the justices thus raised objection to the houses was in order that every one of the licensees might have equal opportunities of bringing evidence before the justices, and that the justices might be thus enabled to decide such cases with perfect justice and fairness.

At the conclusion of the meeting the justices instructed their deputy clerk to serve formal notice in each case, requiring the licensee to attend in person at the adjourned licensing meeting, and to state the grounds of objection, which were based on the report of the committee, and such notices were served accordingly.

In the case of ten of the licensed alehouses notices of objection were also given by Mr. Hayes.

At the commencement of the adjourned licensing meeting on the 14th March, counsel on behalf of the holders of licences who had been served with notice of objection objected that the justices themselves, sitting at the general annual licensing meeting, could not, under sect. 42 of the Licensing Act 1872, be objectors to the renewal of licences. It was further objected that all and every the justices who had been parties to the service of notices of objections to renewals were disqualified from sitting and adjudicating upon the grounds: (1) That such justices were in fact the prosecutors or complainants, and could not adjudicate in their own cause; (2) upon the general ground of "bias" in the legal sense, arising from their resolution, which was either a resolution not to renew a particular licence or a resolution not to renew any of the licences in the district; (3) upon the ground of bias in consequence of having received and acted upon the report of the majority of the committee as to the proposed reduction of licences in the division, and having been thereby influenced by statements not upon oath.

There was a further objection in respect of Mr. Bental, one of the justices, on the ground that he was present at a meeting of the Surrey Congregational Union at which certain resolutions as to the renewal of licences had been passed. It appeared that Mr. Bental did not speak or vote upon the resolutions, and that, when objection was taken to his presence on the bench, he at once retired.

The justices, after consideration, overruled the objections, and proceeded to hear the cases.

In his affidavit the chairman of the justices stated that the reasons which actuated him, and which he knew also influenced his colleagues, were that the justices had arrived at no previous decision whether to renew or not to renew any of the licences in the district, and that in causing notices requiring the personal attendance of licensees to be served they were not in any way taking sides or committing themselves to any particular view as to the propriety or otherwise of renewing any licence, but had merely taken the steps which the statute had imposed upon them of putting matters in proper trim for fully considering, after

due notice to the applicants, each case upon its merits, and upon sworn evidence, which alone they intended to have regard to.

The justices proceeded to hear the evidence on oath in the several cases.

Mr. Hayes was represented by counsel, who conducted the case for the opposition in the cases with respect to which Mr. Hayes had given notice of objection.

In the cases in which notice of objection had been given only by the justices the affidavits in support of the rules stated that the chairman of the justices conducted the case for the opposition and called and examined witnesses in support of the objections. This was denied by the chairman in an affidavit in reply, according to which what actually took place was that, when the cases were called on, the superintendent of police, following the course of procedure adopted in the preceding cases, stepped into the witness-box and gave the bench testimony upon oath within the grounds stated in the notice of objection served upon the applicant. The chairman, on behalf of the bench, put some supplementary questions to him, and he was then cross-examined by the advocate for the applicant, who, at the close of the superintendent's evidence, conducted the case of and called evidence on behalf of the applicant.

In the result the justices refused to renew nine licences.

The chairman of the justices stated in his affidavit that, in arriving at his decision to refuse the renewal of the licences in question, he did not entertain or take into consideration, nor was his decision based upon or affected by any evidence, matter, or thing save the evidence given upon oath and the admissions made in open court during the hearing of the applications.

The Licensing Act 1872 (35 & 36 Vict. c. 94) provides as follows:

Sect. 42. Where a licensed person applies for the renewal of a licence the following provisions shall have effect: (1) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices to attend. (2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holders not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. (3) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. Subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

The Licensing Act 1874 (37 & 38 Vict. c. 49) provides as follows:

Sect. 26. Whereas by section forty-two of the principal Act it is enacted that a licensed person applying for the renewal of his licence need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend: Be it enacted that such requisition shall not be made, save for some special cause personal to the licensed person to whom such requisition is sent. It shall not be necessary to serve copies of notices of any adjournment of a

general annual licensing meeting on holders of licences or applicants for licences who are not required to attend at such adjourned annual general licensing meeting. A notice of an intention to oppose the renewal of a licence served under section forty-two of the principal Act shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed.

May 1 and 2.—*F. Low, K.C. (Hohler with him)* for the justices (except Mr. Gould) showed cause. —The two important questions of law raised in the case are whether, under the circumstances disclosed by the affidavits, the justices were entitled to be objectors to the renewal of the licences, and whether, if they were so entitled and if they did in fact object, they were entitled to sit and adjudicate on the applications. There is this preliminary point: The general rule in all cases of *mandamus*, even in licensing cases, has always been that a *mandamus* is not available where there is another effective remedy. This present case goes further than that, because, not only is there the effective remedy of an appeal to quarter sessions under sect. 27 of the Licensing Act 1823 (9 Geo. 4, c. 61), but the parties are actually pursuing it. The decision of the justices was given on the 27th March; by the 1st April all the necessary steps had been taken to bring an appeal to the next quarter sessions, and after that, on the 15th April, these rules were obtained. Under these circumstances appeal is the proper remedy, and *mandamus* is not applicable:

Reg. v. Bristol Justices, 68 L. T. Rep. 225;

Reg. v. Smith, L. Rep. 8 Q. B. 146.

The appeal to quarter sessions is a rehearing, and if the quarter sessions came to the conclusion that the parties had not a proper hearing below, the case could have been tried. The parties have got the two remedies; they have elected their remedy of appeal, and by bringing their appeal they have waived their right to come for a *mandamus*:

Reg. v. Kent Justices, 44 J. P. 298.

They might have applied for a writ of prohibition or *certiorari*. So much for the question of form. As to the question of substance, it comes to this—whether sect. 42 of the Act of 1872, as amended by sect. 26 of the Act of 1874, has so cut down the discretion of justices with regard to refusing renewals that they are unable to exercise their discretion unless they are set in motion by some outside objector. Under the proviso in sect. 42, sub-sect. 2, upon which this case really turns, the justices themselves can take the objection. The construction of the statutes, the case of *Sharp v. Wakefield* (64 L. T. Rep. 180; (1891) A. C. 173), especially the judgment of Lord Hannon therein, and the other cases show that, but for sect. 42, the justices have as absolute a discretion in granting or refusing a renewal as in granting or refusing a new licence. It was clearly the opinion of Lord Hannon that sect. 42 was only a matter of procedure, and that it was not intended to cut down the discretion of the justices so as to prevent them from exercising the powers they previously had unless they were put in motion by somebody else. It is said that the words in sub-sect. 2 “on an objection being made” must mean an objection made by some other person to the justices, and that an objection to be good could not be made by the persons to whom it was to be made. The judgment of Hawkins, J. in *Reg. v. Angle-*

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sea Justices (65 L. J. 12, M. C.) does not really support that view. The words "on objection made" do not cut down their general powers. The applicants cannot say that, because the justices have given them notice, and have put in the notice the grounds of objection, therefore the justices have made themselves litigants and cannot adjudicate. It cannot be said that because the justices have obtained these reports and have inspected the houses they had so prejudged the matter that they are disqualified from acting. The matters in these reports were all matters proper for the justices to inquire into and to have before them, and they were before the justices not as sworn evidence, but as matters with respect to which they ought to make inquiry before acting. Objections can be taken by the justices themselves. That has been expressly decided in *Baxter v. Leche* (79 L. T. Rep. 138), and there are dicta to the same effect in *Reg. v. Farquhar* (L. Rep. 9 Q. B. 258), *Reg. v. Merthyr Tydvil Justices* (14 Q. B. Div. 584), *Reg. v. Eales* (42 L. T. Rep. 735), and in the opinion of Sir Edward Fry, sitting as chairman of licensing sessions: (see 64 J. P. at p. 642). Assuming that the justices could take the objections, and that the persons were properly before them by notices duly given, there was nothing to disqualify the justices from adjudicating in the cases. With regard to Mr. Bentall, he did not sit and he did not adjudicate in any of the cases. He also referred to

Boulter v. Kent Justices, 77 L. T. Rep. 288; (1897)

A. C. 556, at p. 569;

Reg. v. Shorman, 78 L. T. Rep. 320; (1898) 1 Q. B. 578;

Reg. v. Sunderland Justices, 85 L. T. Rep. 183; (1901) 2 K. B. 357;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. London County Council; Ex parte Akkedyk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190; and sect. 28 of 9 Geo. 4, c. 61.

Cyril Dodd, K.C., for one of the justices (Mr. Gould).—Mr. Gould has only one object in appearing—namely, that the proper procedure in these licensing cases should be laid down and followed. He therefore neither supports nor shows cause against these rules.

Avory, K.C. and Stimson for the applicants in support of the rules.—With regard to the preliminary objection that the applicants have lost their remedy by *mandamus* by giving notice of appeal, the giving of that notice was a matter of precaution, because if they had waited for this application before giving notice of appeal they would have been out of time for appealing and would have lost their remedy. They are entitled to a *mandamus* unless their remedy by appeal is as full as the one they now seek. It is not so, as one of the grounds on which the *mandamus* is asked for is that the court was improperly constituted. That objection would not be open on the appeal, as the appeal would be a rehearing. There are several cases which show that there may be a *mandamus* although notice of appeal has been given:

Reg. v. Farquhar (*ubi sup.*);

Reg. v. Howard, 60 L. T. Rep. 960; 23 Q. B. Div. 502;

Reg. v. West Riding Justices, 21 L. T. Rep. 490; L. Rep. 5 Q. B. 33.

Notice of appeal was given in this case not for the purpose of prosecuting the appeal, but because it

was the only means of keeping the houses open. There is no provision in the Licensing Acts for getting permission of the excise or for keeping the houses open pending an application for a *mandamus*. It can only be done by giving notice of appeal, and that is also an answer to any suggested remedy by prohibition or *certiorari*. [Lord ALVERSTONE, C.J.—We do not think that the giving notice of appeal is any bar to this application for a *mandamus*, or that the applicants by giving notices of appeal have lost their remedy here. It is only a question which would affect our discretion if we thought there ought to be a *mandamus* on other grounds.] The substantial question in the case is, whether justices who have themselves given notice of opposition to the renewal of a licence and have collected information and have identified themselves with the opposition to such renewal, can after doing all that adjudicate upon the case. It is submitted that they cannot do so. It is immaterial whether in fact they were biased. The question is, whether the circumstances are such as to give rise to a reasonable suspicion that they might have been biased, and the more absolute the discretion of the justices the more necessary is it to be careful that they shall not be biased beforehand or identified with either side. Until the decision of Hawkins, J. in *Reg. v. Anglesea Justices* (*ubi sup.*) this question had never been discussed in any of the cases as to the right or power of the justices, who have themselves given notice of opposition, to sit and adjudicate. It is proposed to cite only the cases which apply to justices who are not sitting in a strictly judicial capacity in a court, but are exercising administrative functions though discharging a quasi-judicial duty. The case which lays down those principles most clearly is the case of *Leeson v. General Council of Medical Education and Registration* (61 L. T. Rep. 849; 43 Ch. Div. 366), where the General Council held an inquiry as to the conduct of the plaintiff on a charge preferred by the Medical Defence Union. Twenty-nine members of the council were present, two of whom were members of the Defence Union which had preferred the charge, but neither had anything to do with making the complaint against the plaintiff. Cotton and Bowen, L.J.J. held that those two members were not disqualified from acting; whereas Fry, L.J. held that they were. The decision of Sir Edward Fry sitting at licensing sessions, which has been referred to, apparently only goes to the extent that the mere fact of justices having given notice of objection does not disqualify them, and he had not in his mind any such case as the present. There is all the difference between a justice getting up in court and saying: "I object to the licence, let the case be adjourned," and his doing what was done in this case. If he does more than object, as, for instance, if he collects the evidence, or follows up that notice of objection in open court by serving the document, which the section clearly contemplates is to be served by some third party, then he is disqualified. Even if the statute contemplates that the justice may object in open court, it also contemplates that the notice of objection should be served by a third party: (see sect. 42). Since *Sharp v. Wakefield* (*ubi sup.*) it has been held that the burden of proof is on the opposition to the renewal (*Evans v. Conway Justices*,

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82 L. T. Rep. 704; (1900) 2 Q. B. 224), and unless an objection is made the licence must be renewed. A notice for some cause personal to the man himself (see *Sharp v. Wakefield (ubi sup.)*) must be served, and the justices can only adjourn on an objection being made:

Res v. Kingston Justices; Ex parte Davey, 86 L. T. Rep. 589.

The justices in this case made themselves parties to the litigation. They not merely gave notice of objection, they went very much further; they instructed their clerk to give the notice of opposition contemplated by sub-sect. 2 of sect. 42 and the ground of the opposition, and they both collected evidence themselves, and after they gave the notice they instructed their clerk to collect the necessary evidence to support it. They were therefore disqualified:

Allinson v. General Council of Medical Education and Registration, 70 L. T. Rep. 471; (1894) 1 Q. B. 750;

Reg. v. Antrim Justices, (1901) 2 Ir. R. 133;

Reg. v. London County Council; Ex parte Akkerdijk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. Ferguson, 54 J. P. 101.

LORD ALVERSTONE, C.J.—The points raised in this case are undoubtedly of very general importance. They have been most admirably argued before us on both sides, and for myself I do not think I should gain anything by further considering the matter, and I am prepared to express the opinion at which I have arrived. The rules were moved upon four grounds. First—a very important ground—that the justices who are members of the tribunal cannot raise the objections contemplated by sect. 42, sub-sect. 2, of the Licensing Act 1872; secondly, that, if they do so, they must not adjudicate upon the cases in respect of which they have given notices; thirdly, that in this particular case the justices had obtained information upon which they acted contrary to the provisions of sect. 42 of the Act; lastly, a special objection to a justice named Mr. Bentall, on the ground that he had taken part in the proceedings, which would undoubtedly, it was said, invalidate his action or any judgment to which he was a party. The first and most important thing is, I think, to lay down certain general principles which are derived or can be deduced from the cases, and then consider what are the rights of the justices and of the parties in regard to this matter, having regard to these general principles. I think it is quite clear that the justices can only act upon sworn evidence given before them, and if in any case it appeared to the court that the justices had acted upon information obtained otherwise than through the evidence, their proceedings would be, and ought to be, set aside. I think it is further equally clear, not so much from the decisions as from the legislation and the general principles applicable to the state of circumstances with which the legislation is dealing, that it would not invalidate the proceedings if the justices had become acquainted with what I may call the general circumstances of the case, and made use of that information to bring to the minds of persons who were before them the points that they had to deal with. There is only one other point which I wish to mention, because it

seems to me an important one—namely, that, if in any particular case a justice has private information in regard to that particular case, he ought not, in my opinion, to sit upon that case, nor ought he to do anything except go into the witness-box and give evidence; or, in other words, if a case ever arises of a justice having particular knowledge in regard to a particular individual or against a particular individual, or with regard to a particular house, that knowledge can only be made available or can only be utilised for the purpose of the case by means of his giving evidence as a witness, subject to cross-examination in the ordinary way. I mention these broad principles first, because I think it right to make it clear that I bear them in view when I express the opinion that I have formed as regards what the justices did in this case. I will state as briefly as I can, but sufficiently fully, what I really understand the justices to have done in this case. A year before the attention of the Farnham Bench had been called to the fact that there was a large number, or that there was considered to be, or might be, too large a number of licensed houses for the population in their district, and preparatory to the proceedings which gave rise to this question, information was collected by the committee which, in my opinion, would be of value for the purpose of directing the minds of any tribunal that had to deal with it to the question or the incidents in regard to various houses, which would be of importance when the matter came to be considered, and the justices have not shrunk from stating that they did, before they sat, go round and make themselves acquainted with what may be called the surrounding circumstances of each of these particular houses. I think it is going a great deal too far to say that applying their general knowledge of the district to the cases that they were going to sit upon, or applying the information so obtained, would invalidate the proceedings, provided that everything on which they wish to act or intend to act, is brought to the minds of the persons against whom it can possibly be used. That being so, the justices took a course to which at present, subject to the legal objection with which I will deal in a moment, I think no reasonable objection can be taken. They thought it right, when they were dealing with the question of there being too many licensed houses in the district, that the case of every house should be investigated, and certainly the justices in this case, if their affidavits are taken as representing the facts—and the contrary is not suggested—did investigate individually each case, and gave no decision until after the cases had been investigated. Therefore that they acted upon the principle of fairly considering the requirements of the district, and the suitability of each particular house, I think nobody can question. In that state of circumstances, Mr. Ivory's first objection arises. It is a very important objection, and one which I should have taken time to consider if I did not think it was covered by authority, but it is a question upon which I myself have no real doubt. He says justices cannot either themselves give, or cause any person to give on their behalf, the notice of an intention to oppose the renewal contemplated by sub-sect. 2 of sect. 42. He does not dispute that they can adjourn the case on objection being made, and that they can hear the case

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ultimately when the holder has been called to attend, without the previous prescribed notice having been given; but he says "on an objection being made" must mean made by somebody to the justices, and not made by the justices themselves. That undoubtedly raises a very important point, which was considered by Hawkins, J. in *Reg. v. Anglesea Justices* (*ubi sup.*). There has for a long time been a view, whether judicially decided or not, that justices could raise objections to licences being renewed. That they ought to be able to do so, having regard to their functions and duties under the Licensing Acts, I myself have no doubt at all. That there may be many cases in which the liquor traffic cannot be properly controlled unless justices can raise such objections I think there is no doubt, but, as I have said, I do not found it upon general principles. I refer to the decisions or opinions as they have been expressed from time to time. In the year 1874, in the case of *Reg. v. Farquhar* (L. Rep. 9 Q. B. at p. 261), Blackburn, J. said: "Assuming that the justices might of their own knowledge make the objection themselves, and I do not say that it is not impossible that they might, yet it is clear that they ought not to have decided at once, because no notice had been given to the applicant, and he was entitled to be heard." It is obvious, whatever the actual language used, that Blackburn, J. thought that the justices might be able to give a notice, and when the matter arose in the case of *Reg. v. Merthyr Tydvil Justices* (*ubi sup.*) Smith, J. put the construction upon the case of *Reg. v. Farquhar* (*ubi sup.*) which I have referred to. He said: "The case of *Reg. v. Farquhar* (*ubi sup.*) would seem to show that the objection mentioned in the proviso may be made by the justices themselves"; and in the case of *Reg. v. Eales* (*ubi sup.*) Cockburn, C.J. took the same view. Therefore there was during a series of years a considerable amount of opinion—though I agree no actual decision—to the effect that the justices could raise the objections. When the matter came before Hawkins, J. in the case of *Reg. v. Anglesea Justices* (*ubi sup.*) he certainly did use expressions which amply supported Mr. Avory in urging before us that the opinion of that learned judge was that the objection must be raised by a third person. He used the expression (65 L. J., at p. 15, M. C.): "The language of the proviso, 'on an objection being made,' can only mean made to the justices." It is true that that does not cover the case of an individual justice making an objection, and then ceasing, so to speak, to act as a justice. But I think it is only fair to say that the argument of Mr. Avory was well founded in this, that the opinion of Hawkins, J. in that case certainly did seem to come to this, that the justices could not raise an objection. Then came the last case, the case of *Baxter v. Lecha* (*ubi sup.*), in which there is an express decision of Wills and Kennedy, J.J. to the effect that the justices may raise the objection, and, having raised it, may adjourn and give notice. It would be perfectly true to say that in that case the justices did not give the grounds on which they were going to entertain the objection; but it certainly seems to me to be very much fairer to those whose licences were going to be questioned that they should be told what objections were going to be raised rather than that

they should not. Therefore that particular argument seems to me not to affect the weight of that authority of *Baxter v. Lecha* (*ubi sup.*), in which I entirely concur, and which is binding upon this court. Then there is, I agree, only a matter of opinion, but it seems to me an opinion which contains very weighty reasoning indeed, and that is the reasoning of Sir Edward Fry in the case cited from the justice of the peace (see 64 J. P., p. 642), where he was only giving his opinion after consideration as chairman of quarter sessions; and it is all the more weighty because of the strong line which he had taken, when Fry, L.J., in the case of *Leeson v. General Council of Medical Education and Registration* (*ubi sup.*). Therefore I come to the conclusion that justices can raise these objections under sect. 42, and that it does not invalidate the proceedings that a notice has been subsequently given by them. But it is said by Mr. Avory that, that being so, even then they must not sit and adjudicate. That contention seems to me to raise the fundamental question, What is the position of a person who objects? Certainly, if we take the language of Lord Herschell in *Boulter v. Kent Justices* (*ubi sup.*), in its natural sense, the objector is not in the position of a party, and it seems to me that, looking to the duty which the justices have to perform, and the considerations that ought to affect them, it is not right to regard a person who objects on the grounds which have been raised in this objection as what I may call a personal opponent of the person whose licence is in question, or as a party to any litigation. It is in that respect that I think that the fact that the justices had given notice of objection does not bar them from subsequently acting upon the proceedings, assuming that they acted without any suggestion of improper bias, or of having acted on improper materials. Therefore I now answer the question which I left open in the case of *Rea v. Kingston Justices; Ex parte Davey* (86 L. T. Rep. 589), where I merely indicated my opinion that the question would at some time or other have to be decided as to whether or not the justices could give the notices of objection. Certainly in a case where the justices were of opinion that there were too many licensed houses in the district, and where the real question to be considered by them was how those houses were to be reduced, it would be very unfortunate if the mere fact that notices of objection were given by the justices in order that the whole question might be fairly and impartially considered should prevent these justices from sitting and acting in the case. Mr. Avory has contended in support of these rules that if the justices have prejudged the question from the point of view of having previously made up their minds that there ought to be a reduction in the number of licences, their judgment would be affected. I am not prepared either to agree with, or to dissent from, that argument. It certainly is not this case. But where it is seen that the justices have approached the question of whether there should be any reduction, and, if so, what reduction, by raising the question with regard to every licence in the district, it seems to me to be an entirely different consideration altogether. I will deal shortly with the third objection, that the justices have acted upon information obtained beforehand and not

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given in evidence. I asked to see the notes in the only case which was really argued in detail before us, and which is agreed to be typical of the whole, and I find that all the points on which the objections to the house could be founded were proved in evidence in the case of the Queen-street Tavern, of which Mrs. Smith is licensee. The justices have all said that every substantive matter was proved in evidence, and that they have not acted in any single case except upon the evidence. I think, if I remember rightly, one of the justices says that they heard each case separately, that notes were taken separately, and in each case where necessary the notes of the evidence were read over to them before they came to their decision. Therefore it seems to me impossible to say in fact that there is any foundation on which we ought to come to the conclusion that the justices acted, in coming to their decision, upon information which they obtained elsewhere. It must be distinctly understood that I express my opinion without any hesitation that if they had so acted in getting information they would not be entitled to use any information, or act upon anything, which was not evidence given on oath before them. Lastly, there is the objection that is taken with regard to Mr. Bentall, and I think that ought to be stated so that the facts may be understood. The affidavit on which the rule was moved has stated a resolution in the chapel: "That this meeting of the Surrey Congregational Union notes with satisfaction the efforts of the Farnham magistrates to reduce the number of licensed houses in this ancient town, which are in excess as to number of population with most other towns in Surrey." I agree that this seems a very harmless resolution and one which in itself would not indicate bias. But it is said in the same affidavit that a formal objection was taken to any justices sitting who had attended the meeting of the Surrey Congregational Union on the 5th March 1902. Mr. Bentall says in his affidavit that he was not a member of the Congregational Union, that this being a public meeting and the resolution not having any direct reference to any particular action or any particular house, when the objection was first taken by Mr. Avory it did not occur to his mind that it applied to him; but upon the second day, when counsel expanded this particular objection, he understood it, and he at once got up and retired and took no further part in the proceedings. Then the applicants for renewals went on. It seems to me that it would be going far beyond any case that has ever been decided to hold that in the case where the magistrate retires, and the parties go on with the case, they can afterwards raise the objection. I entirely agree with what has been put forward by counsel in support of these rules, that if this had not been known, if no objection had been taken, but it had afterwards been discovered that a magistrate who had taken an active part or a part in promoting a particular side, had sat, the fact that he had so sat would or might have vitiated the proceedings. With regard to the authorities that counsel for the applicants referred to—namely, *Reg. v. London County Council*; *Ex parte Akkersdyk* (*ubi sup.*), *Reg. v. Fraser* (*ubi sup.*), and *Reg. v. Ferguson* (*ubi sup.*), they are all, in my opinion, illustrations of the principle that if a person has taken sides in the matter in which he is called upon or purports to act judicially, he cannot be allowed to act.

In my opinion they do not assist the applicants in this case in the view I have taken of the facts. I have therefore come to the conclusion that none of the four grounds on which these rules were moved prevail, and that the rules *nisi* should be discharged.

DARLING, J.—I am of the same opinion. In regard to the point that the magistrates had made up their minds to reduce these licences, because they had come to the conclusion, with many other people in the neighbourhood, that there were too many public-houses within their district, I cannot see that there is any objection whatever in that. They must have had some opinion in the matter. They must have had one of three opinions. They must have thought that there was exactly the right number of houses, in which case if any person asked for a new licence it might be said that the magistrates were biased against that, because they thought there were already the right number, or they must have thought there were too many, or they must have thought there were too few. In either case it might be said, if it were proposed to renew a licence or to grant a new licence, that because the magistrates had got an opinion on the matter that there were just enough licences, that there were too many, or that there were too few, they had made up their minds and could not consider the question. To my mind the Legislature has confided this licensing to the magistrates because they are persons in a position to bring to bear upon the question of granting licences their experience of the neighbourhood and of the necessities of the neighbourhood. They are not to decide, if evidence is brought before them, regardless of the evidence; but when it is provided that licences should be renewed, as I say, the justices must come to the licensing committee with some sort of opinion on the question such as I have indicated. Coming there with the opinion which they held, that there were really too many licensed houses in this neighbourhood, and that it would be a good thing if there were fewer, and contemplating, as they must have done, that if a person asked for a renewal of a licence it might very well be that they would grant it, or it might very well be that they would refuse it, it is said that they could not exercise any kind of judgment on the matter unless somebody, who might be a person who knew nothing whatever about it, got up and came before them and said: "I object." The sort of person who gets up and objects is very easily obtained if he is wanted. It is perfectly clear, I think, that the magistrates at licensing sessions have a discretion. If I wanted any authority for that—and it is to be found in many places—I should take it from no place more readily than from what was said by Sir Edward Fry quite lately at the Long Ashton Licensing Sessions for the county of Somerset, where he said: "The duty vested in licensing justices is a discretionary one," and then he went on to say that it had been objected that the discretion was contingent upon an objection taken by a third person, and that the justices could not take an objection for the purpose of giving themselves an opportunity of exercising that discretion. He said: "It seems an unreasonable construction of sect. 42 of the Licensing Act 1872 to suppose that the magistrates were absolutely deprived of

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any opportunity of exercising that discretion unless some third person gave them that opportunity. They thought they might take an objection for the purpose of giving themselves that opportunity, and by so doing they did not express any conclusion or any bias beyond thinking it a question that ought to be inquired into." This was said as to what the justices did in the particular case with which he was then dealing. That, I think, states the law accurately, and better than I can state it myself, and for that reason I desire to adopt those words. To my mind it also carries the other point that the justices, who take the objection, may sit and hear the application for the licence, because that is what happened in that case, and that was how the question arose. When the justices came to hear applications for licences, they were objected to on the ground that the objectors were the justices who were trying the case, and Sir Edward Fry having said what I have quoted, the justices went on to hear the applications for licences. Therefore, to my mind, it is really not necessary to dwell any more upon that point; in fact, the two points are only one, because there is nothing in the point that the justices may not object unless it is coupled with this: "and proceed to hear the application for the licence," as the proposition that the justices may not object could not be sustained. It would not be a good answer to say you cannot object because you are a justice. Therefore it is one point, and not two: Can a justice formally object for the purpose of allowing himself to exercise his discretion, and then proceed to hear the application for a licence and exercise his discretion? I think what I have read from Sir Edward Fry's opinion is enough to show that he can. It follows upon the distinct authority of *Baxter v. Leche* (*ubi sup.*), which has decided this point, and for *Baxter v. Leche* (*ubi sup.*) there is authority which has been alluded to by my Lord in the various cases that he has mentioned. The only thing that I know of to the contrary effect is the judgment of Hawkins, J. in the case of *Reg. v. Anglesea Justices* (*ubi sup.*). That decision cannot, to my mind, be reconciled with these other cases. It was not a judgment of the Divisional Court; it was only the considered judgment of a single judge, and therefore I am at liberty to say what I think about it, which is, that it was wrong.

CHANNELL, J.—I entirely agree. I think the difficulty here arises almost entirely from the fact that the licensing justices have both administrative functions and judicial functions, and that, as so often happens when men are put into that position, it is extremely difficult to divide exactly what are their judicial functions from those which are their administrative functions. I think that the licensing justices are clearly entitled to go in their own way to make themselves acquainted with the character of their district, with the amount of public-house accommodation that there is existing in it, and all matters of that sort. A large number of the justices—local gentlemen—would probably have the information. Justices who have only recently come into the district are fully entitled to inquire, and not judicially to inquire, into the general circumstances of the neighbourhood to fit them for performing their licensing duties, to give them a knowledge of the place and the wants of

it, and whether the public-house accommodation is too much or too little, and things of that sort. When it gets to the rights or *quasi* rights of individuals about renewals—whether a particular individual should or should not have his licence renewed—then it is a different matter; it then becomes a judicial matter. In that matter it seems to me the justices must act judicially. The proceeding is at any rate *quasi* judicial, and the justices must not act upon information acquired behind the backs of the parties without giving the parties the fullest information to enable them to understand what it is the justices are acting upon, and without giving them an opportunity of inquiring about it and seeing whether they agree with it, or what answer they have got to make, or what they say about those facts. There is nothing to my mind, therefore, objectionable in the general character of the inquiries which these magistrates made for the purpose of ascertaining whether or not the suggestions made to them by the other magistrates in the county, that in their district there were a great deal too many public houses, were correct. The way in which they entered into that inquiry shows what a full and careful report it must have been. In the course of that report incidentally the persons who made it furnished information not merely on the general question, upon which I think the inquiry was not a judicial one, but they also furnished information which would be useful when they come to the judicial inquiry, and it became a matter of considerable difficulty how that information so acquired could be properly used. So long as the information was only supplied to the magistrates for the purpose of their not acting upon it, but for the purpose of their using it to make inquiries when the different cases of these applicants for renewals came on, I think it was unobjectionable. It is a little doubtful, no doubt, and a little dangerous, because it was so very likely to be misused; but in this case, as far as I can see, the information really was used merely for the purpose of making full inquiries into each of the cases when it came on, and deciding each of those cases judicially and according to the evidence before the court. That disposes of a certain portion of the objections to these proceedings. There remains only the question about the right of the justices themselves to be the objecting parties, and their right, if they are the objecting parties, to sit. I think the difficulty upon that point arises partly from the different view that Mr. Avory apparently takes, and which questions I asked him in the course of the argument showed that he does take, as to what an objection means in this section. I take the view, about which I intended to have said something more fully, which has been put quite clearly by my brother Darling, in what he has said in reference to Sir Edward Fry's opinion of the matter, and I do not think I can improve upon that. Substantially it is that the objection taken by the justices is not to make the justices themselves parties to an opposition in the sense that they are opposing parties to the person who is requiring his licence, but is simply in the nature of a notice that they propose to exercise their discretion in that matter, and that it is done for the purpose of enabling them to exercise their discretion in that matter. Those, I think, are the substantial points in this case, and I do

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not think it is necessary to add anything further to the matter.

Rules discharged with costs.

From this decision the licence-holders appealed.

June 14, 16, and 17.—*Dankwerts, K.C.* and *Horace Ivory, K.C.* (*Stimson and W. O. Willis* with them) for Jane Smith, the licence-holder in the first appeal.—The justices cannot be themselves objectors as well as judges in the case of an application for a renewal of a licence. The question depends on sect. 42 of the Licensing Act 1872. It could not have been in the contemplation of the Legislature that justices might be objectors under that section, for the justices are the only persons to whom an objection can be made; they are the only persons required to take action upon it, and they are the only persons who are to hear and determine it. If justices were allowed to adjudicate upon their own objections made to themselves, it would be a departure from the first principles of justice. See the judgment of *Hawkins, J.* in

Reg. v. Anglessea Justices, 65 L. J. 12, M. C.

The point has been discussed in other cases, but it became unnecessary then for the court to decide it:

Reg. v. Farquhar, L. Rep. 9 Q. B. 258;

Baxter v. Leche, 79 L. T. Rep. 188.

The opinions that may have been expressed in those two cases are therefore not to be relied on. The power confided to the justices in these matters is to be exercised by them "judicially." That has been laid down by Lord Halsbury in the House of Lords:

Sharp v. Wakefield, 64 L. T. Rep. 180; (1891) A. C. 178.

If it was possible for justices to be objectors, then those justices who make objections ought not to remain on the bench when their objections were being heard. In the case of an application for a renewal of a licence, the application must be granted unless an objection has been made, and the burden of proof is on the objector:

Evans v. Conway Justices, 82 L. T. Rep. 704; (1900) 2 Q. B. 224.

A justice who has made an objection ought to go into the witness-box, instead of remaining on the bench:

Rez v. Antrim Justices, (1901) 2 Ir. R. 133, 162.

Here all the justices were biassed. They came to the bench with a determination in their minds, before they had heard any evidence, to refuse some of the applications for a renewal. They had also previously collected evidence against some of the licensed houses, and in this way they were prejudiced against them. They referred also to

Reg. v. Males, 42 L. T. Rep. 735;

Reg. v. Merthyr Tydvil Justices, 14 Q. B. Div. 584;

Boulter v. Kent Justices, 77 L. T. Rep. 288; (1897) A. C. 556;

Reg. v. London County Council; Ex parte Akkerdijk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190;

Royal Aquarium and Summer and Winter Garden Society Limited v. Parkinson, 66 L. T. Rep. 513; (1892) 1 Q. B. 431;

Leeson v. General Medical Council, 61 L. T. Rep. 849; 43 Ch. Div. 366;

Alkinson v. General Medical Council, 70 L. T. Rep. 471; (1894) 1 Q. B. 750;

Reg. v. Sunderland Justices, 85 L. T. Rep. 189; (1901) 2 K. B. 357;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. Walsall Justices, 24 L. T. Rep. O. S. 111;

Reg. v. Sylvester, 5 L. T. Rep. 794.

Disturnal for the licence-holders in the eight other appeals.

F. Low, K.C. and *G. F. Hohler* for the justices.

—The question here does not depend entirely on the meaning of sect. 42 of the Licensing Act 1872. There might be cases in which the circumstances under which justices appeared as objectors might disqualify them from also acting as justices in deciding whether a licence should be renewed or not. But there is no reason why this court should lay it down as a hard and fast rule that under no circumstances can justices be also objectors. Justices in these matters are not required to act judicially in the strict sense of the word. As to the expression used by Lord Halsbury in *Sharp v. Wakefield* (*ubi sup.*), which has been cited by the appellants, it appears from the shorthand notes of *Boulter v. Kent Justices* (*ubi sup.*) that Lord Halsbury said in that case that in *Sharp v. Wakefield* he had used the word "judicially" simply as opposed to "capriciously." One of the duties of justices in hearing applications for the renewal of licences is to protect the public:

Boulter v. Kent Justices (*ubi sup.*).

Here the notice of objection given by the justices was based upon a public ground—viz., the superfluity of public-houses in the district. It might well be the duty of the justices in certain cases to take objection to the renewal of a licence if no one else was willing to come forward for that purpose. There can be no injustice in the justices pointing out to the licence-holders the case which will be made against them. There are decisions which show that justices may themselves be objectors:

Reg. v. Howard and others, Licensing Justices of Congleton, 60 L. T. Rep. 980; 23 Q. B. Div. 502;

Whifen v. Malling Justices, 66 L. T. Rep. 383; (1892) 1 Q. B. 362;

Dakin v. Parker, 71 L. T. Rep. 379; (1894) 2 Q. B. 556.

As to the other points taken by the appellants, it is clear from the affidavits that the evidence on which the justices acted was all given on oath. There is no ground for saying that the justices acted on the report of their committee. That report did not refer to any particular licence, but dealt solely with the question of the advisability of reducing the number of licensed houses in the district. Upon the question whether *mandamus* was the proper remedy or whether the appellants ought not to have appealed to quarter sessions, they referred to

Rez v. Bishop of Chester, 2 Stra. 797;

Reg. v. Justices of Southport, 28 L. T. Rep. 129; *nom.*

Reg. v. Smith and others, L. Rep. 8 Q. B. 146.

Avory, K.C. in reply.

Cur. adv. vult.

June 23.—*COLLINS, M.R.* read the following judgment:—This is an appeal from the decision of the Divisional Court discharging a rule for a *mandamus* addressed to the licensing justices of the Farnham Petty Sessional Division of the county of Surrey, calling upon them to show cause why a writ of *mandamus* should not issue commanding them to hold a further adjournment

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of the annual licensing meeting and to hear and determine according to law certain applications for the renewal of licences. The case is one of importance, as the question raised goes to the root of the law and practice in the matter of the renewal of licences. The circumstances are shortly these: In Feb. 1891 a letter was addressed by the clerk of the peace of the county to the clerk of the Farnham justices informing him that the attention of the county licensing committee had been called to the large number of licences existing in the parish of Farnham and Farnham Rural, pointing out that the proportion was largely in excess of any other parish in the county, and stating that it was the opinion of the committee—that is, the confirming committee—that steps should be taken whereby the licences of a substantial number of such houses should be discontinued, and inviting the justices to consider this question at their next annual licensing meeting. The justices, as appears by the affidavit of their chairman, addressed themselves to the consideration of the question raised by this letter, and appointed a committee to consider the statistics referred to in the letter. Upon the report of this committee, which was unanimously adopted, the committee were authorised to inquire into the condition, position, and circumstance of each licensed house in the Farnham district, which they accordingly proceeded to do—first, by framing questions addressed to the owners of the houses, and afterwards by personal inspection, the results of which were duly reported to the licensing justices, with recommendations which were adopted by them with one dissentient. It is clear from their report that they were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. These objections were signed by the clerk stating that he was acting under the instructions of the justices present at the annual licensing meeting. At the general annual licensing meeting held on the 1st March a certain Mr. Hayes objected to the renewal of all the licences in urban Farnham and the chairman of the justices, on behalf of the justices, made objection to the renewal of the forty-five licences in the Farnham urban district, stating that the reason why the justices thus raised objections was "in order that every one of the licensees might have equal opportunities of giving evidence before them, and the justices might thus be enabled to decide with justice and fairness," and the meeting was accordingly adjourned until the 14th March following, and instructions were given to Mr. Mason, the deputy clerk, to serve formal notice in each case, requiring the licensees to attend in person and stating the grounds of objection. When the cases came on for hearing, evidence on oath was given in support of the objections, and questions were put by the chairman based on the facts collected by the committee. A copy of the report itself had been placed by the justices in the hands of counsel for the applicants. The rule *nisi* was obtained on the ground that the justices

were incapacitated from dealing with the question of the renewal of licences, inasmuch as they were at once parties and judges, that they had acted upon evidence not taken upon oath as provided by sub-sect. 3 of sect. 42 of the Licensing Act 1872, and that they must be deemed in law to be biased on the ground that they had predetermined to refuse the renewal of some of the licences and had already inquired into the cases. There was also a particular objection to one of the magistrates, which I will deal with, if necessary, later on. In considering how far these points are material it is necessary to understand precisely what is the character in which the justices are required by law to deal with questions of renewal. Whatever views may have been held as to their position before *Boulter v. Kent Justices* (*ubi sup.*) was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the justices do not sit as a court, and that the transaction itself is in no sense a *lis* to which there are parties. The objector is not a "party"; his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not. This point is so material to the true appreciation of the cardinal consideration in these cases that I propose to read one or two passages from the judgment of Lord Halsbury, L.C., and Lord Herschell, in the case I have just referred to. Lord Halsbury said: "The difference between the procedure of a court and of the licensing meeting is not only one of nomenclature. Where justices are acting as a court of any sort they must proceed according to the regular rules which are applicable to all courts of justice; but in respect of an application for a licence or its refusal they may and constantly do receive representations not on oath." He then quotes Lord Kenyon, who in 1790, in the case of *Rex v. Downes* (3 T. R. 560), when holding a licence bad because it was granted at a private meeting, did not rely upon the general principle that all courts of justice must be open, but upon the ground that the statute directed it, and added that the construction of the then statute law was advantageous to the public because it was "of importance to the public that licences of this sort should be granted openly and not by stealth, in order that they may have an opportunity of objecting to the granting of these licences to particular persons on the ground of unfitness." Lord Halsbury adds: "The Acts referred to by the learned judge were repealed by the Act of 1828. But a careful distinction appears to me always to have been observed between the same bodies acting as a court and deciding questions of licensing at a licensing meeting of the justices." Further on he says: "But if I am right in the distinction I have drawn between a magistrates' meeting for licensing purposes and courts, although consisting of the same persons, it would be the height of absurdity to suppose that the Legislature intended to include in the definition and to make applicable to that definition persons who were in fact justices of the peace, but who in the particular matter here referred to—namely, 'licensing'—were not occupying the position of judges at all, but were exercising the discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on." Lord Herschell (77 L. T. Rep.

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at p. 292; (1897) A. C. at p. 569) said as follows: "Persons objecting to the grant of a licence are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one *inter partes* at all. The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the court to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all, then, become "the other party"? There is, in truth, no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in sect. 2 seems, then, to me, an additional reason for holding that an appeal from the act of the justices in refusing a licence is not an appeal from a 'conviction or order' of a court of summary jurisdiction." The standard, therefore, to be applied in determining whether justices have incapacitated themselves from dealing with the renewal of licences is not in any sense that applicable to judges dealing with litigation. Moreover, their position in relation to the right of objecting is not *res integra*. Since *Reg. v. Farquhar* (*ubi sup.*), at all events, decided in 1874, the practice has been that they might, when circumstances required it, themselves make or cause to be made an objection, at all events provided they adjourned for the purpose of hearing it and caused the necessary notice to be served requiring attendance upon a future day. I think this practice was founded on a true view of the law for reasons which I will state hereafter, but, whether it is or not, I think it has been treated as law for nearly thirty years, and ought not to be now disturbed. In *Reg. v. Eales* (*ubi sup.*), decided in 1880, it is thus referred to by Cockburn, C.J. He says: "And although by a practice founded upon a dictum in the case of *Reg. v. Farquhar* an objection may be made by the justices themselves, it must be upon one of those four grounds" (it was a case under the Act of 1869) "and the particular ground of such objection should be notified to the appellants in order that an opportunity may be given to meet it." He there treats the practice as established and in no way dissents from it. It has been treated as law in more than one case referred to in argument, and was formally decided to be so in 1898 in *Boater v. Leche* (*ubi sup.*). It is true that a different view was taken by Hawkins, J. in *Reg. v. Anglesea Justices* (*ubi sup.*). But in the same case that learned

judge upheld a decision based upon a notice given by the chief constable apparently at the instance of the licensing justices themselves. And on the general question whether there is such incompatibility between the position of the justices who adjudicate and that of an objector that the two cannot be combined, it seems to me to be immaterial whether the objection is made personally by the justices or by somebody else at their instance, and from the reported cases it seems to be a very common practice, and one that has never been questioned, for the objection to be made at the instance of the justices, if not in their name. The observations of Hawkins, J. in the case referred to are very valuable as to the discretion of justices, and their right to discuss among themselves matters affecting the expediency of renewals, and their right to take steps to have a full investigation of them. On the same point Lord Halsbury, in *Sharp v. Wakefield* (*ubi sup.*) says: "By the express language of the statute, which is still the governing statute, the grant of a licence is expressly within the discretion of the magistrates. For the reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but, if one were to argue *à priori*, what possible reason could there be for limiting the discretion of the justices to the first grant of the licence? It is not denied that for the purpose of the original grant it is within the power and even the duty of the magistrates to consider the wants of the neighbourhood with reference both to its population, means of inspection by proper authorities, and so forth." The key to the position appears to be that the justices in dealing with licences are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the Legislature that they should divest themselves of all such knowledge in dealing with questions of licences. It would be a great public misfortune if they were bound to determine the question merely on materials provided by the individual who happened to object, and were constrained to sit by in silence although they had reason to suppose that there were very good grounds which ought to be inquired into before the matter was decided; and yet, if they were debarred from making an objection or causing one to be made, these facts never could be inquired into, and the licence would have to be disposed of without the necessary investigation. I think, therefore, that the practice is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson v. General Medical Council* (*ubi sup.*) and *Allinson v. General Medical Council* (*ubi sup.*) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense

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become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them. Assuming, therefore, what I regard as clearly established by the evidence, that what was done by the justices in this case was honestly done to enable them to secure a full investigation of the facts for the purpose of avoiding the injustice which might arise if they had to deal with the question without such materials, and upon one or more isolated applications only, I think they were within their rights in doing what they did, and were not thereby debarred from sitting and deciding upon the question of renewals. Their original and fundamental discretion in the matter of granting or refusing applications for new licences remains when they are invited to deal with renewals, except so far, and only so far, as it is conditioned by sect. 42 of the Act of 1872, as amended by sect. 26 of the Act of 1874, which relates to procedure only: (see *Sharp v. Wakefield*, 64 L. T. Rep. at p. 182; (1891) A. C. at p. 182). In my opinion the course the justices took involved no predetermination of any point, but merely secured a full and informed discussion of the whole subject. It is not denied that on the hearing all the formalities of the 42nd section were complied with. The respondents indeed contend that the justices could have exercised their discretion without complying with these conditions, but I think the case of *Evans v. Conway Justices* (*ubi sup.*) debars them from advancing that contention in this court. I agree therefore, with the decision of the Divisional Court, and it is not necessary to discuss in detail the numerous cases which were referred to in argument before us. With regard to the special objection urged against Mr. Bantall on the ground that he was present at a meeting at which certain resolutions were passed upon which he did not vote, I think it cannot be sustained. It is not necessary to express an opinion upon the technical objections urged against the granting of a *mandamus* in the form prayed for. The appeal must be dismissed.

MATHEW, L.J. read the following judgment:—The grounds relied upon in support of the appeal were—(1) That the justices were prohibited from being themselves the objectors to the renewal of the licence; (2) that they were disabled from adjudicating upon the grounds of objection; and (3) that their decision was invalidated on the ground of personal interest in the result, or manifest bias against the applicant. As to the first point, if the jurisdiction of the justices depended upon the Act of 1823, there would seem to be no question that objections to a renewal might be made by the Bench sitting in open court, and that upon giving the applicant the opportunity of being heard, the justices had an absolute discretion to grant or refuse the renewal. But it was argued that the discretion of the justices could no longer be exercised freely, and that their jurisdiction was fettered by the provisions of the Act of 1872. Attention was called to the language of sect. 42, and it was contended that the jurisdiction of the magistrates depended upon the objection being made by some one who was not a member of the Bench. No reason was given for this supposed change of the law. It would matter

nothing to the applicant from what quarter the objection came. A third person would be entitled to object without giving a reason, and might then withdraw and be no party to the subsequent proceedings. The grant of a renewal was for the magistrates only, and would seem to depend in every case upon the result of the subsequent inquiry upon sworn testimony. But it was said that the inference from the language of the section was clear, and that the object of the Act was to provide for a new method of procedure in all cases. Sect. 42, as modified by the later Act of 1874, is in the following terms: [His Lordship read the section.] Sub-sect. 1 would seem to assume that an objection might be made from the Bench, and that the applicant might be required to attend in person upon having proper notice given him in accordance with sub-sect. 2. He would thus learn the grounds upon which his attendance was considered by the justices to be necessary. The proviso in sub-sect. 2 leads to the same conclusion. It would appear, therefore, that the justices may entertain any objections to the renewal whether made previously or not and take evidence upon them. Further, even if, contrary to what would seem to be the true meaning of the statute, sub-sects. 1 and 2 must be taken to apply only when the Bench are not the objectors, the last clause in the section preserves their former powers and discretion. They continue to possess the authority conferred upon them by the Act of 1823. This is in accordance with the valuable judgment of Hawkins, J. in the case of *Reg. v. Anglessea Justices* (*ubi sup.*). I see no reason to doubt the authority of the cases referred to by the Master of the Rolls, which sanction the conclusion that objections may be made from the Bench in open court, and may afterwards be investigated upon proper notice to the applicant to attend and answer the objections. The argument for the appellant would involve this consequence, that the magistrates, if there were no objector, would be bound to renew the licence, though they knew or had been furnished with reliable information that the application ought to be refused. But then it was said that, even though objections might be made from the Bench, the justices, who were parties to the notice to the applicant to attend, could not afterwards sit and adjudicate upon the application. The proceedings would have been regular under the Act of 1823, and it seems to me that there is no ground for saying it was impliedly forbidden by the Act of 1872. But it was urged that the inquiry was in the nature of the trial of an action between the justices and the applicant, and that those who had instigated the proceedings could not adjudicate upon what was described as their own cause. But, as has been laid down in the cases referred to by the Master of the Rolls, in licensing cases there is no *lis*, and nothing in the nature of a suit or a prosecution. The duty of the justices is to arbitrate impartially, not between themselves and the holder of the licence, but between that person and the public. The fact that the magistrates had obtained the report which was so much complained of by the counsel for the appellant was the ground upon which we are asked to say that the justices had made themselves parties to the opposition in each case, and were attempting to adjudicate on their own behalf. The form of the report, it was said, showed that

the justices must have arrived at the conclusion that the appellant's premises were not required, and that the subsequent inquiry was only designed to support a foregone decision. But I am wholly unable to adopt this reasoning. The report seems to me to contain no more than the information necessary to enable the magistrates to enter upon the consideration of the question whether there were too many licensed houses in the district. The document was neutral in its character, and contained no indication of an opinion as to the claim for renewal of the appellant or any other occupier of licensed premises. The justices seem to have acted with perfect fairness and to have been guided to the conclusions at which they arrived, not by anything contained in the report, but by the sworn evidence laid before them. The objection that the justices had what was described as an interest in the result of each inquiry took another shape in the suggestion that they were shown to have been influenced by bias. There is no ground for any such conclusion. The magistrates proceeded from first to last with commendable care, and seem to have had no other motive than the desire of honourable men to discharge their duties faithfully. With reference to Mr. Bentall, I agree that his temporary presence on the Bench did not invalidate the proceedings. He was not shown to have committed himself to any opinion on the subject of inquiry, or to have taken sides, as was suggested, against the appellants. It is not necessary to deal with the technical objections to the application for a *mandamus* which were raised by the learned counsel for the respondents.

COZENS-HARDY, L.J. read the following judgment:—In this case I should be content to say that, for the reasons assigned by the Master of the Rolls, I agree that the appeal must be dismissed. But, having regard to the great importance of the questions which have been raised as to the precise powers and duties of justices with respect to renewals of licences, it is right that I should state shortly, in my own words, the conclusions at which I have arrived. I do not propose to restate the facts. It cannot be disputed that, under the Act of 1828 the justices had an absolute discretion to grant or refuse applications for new licences and applications for the renewal of old licences. Their functions in this matter were administrative rather than judicial, and they were entitled to rely upon their general knowledge of the needs of the locality as well as upon any evidence which might be adduced. The Act of 1828 is still the governing statute, except so far as it has been modified by the Acts of 1872 and 1874. With respect to new licences, there are very material modifications to which it is not necessary to refer in detail. With respect to renewals, the material section—viz., sect. 42 of the Act of 1872, as amended by sect. 26 of the Act of 1874—need alone be considered. Now, in two cases the effect of this section has been discussed in the House of Lords. In *Sharp v. Wakefield* (*ubi sup.*) it was held that the old discretion of the justices under the Act of 1828 was not affected, and that sect. 42 only dealt with procedure. The attempt to establish a vested right to the renewal of a licence, except on some ground personal to the applicant, failed. In *Boulter v. Kent Justices* (*ubi sup.*) it was held that justices

in granting or refusing to grant an application for renewal are not a court, and that the objector contemplated by sect. 42 is not a litigant, and that in short there is no *lis*. Now, in the face of those decisions, it has been strenuously argued before us that the effect of this section is to prevent the justices from exercising their discretion and discharging the duties imposed upon them in the public interest unless some outsider appears and objects to a renewal, or, in other words, that they are powerless themselves to require the attendance of the licence-holder with a view of considering whether his licence should be renewed. I cannot adopt this view. It seems to me that there is no reason why the justices should not on their own initiative direct the licence-holder to attend on a subsequent day, inform him of the grounds of objection, and then deal with the matter in due course at the adjourned meeting. The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of Lords held in *Boulter v. Kent Justices* (*ubi sup.*) that there is no *lis* between an objector and a licence-holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he must be prepared to deal with certain specified points. It is not necessary to consider whether the justices can act solely upon their own local knowledge—for example, as to the number of public-houses compared with the population, or whether they must in all cases act upon sworn evidence. In the present case the evidence was all taken upon oath. If I am right in the view that magistrates may themselves take, or direct their officer or agent to take, objection, all difficulty seems to be removed. It cannot be wrong to obtain careful and accurate information before taking, and with a view to taking such objection. No question of bias as against a particular licence-holder arises. In making the preliminary investigation and considering whether the number of licensed houses was in excess of the needs of the district the justices were simply preparing to discharge the important duties, mainly administrative, imposed upon them by the Act of 1828. In directing all the licence-holders to be served, and in taking sworn evidence upon each separate application, they seem to me to have acted with praiseworthy care. They were not adjudicating upon any rights. They were not prosecutors. In truth, there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred. There is no ground for suggesting that they exercised their discretion capriciously or without regard to the circumstances of each individual case or without considering the requirements of the locality. The separate objection taken to Mr. Bentall may be disposed of very shortly. He was present at a meeting of the Surrey Congregational Union, at which a mild and harmless resolution was passed expressing satisfaction at the efforts of the Farnham magistrates to reduce the number of licensed houses. He took no part in the proceedings, and I think it idle to suggest that this in any way precluded him from acting as a licensing justice.

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I may add that in fact he retired directly it was brought to his mind that any objection could be taken to his presence. For these reasons I agree with the Divisional Court that the rule for a *mandamus* must be discharged.

Appeal dismissed.

Solicitor for the licence-holders, *W. Montgomery White*, for *Edgar Kempson*, Farnham.

Solicitors for the justices, *Prior, Church*, and *Adams*, for *Hollett, Mason*, and *Nash*, Farnham.

Tuesday, July 1.

(Before COLLINS, M.R., MATHEW and STIRLING, L.JJ.)

GREAT WESTERN RAILWAY COMPANY v. SOLIHULL RURAL DISTRICT COUNCIL. (a)

APPLICATION FOR A NEW TRIAL.

Highway—Power to dedicate—Land vested in company for statutory purposes—Canal company—Reservoir embankments.

A statutory body cannot dedicate to the public a right of way which would be incompatible with the special purpose for which it was incorporated.

So a canal company, which was empowered and obliged to make a canal and the works incident and necessary for the purpose of making and maintaining the canal, was held to have been incapable of dedicating to the public a right of way over the embankments of reservoirs constructed by or in pursuance of its powers in a case where it was subsequently proved that the user by the public of the right of way must ultimately lead to the destruction of the embankment and consequent damage to the public unless great expense was incurred by the company to prevent such a result.

Mulliner v. Midland Railway Company (40 L. T. Rep. 121; 11 Ch. Div. 611) followed.

THIS was an application by the plaintiff company for judgment or a new trial in an action tried by Jelf, J. with a jury.

The plaintiffs were the owners and occupiers of certain reservoirs, feeders, and embankments which formed part of their canal undertaking as constituted under several Acts of Parliament.

Of recent years excursionists had been in the habit of rambling over these embankments, and to prevent this the plaintiffs put up fences and notice boards warning the public against trespassing.

In 1901 persons acting on behalf of and under the authority of the defendant council, by force broke down and carried away the fences and notice boards.

The plaintiffs thereupon brought the present action to obtain an injunction to restrain the defendants from interfering with the fences and notice boards.

The defendants pleaded that long before excursionists had begun to visit the reservoirs the plaintiffs had dedicated to the public a right of way over the embankments of the reservoirs.

It appeared that the system of reservoirs had been made on ground at a higher level than the canal in order to allow the water to run down to

the canal, and that great damage would be caused to the public if the embankments gave way.

The evidence showed that the exercise by the public of rights of way over the embankments would lead to the destruction of the reservoirs unless considerable extra expense were incurred in maintaining the banks.

This evidence was not in any way disputed by the defendants, whose contention was that the plaintiffs had dedicated public rights of way over the banks before any danger had been apprehended from such user by the public.

The action was tried at Birmingham Assizes before Jelf, J. with a jury. The learned judge left the jury two questions: (1) Was the user of the disputed footpaths by the public as of right and for all time consistent with the fundamental powers for which statutory powers were given to the company? Answer—Yes. (2) Did the company intend to dedicate the disputed footpaths to the use of the public? Answer—Yes.

Jelf, J. gave judgment for the defendants.

The plaintiffs moved for judgment or a new trial.

Asquith, K.C., *A. T. Lawrence, K.C.*, and *Leslie* for the plaintiffs.

Hugo Young, K.C. and *W. Shakespeare* for the defendants.

The following cases were referred to:

R. v. Leake, 5 B. & Ad. 469;

Rochdale Canal Company v. Radcliffe, 18 Q. B. 287;

Staffordshire and Worcestershire Canal Navigation Proprietors v. Birmingham Canal Navigation Proprietors, L. Rep. 1 H. L. 254;

Greenwich District Board of Works v. Maudslay, 23 L. T. Rep. 121; L. Rep. 5 Q. B. 397;

Grand Junction Canal Company v. Petty, 59 L. T. Rep. 767; 21 Q. B. Div. 273;

Mulliner v. Midland Railway Company, 40 L. T. Rep. 121; 11 Ch. Div. 611;

Re Gonty and Manchester, Sheffield, and Lincolnshire Railway Company, 75 L. T. Rep. 239;

(1898) 2 Q. B. 439;

Caledonian Railway Company v. Turcan, (1898) A. C. 256.

COLLINS, M.R.—This is a motion for a new trial of a case tried before Jelf, J. and a special jury at Birmingham. The question involved is whether or not there is a public right of way over the banks of certain reservoirs constructed by the predecessors in title of the plaintiff company. These reservoirs were originally made somewhere about the year 1820 under the powers of an Act of Parliament whereby a canal company received power to make a canal and the works incident and necessary for the purpose of making and maintaining the canal. That was the reason of their existence. They came into existence as a body created by statute for a certain special purpose, with no other powers except those that are conceded by Act of Parliament and that are compatible with the main purpose for which the company was called into existence—namely, to make a navigable canal with all the appliances necessary for that purpose, among the chief of which was a system of reservoirs. That system of reservoirs they constructed, and naturally they chose land sufficiently high to admit of the water, when there embanked, finding its way down by force of gravity into the channels where they desired to use it. The action is brought in respect of an

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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alleged trespass on the banks of the reservoirs. The defendants, who are the local authority, have set up (in answer to the plaintiffs' claim) the existence of a public right of way. At the trial of the action, Jelf, J., who evidently tried the case with the greatest possible care, left two questions to the jury [His Lordship read them]. I will consider first with the question of dedication. If this action had been brought between private persons, and the only question was whether or not the verdict that the plaintiff had dedicated a highway should stand, I do not myself think that on the materials before us I should feel able to say that there was not evidence to go to the jury fit to be considered by them on the question whether there was a dedication or not. In what I am going to say upon this case I will deal with the matter upon that hypothesis; but I think that, having regard to another question (which I propose to deal with in a moment), the fact that in the present case the person dedicating is not a private individual, but is, as I have already stated, a statutory body having no powers outside the ambit of the statute, is of enormous importance on the question of dedication itself. But I will assume for the moment that there was evidence sufficient to be left to the jury upon the question, aye or no, whether a highway in the proper sense of the term was dedicated over the embankments of these reservoirs. Now, that dedication must be of a highway. It does not embrace, and it is not contended that it does embrace, what is called a stray—a general right to traverse at large the lands of the plaintiffs. That is not contended for, and no proof of that kind of usage would found a proof of dedication. The real question is this: Whether or not it was possible for the company, fettered as it was by the conditions of its existence to be found in the statutes creating it, and regard being had to the objects for which it was brought into existence, to grant to the public a right of way over the embankments containing the reservoirs. Now, Jelf, J. left that question, as a question of fact, to the jury. I am not able to say that it is not, in part at all events, a question of fact; and therefore I am not able to say that the learned judge was wrong, or that he misdirected himself, in leaving that question to the jury, because it does seem to me to embrace a question of fact as well as one of law. But it is undisputed law that a company brought into existence by an Act of Parliament cannot confer upon other persons any right inconsistent with the primary object of the company's own existence. Therefore if it were admitted that the existence of this alleged highway was calculated to impair the use of these embankments for their primary purpose of containing the reservoirs, or was likely to force upon the company a larger expenditure than that which would be otherwise necessary for the maintenance of these embankments, and would involve them in a reasonable expectation of danger to the embankments, and therefore also to the public at large—if that were admitted, it would be obvious that the conferring of such a right upon the public would, as a matter of law, be outside the powers of that corporate body, that statutory entity. But, as I have already said, that is a question partly of law and partly of fact, and it must, I think, depend upon the particular facts whether the particular user which the statute

defines is or is not consistent with the particular user which is supposed to be based upon that grant. We have got to compare those two things, and the comparison of them results in an opinion of fact. Here there is the primary statutory obligation on the company to keep up this canal. There is the right on their part to put the reservoir in the place where it is, and there is the necessary incidental danger to the public by reason of the level at which it has been placed, and there is the class of protection—these embankments—to which the reservoir is necessarily limited for a safeguard. All those things have to be considered, with the necessarily imminent danger to the public in case there should be any defect in any of these works. Now, a company brought into existence for this purpose has no right, in my opinion, to cast upon itself and its members the burden of maintaining for the public at its (the company's) expense a highway over its embankments if that involves a larger expenditure in making larger embankments, and in continually attending to and safeguarding them. If and so far as it involves a larger outlay than is required for the primary and necessary purpose of their statutory undertaking, it seems to me that any obligation of that kind undertaken outside and beyond that limited line would be beyond their powers and therefore void. Now, how far—and this has been the real difficulty in the case to me—on the evidence given was it a matter of disputed evidence as to whether or not this alleged right of the public over these embankments was consistent with the main purposes of the company? Was there or was there not any real dispute in the evidence upon that fact? If there was, although we might, I think, order a new trial if we were dissatisfied for any of the reasons alleged with the trial itself, yet it would be very difficult for us to take the matter into our own hands and pronounce upon it as a question of law. It is exceedingly important, therefore, to see what was the real issue upon which there was a conflict of evidence before the jury, and how far the evidence on this particular part of the case stands outside controversy. It seems clear to me that the great question which the defendants set up, and to which they limited their evidence, was the question of dedication. They sought to prove dedication by the fact of user, more or less continuous, without objection or obstruction, and they called a considerable body of evidence with the view of showing that the plaintiffs must be taken to have intentionally conferred the right which that user would appear to justify. The defendants did not at all attempt to show that the right they claimed was one that was compatible with the perfect safety and continuance of the embankments for the purpose for which they were made. I think that Mr. Lawrence was justified in saying that where as against a statutory body of this kind a right is set up for the public to a highway over their embankments, it is incumbent on the persons who set up that right to show that the person by whose grant they seek to establish it was in point of fact a person capable of making that grant. It is nothing to show that the public have passed over the way, unless it is also shown that the owners of the soil of that way had the power to grant the right claimed over that soil. Have the defendants done that in this case? It

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is true that they have shown that for a considerable period members of the public have passed along these embankments, and I will assume that they have shown something more than a mere right of what I call "stray,"—that is, that they have given some evidence that people used the way for the purpose of getting from one point to another. But on looking at the way in which the case was conducted, it is perfectly clear that the learned counsel for the defendants thought it quite enough for his case to show that before the time when danger from excursionists was felt and foreseen, and an attempt made to guard against it, the plaintiffs had dedicated a right of way to the public. Therefore when a large body of expert evidence was given on behalf of the plaintiffs that the user by the public would ultimately lead to the sure destruction of these embankments, unless great expense was incurred in trying to prevent such a result, the learned counsel who appeared for the defendants, without in any way impeaching the weight to be given to such evidence, and without any cross-examination of the witnesses, merely said that the evidence came too late into the discussion, that before the time when danger began to be anticipated the right of way had been dedicated, and that when once a right of way has been dedicated the person dedicating must take the risk of the whole public coming and making use of the right of way. The view of the learned counsel was that it is of no use for the plaintiffs to say now that dangers are arising from the enormous increase of excursionists, which were not anticipated at the time of dedication; the plaintiffs having dedicated the right of way to the public, must now accept the greater burden, because that burden was involved, though they did not know it at the time, in their dedication to the public. That was the reason that they deliberately left unquestioned the evidence of the experts which was given on behalf of the plaintiffs. The position thus taken up by the defendants seems to me to involve a radical misconception of the true legal view of the matter, because it was not competent for the company to assume that they could dedicate successfully to the limited number of persons who were then using these ways. It was not competent for them to ignore the possibility that in the future the whole public might take advantage of that which was at the time being used by only a section of the public. If the company had even executed some formal document of dedication, and if it were afterwards shown that the result of that dedication, when the public came to be aware of it, and to make use of it to the full extent, would necessarily lead to the destruction of the embankments, it seems to me that by law the company would be incompetent to have made a dedication which would result in such effects. Therefore the dedication, or that which was contended by the defendants to have been dedication, is simply of no avail whatever. I do not think it necessary to cite authorities, because when once you grasp this fact, that the only rights the company has are to carry out the enterprise which has been committed to them by the Legislature, it becomes clear that the company had no power to dedicate a highway over these embankments. The company only exists for that purpose, and they cannot now or hereafter fetter their hands, and so prevent

themselves from dealing with any emergencies that may arise afterwards. It would be impossible for the company to fetter themselves in respect of their use of these embankments in such a way that, though the embankments were crumbling away and perishing from the user made of them by the public, the company would have no means of avoiding that result because their capital was not designed to include the purpose of keeping up highways for the public benefit. By granting this right to the public, the company would put it out of their power to remove the embankments, or to deal with them in such a way as they might do but for the right given to the public. That would be involved if we were to hold that the company have undertaken a new obligation by dedicating these embankments as highways, and by allowing them to be used for purposes other than their own proper purposes. Therefore the evidence does not seem to me to come too late if it is demonstrated as a fact that the purpose for which the company have sought to grant the use of the embankments is inconsistent with the reasonably safe maintenance and carrying out of the enterprise committed to their charge. Now, in the present case there is no conflict of evidence. The only evidence as to the after consequences that will necessarily result from this user is that it would be extremely detrimental to the canal and the reservoirs. If that be so, that at once seems to me to lead to the conclusion that the act was *ultra vires*, that the company had no right to take upon themselves this burden larger than the Legislature empowered them to assume. With regard to the authorities, there is one case which is, I think, absolutely in point here. That is the case of *Mulliner v. Midland Railway Company* (*ubi sup.*), a decision of Sir George Jessel's. The facts are not identical, but the principle seems to me to be that which I have attempted to explain. Cases have been cited in which public bodies have been held to have granted rights of way over embankments, or canals, or sea walls. But in each of those cases it will be found that it was a fact, and was the basis of the decision, that the user was not incompatible with the main purpose for which the bodies were called into existence. In the case of *Grand Junction Canal Company v. Petty* (*ubi sup.*) the question arose with reference to the towing path of a canal made for the purpose of carrying the traffic of men and horses over it. Obviously where a man and a horse could go members of the public could walk without doing any injury. The basis of the decision was that the user by the public was not or could not be incompatible with the user of the towing path in the usual way. So also in *Greenwich District Board of Works v. Maudslayi* (*ubi sup.*) it was assumed as established that there could be no incompatibility between the object for which a sea wall was erected and the existence of a right of way along it. So also in the case of the bank in *E. v. Leake* (*ubi sup.*). As there is no conflict of evidence in the present case, it is competent for the court to deal with it as a matter of law. As a matter of law the right of the public to use these embankments as highways and the obligation of the company to safeguard the public and to preserve the rights of navigation cannot co-exist. For these reasons, I think that the application must be allowed and judgment entered for the plaintiffs.

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MATHEW, L.J.—I am of the same opinion. I think under the circumstances there was no satisfactory evidence of dedication on which a jury could have acted. But then comes the further formidable point—supposing there had been a scintilla of evidence that would justify the case being left to the jury, was there any power on the part of the canal company to grant the right that the defendants set up? [His Lordship referred to the evidence.] To permit the public to come in such numbers to such a place as this with the very little protection that the servants of the canal company could afford, would result in damage to the property of the company. What would be the consequence of neglecting the repairs that appear to have been rendered necessary by what took place? Why, the destruction of the canal and the utter frustration of the purposes for which the powers were conferred on the company. That being so, it seems to me that it is perfectly clear that there was no power in the company to dedicate in the way that the defendants assert. I agree with my Lord in the result he has stated, and in his reference to the authorities, which I do not think it necessary to refer to again.

COZENS-HARDY, L.J.—I am of the same opinion. The defendants have to prove two things at least. They must prove acts of user from which a dedication of the highway might be presumed in the case of a private owner. The evidence on that point, though not very satisfactory, is, I think, sufficient in the case of a private owner to have justified the jury in finding that there was a dedication. But the defendants have a further burden imposed on them. In the *Staffordshire and Worcestershire Canal Navigation Proprietors v. Birmingham Canal Navigation Proprietors* (*ubi sup.*) Lord Westbury used these words: "But if the Prescription Act had been at all applicable it would be incumbent on the appellants to prove that the right founded on the claim by user might at the beginning of, or during, that user have been lawfully granted to them by the respondents' company. No such proposition can be maintained. Had any grant been made at any time by the respondents' company of the right now alleged by the appellants to have been acquired against them by user, such grant would have been *ultra vires* and void, as amounting to a contract by the respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy and prudence." The language of that passage seems to me to be precisely applicable to the present case, only substituting the word "dedication" for the word "grant." Here the evidence seems to me to be really all one way. It is not necessary for the plaintiffs to show that at the present moment the banks are in imminent danger. It is quite sufficient for them to show that it is reasonably certain that danger will result to the banks of the reservoirs if the public have the right which all the public must enjoy if there has been a dedication of this highway to the public. On the uncontradicted evidence that danger will result, it seems to me, for the reasons which my Lord has given, that it is impossible to hold that it would have been competent for the plaintiffs or their predecessors by the most sound mode possible to have dedicated to the public a right of way along

these three miles of bank. It would have been inconsistent with the primary purposes for which the reservoirs were made, and the duties that were imposed on the company of maintaining the banks of the reservoirs. None of the authorities cited seem to be inconsistent with this view. *E. v. Leake* (*ubi sup.*), *Greenwich District Board of Works v. Maudslay* (*ubi sup.*), and *Grand Junction Canal Company v. Petty* (*ubi sup.*) all proceeded upon the ground that the public right which was proved to exist in each case was perfectly consistent with the discharge by the owners of the soil in each case of every public duty which had been imposed on them. That was not merely an incident in those cases, but was really the root and foundation of the decisions. The evidence here being entirely uncontradicted that the public right of way would endanger the canal and involve the company in great extra expense, and very possibly lead to a public disaster, I am driven to the conclusion that the right alleged by the defendants is one which the law does not admit, and which can not prevail. I may add that I have great satisfaction in feeling certain that the view which we are taking in this case is that which was in fact taken by the learned judge who tried the case, although he did not feel himself at liberty to withdraw the case from the jury.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *R. B. Nelson.*

Solicitors for the defendants, *Taylor, Hoare, and Pilcher, for W. Shakespeare, Birmingham.*

Monday, July 7.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

REDFERN AND SONS v. ROSENTHAL BROTHERS AND ANOTHER. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of exchange—Holder for value—Solicitor to drawer—Lien for costs—Bill overdue when obtained by solicitor—Rights against acceptor—Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 27, sub-s. 3.

The acceptors of a bill of exchange, for whose accommodation it was drawn, handed it to the drawer with instructions to him to get it discounted. The drawer indorsed it in blank, and handed it to L., asking him to get it discounted. L. claimed to keep it, and the drawer thereupon sued him for detention of the bill. In this action the drawer obtained judgment, and the bill, which by this time was overdue, was handed over by L. to the drawer's solicitors. The solicitors knew of the circumstances under which the bill had been drawn. They retained possession of the document, over which they claimed a lien in respect of their bill of costs in the action by the drawer against L. Afterwards they brought an action upon the bill against the acceptors, claiming so much as would satisfy their lien.

Held (reversing the decision of the King's Bench Division), that the solicitors had no right of action against the acceptors.

THIS was an appeal by the defendants from a judgment of the King's Bench Division (Channell

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

and Bucknill, JJ.), affirming a decision of the judge of the Birmingham County Court.

The action was brought against the acceptors of a bill of exchange, dated the 23rd June 1899, for 200*l.*, payable four months after date.

The facts appear in the judgment of the Master of the Rolls.

It may further be added that, on the 7th Oct. 1899, it appeared that the plaintiffs first learnt that the bill was an accommodation bill.

The judgment of the King's Bench Division is reported 85 L. T. Rep. 313.

The Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) provides as follows :

Sect. 27, sub-sect. 3. Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

W. H. Stevenson for the defendants.—The plaintiffs are not "holders" of the bill within the meaning of sect. 27, sub-sect. 3. They are in possession of it merely as solicitors to Bischoffswerder. It was never transferred by him to them in such a way as to make them "holders" under sect. 31 of the Bills of Exchange Act 1882. Even if they were "holders" within sect. 27, sub-sect. 3, they took the bill when it was overdue and knowing that it was an accommodation bill. They thus obtained no greater right against the defendants than Bischoffswerder had : (see sect. 36 of the Bills of Exchange Act 1882). Bischoffswerder had no rights at all against the defendants. When the document was handed over by Lewis in obedience to the judgment against him, it had ceased to be a "bill of exchange" within the definition in sect. 3 of the Act. It was nothing more than a piece of paper. It had never been re-issued as a bill under sect. 37; and in fact could not be, as that section only applies to a "bill" as defined by the Act. The judgment of the Divisional Court proceeded upon wrong assumptions of fact. As to the nature of a solicitor's lien at common law, he referred to

Verity v. Wyldes, 32 L. T. Rep. O. S. 368; 4 Drew. 427.

Montague Lush, K.C. and *Malcolm Macnaghten* for the plaintiffs.—The plaintiffs are holders of the bill. Practically Bischoffswerder negotiated it to them. The bill was indorsed by him in blank, and was therefore payable to bearer. There is nothing unreasonable in saying that Bischoffswerder could give a transferee greater rights than he himself had. The bill had been given to him by the defendants for the very purpose of transferring it to someone else. If the plaintiffs are not the holders of the bill, who is? The person with the right of possession is the holder :

Nash v. de Freville, 72 L. T. Rep. 642; (1900) 2 Q. B. 72.

As to the nature of a solicitor's lien, they cited

Greer v. Young, 49 L. T. Rep. 224; 24 Ch. Div. 545;
Boxon v. Bolland, 4 M. & Cr. 354;

Re Wadsworth, 55 L. T. Rep. 596; 34 Ch. Div. 155.

Stevenson in reply.

COLLINS, M.R.—This is an appeal from a judgment of the Divisional Court, consisting of Channell and Bucknill, JJ., who affirmed a decision of the judge of the Birmingham County Court, but on different grounds. The transaction which gave rise to the action is somewhat compli-

cated, but the facts are shortly these : Rosenthal Brothers were desirous of raising some money, and for this purpose sent to Bischoffswerder a bill of exchange, dated the 23rd June 1899, payable four months after date accepted by them, and they requested him to fill in his name as drawer, and get the bill discounted for them. Bischoffswerder filled in his name as drawer, indorsed the bill in blank, and handed it to a man named Lewis, who agreed to get it discounted. Lewis then claimed a right to keep the bill, on the ground of Bischoffswerder being in debt to him. The bill in Lewis' hands being a fully negotiable instrument, Bischoffswerder at once in July instructed his solicitors, Messrs. Redfern and Son, who are the plaintiffs in the present action, to commence an action against Lewis in order to stop him from negotiating it, and to get it back from him. An interlocutory injunction was obtained, restraining Lewis until the trial of the action from negotiating the bill. The action came on for trial at Birmingham Assizes in Dec. 1899, so that by that time the bill was overdue. Bischoffswerder obtained a verdict and judgment for the recovery of the bill. At the end of the trial the bill was handed over by Lewis to the managing clerk of Messrs. Redfern and Son. The clerk showed the bill to Bischoffswerder and to Rosenthal Brothers, who were present in court, but after looking at it they handed it back to the clerk, who said that Messrs. Redfern and Son had a right to retain it as they had a lien on it for their costs. The present action was then brought by Messrs. Redfern and Son to recover the amount of their costs in Bischoffswerder's action against Lewis. The action is brought not only against Bischoffswerder, who is clearly liable for the costs, but also against Rosenthal Brothers as acceptors of the bill, for so much of the amount due upon the bill as will satisfy the plaintiffs' claim for costs. The County Court judge held that Rosenthal Brothers were liable upon the bill, under sect. 27 sub-sect. 3 of the Bills of Exchange Act 1882, and that judgment was affirmed by the King's Bench Division. Rosenthal Brothers have appealed against this decision. Bischoffswerder is no party to the appeal. Now, sect. 27, sub-sect. 3, provides that where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. The plaintiffs' argument was that they were holders of the bill and as they had a lien on it, they were holders for value, and were therefore entitled to recover in this action. Now, there was some evidence at the trial of the action that Rosenthal Brothers and Bischoffswerder, after some discussion with the plaintiffs' clerk, had handed the bill to him for the purpose of Messrs. Redfern and Son's lien so as to make him holder for value. A controversy arose as to this evidence, and thereupon the plaintiffs said that they did not wish to rely upon that ground, and that they relied solely upon their common law rights of lien and on the Bills of Exchange Act 1882. Now, upon these facts I am of opinion that the plaintiffs have no right of action against Rosenthal Brothers. The bill was handed by Rosenthal Brothers to Bischoffswerder for a specific purpose—namely, to get it discounted—and that purpose failed. When the bill came into the plaintiffs' hands it was overdue. It was not a

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negotiable instrument. As between the plaintiffs and the defendants the bill never was a living instrument. The plaintiffs when they first got possession of the document as Bischoffswerder's solicitors knew all these facts about it. Yet it was contended that by getting the physical custody of this piece of paper and having done work as solicitors they had acquired the rights of a holder for value under the Bills of Exchange Act 1882 and could sue the acceptors of the bill. It seems to me impossible to say that by getting hold of an overdue bill such as this they became holders for value. The bill should have been re-issued in order to give them any rights upon it. They have misconceived their position. Their rights against the defendants in respect of their lien were no greater than the rights of Bischoffswerder on the bill against the defendants. Bischoffswerder, under the circumstances that I have mentioned, could not, with the plaintiffs' knowledge of the facts, give them any rights on the bill *quâ* bill. The instrument when they received it was dead, and they could not treat it as a living one. That is enough to decide this case. It is not necessary to give any opinion as to what the plaintiffs' rights would have been if the document had been a living bill. The appeal must therefore be allowed. In the Divisional Court Channell, J. seems to have given judgment with great hesitation, and I think he accepted an inference of fact which was not supported by the evidence. The court seems to have lost sight of the view that at the time when the plaintiffs' supposed lien came into existence, the instrument had, under the circumstances, ceased to be a negotiable instrument.

MATHEW, L.J.—I am of the same opinion. It is said that the effect of the judgment in the action by Bischoffswerder against Lewis to restrain the negotiation of the bill was to restore a negotiable character to the bill and give the plaintiffs a right to sue upon it. That would be a very extraordinary result. When the bill was given up it was a security for nothing. It was mere waste paper. It was dead in law, as the plaintiffs must have known. Yet it is contended that the document by being handed to the plaintiffs acquired a new lease of life, and became a negotiable instrument. The plaintiffs obtained no more right against the defendants than Bischoffswerder had; and that was none at all. The only difficulty in the case has been caused by some uncertainty as to what were the actual findings of the County Court judge. I agree that the appeal must be allowed.

COZENS-HARDY, L.J.—I am of the same opinion. Many interesting points have been raised, but on the actual facts of the case I see no great difficulty. The solicitors had a lien on their client's interest in the bill, but when they got possession of the bill Bischoffswerder had no rights against the defendants. The document had ceased to be a real bill. It was recovered by Bischoffswerder in his action against Lewis for the very purpose of preventing its being negotiated. The plaintiffs are in no better position than Bischoffswerder, who had no rights on the bill against the defendants. It is unnecessary to give my opinion on what the rights of the plaintiffs might have been if the bill had not been overdue when they got possession of it.

Appeal allowed.

Solicitors for the plaintiffs, *Beal and Payne*, for *Redfern and Sons*, Birmingham.
Solicitors for the defendants, *Fred. Marriott*.

Wednesday, July 9.

(Before MATHEW and COZENS-HARDY, L.JJ.)
LEVI v. ANGLO-CONTINENTAL GOLD REEFS OF RHODESIA LIMITED; TAYLOR, Third Party. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Third-party procedure—Counter-claim against plaintiff—Right of plaintiff to add third party as defendant to the counter-claim—Order XVI., r. 48.

A plaintiff against whom a defendant has counter-claimed is, as regards the counter-claim, a "defendant" within the meaning of Order XVI., r. 48, which enables a defendant, who is entitled to contribution or indemnity against a person not a party to the action, to add him as a third party.

THIS was an appeal by the third party against an order of Ridley, J. at chambers giving leave to the plaintiff in the action to issue a third party notice.

Order XVI., r. 48, is as follows:

Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice (hereinafter called the third-party notice) to that effect stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the services of writs of summons. . . .

The action was brought to recover 100*l.* alleged to be due to the plaintiff as director's fees.

The defendant company by their statement of defence disputed the plaintiff's claim, and they also counterclaimed against him for 437*l.* 10*s.* which they alleged was due from him for calls on 500 shares in the company which he had applied for and which had been allotted to him.

The plaintiff thereupon applied for leave to issue a third-party notice against Taylor upon the ground that he had applied for the 500 shares as Taylor's nominee, and that Taylor had agreed to indemnify him against loss on any shares which the plaintiff might be allotted as his nominee.

Ridley, J. (reversing the decision of the master) granted the plaintiff's application.

Taylor appealed.

Llewelyn Davies and *Denis O'Connor* for Taylor.—The learned judge had no jurisdiction to grant the plaintiff's application. Order XVI., r. 48, only applies to the case of a "defendant." That means a defendant in an action. The rule does not apply to a plaintiff in an action, though he is also defendant to a counter-claim. The rule must be construed with reference to the interpretation clause, sect. 100, of the Judicature Act 1873. There "plaintiff" is defined as including "every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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same be taken by action, suit, petition, motion, summons, or otherwise." And also, "defendant shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceedings." A counter-claim is in some respects to be treated as a cross-action, but a plaintiff has not in respect of a counter-claim against him all the rights of a defendant in an action. A counter-claim should be used as a shield, not as a sword.

Renton, Gibbs, and Co. v. Neville and Co., 52 L. T. Rep. 446; (1900) 2 Q. B. 181.

There is no reported case in which a plaintiff has obtained leave to bring in a third party as defendant to a counter-claim. If the learned judge had jurisdiction to make the order, he ought in the exercise of his discretion to have refused to make it under the circumstances of the case. If the plaintiff succeeds on his claim, and the defendants succeed on their counter-claim, there would be judgment for the defendants for 337*l.* 10*s.* The result of that would be that the plaintiff would have to bring another action against Taylor to recover the balance of 100*l.* Thus the third-party procedure would not effect any saving of expense.

C. H. Swanton, for the plaintiff, was not called upon.

MATHEW, L.J.—I think that the order of Ridley, J. must be affirmed. The first question raised was as to jurisdiction. It was said that though the defendants had the right to counter-claim, yet the plaintiff was debarred from adding a third party as a defendant to that counter-claim. No reason was suggested why the plaintiff ought to be thus fettered and embarrassed. If we turn to the Rules of the Supreme Court, we find that whenever a counter-claim is mentioned it is treated as a cross-action. Order XXI., r. 11, directs that "where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action." A counter-claim is there contemplated as being similar to a cross-action. Lord Esher, M.R. in *Stowman v. Campbell* (66 L. T. Rep. 218; (1892) 1 Q. B. 314) and Bowen, L.J. in *Amon v. Bobbett* (80 L. T. Rep. 912; 22 Q. B. Div. 543) have said that a counter-claim is a cross-action. I can see no difficulty whatever in the course that the plaintiff proposes to take. It is said that such a thing as he wishes to do has never yet been done. Certainly no authority has been mentioned in which the question has arisen. But that may be because no one has ever yet thought the point worth raising. I think that Ridley, J. had jurisdiction to make the order appealed against. Upon the question of discretion, it is true that in some circumstances it might be so embarrassing to allow this course to be taken that a judge might refuse to sanction it. In the present case I see no more difficulty than must always arise when a third party is added by the plaintiff as a defendant to a counter-claim. This is quite a simple case. It is said that the judge at the trial could only give judgment against the third party for 337*l.*, and that another action would have to be

brought to recover the 100*l.* But that difficulty, if it exists, could easily be managed, as was pointed out by Cozens-Hardy, L.J. in the course of this argument, because a declaration might be made in the judgment that the defendants were entitled to recover 437*l.* on their counter-claim against the plaintiff, and the third party would be bound by such a declaration. I think that the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. Without holding that a counter-claim is under all circumstances a cross-action, I think that the present case comes within Order XVI., r. 43. I cannot imagine a case more within the words and spirit of that rule, nor one more fitting for the exercise of the discretion of the court in the way that it has been.

Appeal dismissed.

Solicitors for the plaintiff, A. E. Timbrell.

Solicitors for the third party, Spyer and Sons.

Friday, July 11.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.).

ROBINSON GOLD MINING COMPANY LIMITED v. ALLIANCE MARINE AND GENERAL ASSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance—Construction of Policy—Arrests and detentions of kings, princes, and people—Exceptions from risks—"Capture, seizure, and detention"—Seizure by foreign Government of property of its own subjects before outbreak of war—Absence of violence.

A gold mining company, incorporated under the laws of the South African Republic, effected a policy of insurance on their gold in its transit from the mines by rail through the territories of the republic and so on to the United Kingdom. The risks insured against included "surprises, takings at sea, arrests, restraints, and detentions of all kings, princes, and people," but the policy contained a clause, "warranted free of capture, seizure, and detention . . . and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

In the course of its transit through the territory of the republic, the gold was taken possession of by the executive Government, in anticipation of an outbreak of war, which in fact took place a few days later. This act of the executive was in accordance with the laws of the republic. No violence was used in carrying out the order of the executive for the seizure of the gold, but the escort in charge of it during its transit gave up possession when required to do so. None of the gold thus taken possession of by the executive was ever recovered by the company. In an action against the underwriters on the policy: Held (affirming the judgment of Phillimore, J.), that the underwriters were protected by the terms of the warranty from liability under the policy for the loss of the gold.

THIS was an appeal by the plaintiff company from the judgment of Phillimore, J. at the trial of the action without a jury.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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The action was brought against the underwriters of a policy of insurance.

The plaintiffs were a gold-mining company incorporated under the laws of the South African Republic, where they carried on business.

By a policy of insurance, dated the 12th Sept. 1899, effected with the defendant company, the plaintiff insured gold up to the value of 500,000*l.* "at and from the mine or mines situated in the Witwatersrand Goldfields District as enumerated below, either direct or *via* any bank or banks, whether in charge of the assured or their employees or otherwise, to the railway station at Johannesburg, and then by rail to Port Elizabeth or Cape Town, and thence by steamer as below to destination in the United Kingdom and (or) France, including risk of craft and all land conveyance from dispatch until delivered to addressees."

The policy contained the following clause:

Touching the adventures and perils which the said company are contented to bear and to take upon them in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letter of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and peoples, of what nation, condition, or quality soever, . . . warranted free of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

On the 2nd Oct. 1899 gold, to which the policy attached, amounting in value to 221,950*l.* was despatched by the plaintiff company by rail from Johannesburg to Cape Town for London.

When the train reached Vereeniging, a frontier station in the territory of the South African Republic, the resident justice of the peace produced a telegram in the Dutch language, which, being translated into English, read as follows:

From the State Attorney, Pretoria, to Resident Justice of the Peace, Vereeniging.—I have learned that the mail passing Vereeniging at 7 p.m. carries the value of three hundred thousand pounds (300,000*l.*) in gold. I order you to take the same into safe custody.

The custodians of the gold submitted without resistance, and the gold was removed from the train.

None of the gold was ever recovered by the plaintiffs.

On the 11th Oct. 1899 the South African Republic declared war against Great Britain.

Evidence was called which showed that before the 2nd Oct. the Government of the South African Republic had called out the commandoes with a view to war, and that the Volksraad had passed a resolution, the effect of which was to vest in the executive Government a lawful power to seize the property of subjects of the republic, which it might deem necessary for purposes of war.

At the trial of the action Phillimore, J. held that the circumstances of the seizure of the gold by the Government of the South African Republic were such as to bring the case within the exceptions contained in the warranty, so that the defendant company were relieved of any liability under the policy.

The case is reported 85 L. T. Rep. 419; (1901) K. B. 919.

The plaintiffs appealed.

Lawson Walton, K.C. and J. A. Hamilton, K.O. (John Dove with them) for the plaintiffs.—The loss is due to risks named in the policy, "arrests, restraints, and detentions of all kings, princes, and people":

Aubert v. Gray, 7 L. T. Rep. 469; 3 B. & S. 168;

Botch v. Edie, 6 T. E. 413.

The case does not come within any of the exceptions named in the warranty. There has been no "capture" or "seizure" such as is there contemplated. Those words imply the existence of a state of war, and war did not exist when the Transvaal Government took possession of the gold. Those words also involve the application of force. Recognition of authority is not an admission of taking by force. In every case where an executive Government takes possession of anything, force is the ultimate sanction under which it acts. But "capture" and "seizure" in this warranty imply something more than that; they imply the actual use of violence. Here no violence was used. The persons escorting the gold yielded it up directly the telegram from the Transvaal Government ordering the gold to be taken was produced:

Finlay v. Liverpool and Great Western Steamship Company Limited, 23 L. T. Rep. 251;

Kleinwort v. Shepard, 1 E. & E. 447;

Powell v. Hyde, 5 E. & B. 607;

Johnston v. Hogg, 48 L. T. Rep. 435; 10 Q. B. Div. 432;

Cory v. Burr, 49 L. T. Rep. 78; 8 App. Cas. 393;

Müller v. Law Accident Insurance Society, 18 Times L. Rep. 518;

Bodocanachi v. Elliott, 28 L. T. Rep. 840; L. Rep. 8 C. P. 649.

The words "capture" and "seizure" are not applicable to a case where a Government seizes the property of one of its own subjects as here.

Lord Robert Cecil, K.O. and Hon. Alfred Lyttelton, K.C. (Loehnis with them) for the defendants.—The case comes within the exceptions in the warranty. If it does not, then it does not come within the risks insured against. The cases cited do not show that either a state of war or the use of actual force is necessary to constitute a "capture" or "seizure." The warranty uses the plain words "whether before or after declaration of war."

Lawson Walton, K.C. replied.

COLLINS, M.R.—This is an appeal from the decision of Phillimore, J., who held that the facts in the case brought it within the exceptions contained in a warranty in a policy of insurance. The facts of the case are shortly these: A large quantity of gold was consigned from Johannesburg to England by a company which was formed, and which was carrying on its business under the protection of, the laws of the South African Republic. The company effected an insurance against the loss of the gold during its transport, and amongst the perils insured against were "arrests, restraints, and detentions of all kings, princes, and peoples, of what nation, condition, or quality soever." The policy also contained a clause on the effect of which the question in this appeal has arisen, namely, "warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riot, civil commotions, hostilities, or warlike operations,

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whether before or after declaration of war." Now, at the time that this gold was consigned to England, an ultimatum had been delivered by the Government of the South African Republic to the British Government. No declaration of war had been yet made, but some few days before it was declared the Government of the republic sent an order by telegram to its officials at the station of Vereeniging, and under that order the gold was there arrested. At that time commandoes had been called out, and the railway and its staff had been taken over by the Transvaal Government, so that the railway officials were bound to obey the behests of that Government. The consignment of gold was guarded by an armed escort, who were servants of the Transvaal Government. When the train in which the gold was being conveyed arrived at Vereeniging station, an official armed with the mandate of the Attorney-General of the Government came and spoke to the station master. Under his order the gold was then moved from the train, and was taken over by the Transvaal Government, so that its owners never saw any of it again. Under these circumstances the owners of the gold have brought an action to enforce their claim under the policy by which they were insured against losses by "arrests, restraints, and detentions of all kings, princes, and peoples." The defendants contended faintly that the loss was not covered by those words, but their chief point is that they are protected by the exceptions contained in the warranty which I have already read. Now, the plaintiffs were undoubtedly placed in a position of considerable difficulty, because the risks against which they were insured in themselves import some act of force exercised by kings, princes, or people against a person who does not bestow on them of his own free will a right to possess themselves of his property. The risks imply a force exercised by some superior paramount authority which could not be resisted. Though the plaintiffs' counsel had to introduce some element of superior force in order to let in their contention that the loss was covered by the risks insured against, yet at the same time they were obliged to try and show that the loss was not within the words "warranted free of capture and seizure." They had to attenuate the element of force to the highest possible degree consistent with their allegation that the case did not come within the words of the exception. They have therefore contended that what actually took place at Vereeniging was merely the willing acquiescence of the owners of the gold in the constitutional and legitimate right of the Transvaal Government to invite the owners under certain conditions to part with their property for the benefit of the Government. The taking of the gold by the Transvaal Government was thus, they say, without any element of force, and force is not a necessary element to an "arrest" within the meaning of the policy, though it is a necessary element in a "seizure" within the meaning of the warranty. It was a difficult point to take, and the difficulty seems to me to have been too great even for the ingenuity of the learned counsel who appeared on behalf of the plaintiffs. The gold was taken possession of by the Transvaal Government by their exercise of an authority which they had assumed in consequence of the delivery of an ultimatum, and the calling out of the forces of the country and such a suspension of the consti-

tution as to let in the general principle *Salus populi suprema lex*. To say that such an exercise of authority has no element of force in it, and is not properly described as a "seizure," seems to me to be an impossible contention, unless some authorities can be found to justify it. It involves a refinement upon the ordinary use of words which I think no person uninstructed in the law would think the words capable of bearing. It seems impossible to me to contend that the plaintiff company in surrendering their property in this way did not yield to force, and that the taking possession of it by the Transvaal Government was not a "seizure" by them. The authorities that have been referred to in support of that contention seem to me to have just the opposite effect. In *Cory v. Burr* (*ubi sup.*) Lord Selborne, L.C. said: "The first question that has been considered in the argument has been, What is the meaning of the words 'capture and seizure'? 'Warranted free' clearly means that the insurers are not to be liable for the things to which the warranty applies. I own I should have hesitated, even if there had been no authority, before I should have been brought to agree with the view which was thrown out in the course of the argument, and which Brett, L.J. seemed to think might have influenced him if there had not been authority against it—the view I mean that 'capture and seizure' in such a warranty must be taken to mean *prima facie* belligerent capture and seizure only." That was one of the points urged in the argument of this case in the court below. Lord Selborne went on: "My reasons for saying so are that the word 'seizure' is used as well as the word 'capture.' I am disposed to agree that if the word 'capture' had stood alone it might have appeared to point to a belligerent capture, but the addition of the word 'seizure' is only officious, as I read the warranty, by supposing that it is to exclude that narrow construction of the word 'capture,' and to let in other 'seizures,' such as Cotton, L.J. suggests, by means of the revenue laws of a foreign State." Lord Selborne then described the facts of the case, which in his judgment really amounted to a "seizure." He said: "The ship was seized in every sense we can put upon the word 'seize.' It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy or the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship." Now, every word of that applies to the present case, except that in that case Mr. Lawson Walton would say the ship was taken forcible possession of. He contends that the gold in the present case was not taken forcible possession of. Yet it was taken under precisely similar conditions as regards the authority of the State. There the Spanish authorities sent the indicia of force without its actual presence. They sent certain craft which carried the authority of the Spanish Government, authority exercised over persons engaged in smuggling, and the British merchant yielded without resistance to this exhibition of power and authority. So here there was nobody actually representing the consignee of the gold. The mandate which was given to take possession of the gold was that of an over-

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whelming authority, and the escort and the railway officials were servants of the Government and carried out the mandate given to them. The owner of the gold was not present, nor could he have resisted if he had been. The fact that he was not present and made no resistance does not deprive the act of the Government of its essential features—namely, that it was an act of paramount authority, irrespective of the will or assent of the person against whom it was exercised. Therefore, in my judgment it was a “seizure.” The cases clearly show that a seizure is none the less a seizure because it may be justified under the laws of the country by whose authority it is made. That is clear from the case of *Cory v. Burr* (*ubi sup.*). The matter was well put by Lord Fitzgerald in that case, where he says: “In the construction of this warranty it is observable that ‘capture’ and ‘seizure’ do not mean the same thing. ‘Capture’ would seem properly to include every act of seizing or taking by an enemy or belligerent. ‘Seizure’ seems to be a larger term than ‘capture,’ and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession either by a lawful authority or by overpowering force.” Those words are altogether applicable to the present case. It was also suggested on behalf of the plaintiffs that lawful authority must be excluded from the meaning of “seizure,” or at all events that the word does not cover an act of the lawful authority of the country of which the person who has suffered by the act was a subject; and in the case before us the plaintiff company was a subject of the Transvaal Government. That distinction does not seem to me to be justified by the authorities. In *Cory v. Burr* (*ubi sup.*) Lord Blackburn refers to *Havelock v. Hancill* (3 T. R. 277), in which the seizure was by the British Government, of which the assured was a subject, and he was clearly of opinion that that fact did not make any distinction between that case and *Cory v. Burr*, in which the seizure was by the Spanish Government. In this case, in my opinion, there has been a seizure, a seizure accompanied with the indicia of overwhelming force. The authority on which the seizure took place seems not to have been based on any enacted law, but on the suspension of the laws, though, under the circumstances, that suspension of the laws may have been according to the constitution. The seizure seems to me to be within the class of risks named in the warranty. The words of the warranty seem to me to have been intended to cover the very thing that happened in this case. As has been pointed out, the last words of the clause are very applicable to what occurred. We find the preliminary and fundamental conditions of warlike operations. There was the calling out of the commandoes which led to the suspension of the constitution, and the application of the principle *Salus populi suprema lex*. What is that if not a “warlike operation whether before or after declaration of war”? It seems, therefore, to me that the case falls within more than one of the exceptions in this warranty. The judgment of the court below was in my opinion right, and this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. It is to be borne in mind that this policy of insurance against risks of land transit is in the old form in use for policies of marine insurance. Now, sup-

posing that the taking of the gold by the Transvaal Government had occurred on the high seas, could anyone doubt for a moment that that would have been a “seizure” within the meaning of this marine policy? In the risks named in the policy nothing is said about a state of war. The risks insured against are “surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever.” If this loss had occurred on the high seas, it would have been described as having been a loss through the capture and carrying off the gold by the Transvaal Government. We have to apply this to transit by land. That means that losses analogous to those that occur at sea are to be borne by the underwriters on a policy containing this land risk only. If capture and seizure at sea is covered by the original words of the marine policy, capture and seizure on land under analogous circumstances are intended to be covered by the words of this policy. Now, what occurred here? The evidence, which I am bound to say is not very satisfactory, shows that by the constitution of the South African Republic there was vested in the Government a right to set aside the law, and in the interests of the community to seize any property which might be found within the territory of the republic, when war was imminent. Can it be doubted for a moment that an act done in exercise of that supposed principle of the Constitution comes within the terms of the policy as originally framed, without the exceptions? The learned counsel for the plaintiffs were obliged to admit that, or else they would have lost altogether the protection which the policy was intended to give. I take it that there cannot be a shadow of a doubt that the underwriters would have been liable for a loss under the circumstances. The capture of the gold on land in this case is analogous to the capture of gold upon the sea, and the underwriters would have been liable on the policy as originally framed, although the capture was made by the Government of the plaintiffs’ own country, and although it was not in time of war, and although the seizure may not have been carried out by means of direct force and violence. Now I come to consider the warranty. The character of warranties in these contracts is well known. A warranty is intended to withdraw from the policy the risks which are covered by it. It is said that in this case the warranty falls short of withdrawing from the policy the risk insured against. The argument is that “capture” in the warranty does not mean the same thing as the capture which, as I have said, is admittedly within the risks covered by the policy. Two reasons are given for this. It is said, first, that “capture” implies war; and, secondly, that it implies violence. Then as to the word “seizure,” it is said that that word means the same as capture and implies a state of war, and the use of violence. Can anyone doubt that violence was implied in the act of the Transvaal Government in taking possession of this gold? The gold was entrusted to the servants of the Government to escort it safely, and then the Government, thinking it fit to exercise its supreme constitutional right, withdrew the authority it had given to the men who were in charge of the gold on behalf of the assured. Thus there was nobody left to offer any resistance on the part of the assured. Can anybody doubt that if there

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had been a hint of resistance from any quarter, it would have been put down at once by the strong hand of what is called the law in that part of the country? There is nothing, as it seems to me, in that part of the argument. There was a capture, and no force was necessary. There was a seizure, though unaccompanied by violence. No one was injured or attacked. Can there be any doubt that neither belligerency nor violence was necessary? Belligerency, as it seems to me, is entirely excluded by the terms of the warranty, and the idea that violence is absolutely indispensable to the existence of a capture or seizure is far-fetched, and is not indicated by the words of the warranty. The exceptions are upon the original contract and strike out of it the war risk. I think that the judgment of Phillimore, J. was right and ought to be affirmed.

COZENS-HARDY, L.J.—I am of the same opinion. The matter has been so fully discussed by the Master of the Rolls and by Mathew, L.J., with whose judgments I entirely agree, that I do not think I could usefully add anything.

Appeal dismissed.

Solicitors for the plaintiffs, *Ingle, Holmes, and Sons.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, and Whetton.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, May 9.

(Before FARWELL, J.)

Re CARROLL; BRICE v. CARROLL. (a)

Practice—Breach of trust—Solicitor borrowing money without security and with notice—Summary order.

The trustee of a will lent certain moneys which formed part of the trust estate to M., his solicitor, who had also acted as solicitor to the will. There was no security for the loan.

M. was no party to an administration action subsequently brought by legatees against the trustee.

Held, that the court, in the exercise of its jurisdiction, had power on motion in the action to order M. to bring the money into court.

ORIGINATING SUMMONS by two of the legatees under the will of Elizabeth Carroll, who died in 1894, against one P. Carroll, the sole executor of the will, claiming (1) payment of legacies given to each of them by the will; (2) administration of the estate; and (3) that the defendant should bring into court moneys in his hands belonging to the estate.

By the terms of the will the plaintiffs were to be paid their legacies on attaining twenty-five.

The plaintiff, Emma Brice, attained that age before the summons was issued, but her co-plaintiff would not be twenty-five until 1904.

On the 25th Feb. an order for a common account was made against the defendant, who was a clerk in the employment of a Mr. McIntosh, a solicitor, who was acting as solicitor for the

defendant in the action, and who had acted as his solicitor in proving the will.

On the 7th April defendant filed his accounts verified by affidavit, from which it appeared that the amount available for payment of the legacies given by the will was 902l. 9s. 9d., and that 450l. 4s. 10d. (parcel of this sum, which represented the legacies of the plaintiffs) had been lent by the defendant in 1896 to Mr. McIntosh at 4 per cent. interest without any security, subject to six months' notice.

Notice calling in the amount in question was given in Aug. 1901, but no payment had been made.

On the 28th April 1902 the court, on motion by the plaintiffs for an order on the defendant to pay 450l. 4s. 10d. into court, declined to make any order, as the money was not in the hands of the defendant.

The plaintiffs then served Mr. McIntosh with notice of motion for an order on him to bring the money into court, the notice of motion being headed, "In the matter of Francis Hugh de Mortimer McIntosh," a solicitor of the Supreme Court.

He filed an affidavit in answer to the motion, admitting that he had accepted the loan of 450l. 4s. 10d. from the defendant with notice of its being trust money, and stated his intention to repay it "in due course." He objected that the court had no jurisdiction in an action to which he was not a party to make an order upon him.

Sheldon for the plaintiffs.—The court has sufficient power over its own officers to give summary relief in a case like this. In *Re Clerihew's Estate* (24 L. T. Rep. 860) an order was made that a solicitor (who was also trustee of a will) should pay into court trust money which he had by affidavit admitted that he had in his hands, upon motion made by the *cestui que trust* in a suit to administer the estate, the notice of motion being entitled in the suit and in the matter of the solicitor. He also referred to

Stanier v. Evans, 56 L. T. Rep. 87; 34 Ch. Div. 470.

There an order was made on a trustee to pay into court interest found due from him, and the balance, beyond his costs to be taxed, of capital money certified to have come into his hands. The capital money had been received by the trustee's solicitors as part of the trust estate. The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the court made an order notwithstanding the former order that the solicitors should pay into court the capital which had come to their hands with interest.

Muir Mackenzie for McIntosh.—The court has certainly a jurisdiction over its officers, but it is submitted that McIntosh not being solicitor to the plaintiffs, and not having money in his hands as solicitor to the estate, no order can be made against him in this action. In *Re Clerihew's Estate* (*ubi sup.*) the solicitor was trustee of the will. In *Stanier v. Evans* (*ubi sup.*) no objection to the jurisdiction was raised. Here the solicitor received the money in question under a contract of loan with the trustee, and it may well be that he is liable to the trustee, but he is not liable to the estate.

Sheldon in reply.

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

ADM.]

THE MARGERY.

[ADM.]

FARWELL, J.—The defendant Carrell, being a clerk in the employment of this solicitor, in 1895 received as executor of the will of the testatrix in this action a small sum of money to which the plaintiffs are now entitled. This money he handed over to his master, who had acted as his solicitor in proving the will of the testatrix, and who took it knowing it to be trust money and retained it without giving any security. As long ago as August last the money was called in. It is not forthcoming, and now this solicitor makes an affidavit in which he states that he will pay the money "in due course," whatever that may mean. The only defence to the present application is, that this court has no jurisdiction to make the order. In my opinion the two cases that have been cited sufficiently support this application, and are authorities to show that the court has jurisdiction to make a summary order on its officer in a case like this. I adopt the language of James, L.J. in *Re Clerihew's Estate (ubi sup.)*, where he says: "It would be a shocking thing if this order could not be made." The order I make is, that Mr. McIntosh do bring the money into court within fourteen days, and I also order him to pay the costs of this motion.

Solicitors: W. B. Miller and Sons; de Mortimer-McIntosh and Shaw.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 6 and 8.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE MARGERY. (a)

Salvage—Associated insurance clubs—Agreement by owners, as insurers in clubs, to render mutual assistance—Notice to masters—Arbitration—Rights of master and crew.

Where salvage services were rendered by one vessel to another, and both vessels were insured in associations under the articles of which compensation for salvage services was to be mutually settled by the committees of the associations.

Held, that the master and crew of the salvaging vessel were not bound by such settlement, as they were not parties, and could not be taken to have acquiesced in it.

THIS was an appeal by the defendant, the owner of the steam drifter *Margery*, against a decision of the judge of the County Court at Yarmouth awarding salvage to the master and crew of the steam drifter *Fifteen* for services rendered to the *Margery* in the North Sea.

The *Margery* was a ketch-rigged steam drifter of 31 tons register, and carried a crew of ten hands all told. On the 9th Oct. 1901, while fishing off the east coast, and when about thirty-six miles from Yarmouth, she lost her rudder. There was a heavy sea running at the time and a strong wind from the N.W., and two shapes were hoisted to show that she was not under command. The flag of the club she was insured in was also hoisted. About 3 p.m. the *Fifteen*, a steam drifter of 25.76 tons register, manned by a crew of ten hands all told, came up and gave the *Margery* a rope. The *Margery* at this time had

managed to get within about fourteen miles of Yarmouth. The rope shortly afterwards parted and fouled the propeller of the *Margery*. A wire rope was then passed, and she was taken in tow by the *Fifteen* and brought safely into Yarmouth.

Both vessels at the time in question were insured in insurance clubs, the *Fifteen* in the Total Loss Mutual Steamship Insurance Company of Sunderland, and the *Margery* in the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields.

In the policy under which the *Fifteen* was insured was the following clause:

It is mutually agreed between the assured and assurers that the articles of association of the assurer's company shall be deemed part hereof, and be binding upon the assured and assurers as fully and effectually, to all intents and purposes as if such articles were inserted in this policy, and any breach thereof will invalidate the same.

By clause 92 of the articles of association:

Steamers insured in this association bind themselves to give assistance to any vessel broken down or in distress, insured in this association, or in the associations of the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields . . . it having been arranged that the vessels in these associations shall be bound to like conditions, and that the compensation for services rendered be decided and determined by the committees of the association or associations in which the vessels were insured.

In the insurance policy of the *Margery* was a similar clause, and a similar article was embodied in the articles of association of the club she was insured in.

In accordance with the rules of the two clubs, a committee, consisting of three directors of the United Kingdom Insurance and Indemnity Association and one director of the Total Loss Company of Sunderland, met on the 16th Dec. The statements of the two masters were read and discussed, and an award of 25*l.* made. This sum was paid to the owners of the *Fifteen* and accepted, and out of this amount they tendered 12*l.* 10*s.* to the master and crew of their vessel, but they refused to accept it.

On the 6th Jan. 1902 an action for salvage was instituted in the Yarmouth County Court by the master and nine members of the crew of the *Fifteen* against the *Margery*, and her nets and fishing gear, claiming the sum of 150*l.* At the trial of the action it was admitted by the master and crew of the *Fifteen* that they were aware of the arrangement as to mutual assistance, and that they had noticed the club flag the *Margery* was flying, and knew the reason why she was flying it, but they denied that they had ever heard of or agreed to the mode of settlement adopted by the two clubs.

In the agreement signed by the crew of the *Fifteen* was the following clause:

Every member of the crew, including apprentices and sea-fishing boys, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage, or salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement.

Under the heading "Salvage" against each name was written "half and half."

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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The various associations had published a card with illustrations in colours of their flags, and on it was printed :

Notice to Masters.—The above association is amalgamated with the under-mentioned associations and companies for the settlement of towage cases: United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields (the names of other associations then followed). All masters of vessels insured in the Total Loss Insurance Company, Sunderland, are bound to render and accept assistance when necessary to and from any vessel insured in the above associations and companies.

One of these cards was on board the *Fifteen*.

The value of the *Fifteen* at the time of rendering the services was 3200*l.*, and of the *Margery* 2000*l.*, her nets and gear 300*l.*, and fish 1*l.* 10*s.*, making a total of 230*l.* 10*s.*

The case was tried before the learned County Court judge, assisted by nautical assessors, and having held that the master and crew were not bound by the arbitration proceedings, he awarded the master and crew the sum of 80*l.* by way of salvage, which, he explained, was half of what he thought would have been a fair sum if the owners had been also parties to the action.

The defendant appealed.

Scrutton, K.C. and *Roche* for the appellant.—The master of the *Fifteen* knew he was bound to render assistance, and admitted that he knew of the arrangement as to vessels in the various clubs rendering each other assistance. He also admitted that he acted upon it when he saw the club flag flying on board the *Margery*. The owners are bound by the arrangement, and it is submitted the master and crew are too. The card with the "Notice to Masters" on it, which was exhibited on board, is sufficient to bring it to their notice. Further, in the agreements signed by the crews there is the provision that the division of salvage shall be on the basis of "half and half." The master can bind his officers and men by an agreement fixing the amount of reward for salvage services, and presumably the owner of the salving ship is in the same position as the master:

See *Kennedy on Salvage*, p. 224;

The Naemyth, 52 L. T. Rep. 392; 5 Asp. Mar. Law Cas. 364; 10 P. Div. 41.

Batten for the respondents *contra*.—The master and crew of the *Fifteen* were not bound by the settlement arrived at between the respective owners. In any event, the sum awarded by the committee was absurdly inadequate. The right to salvage is dependent, not on contract, but is a right given in the interest of commerce to those who voluntarily undertake to save property, and even when an agreement is made, the court will always closely scrutinise it to see whether it is a fair one or not. The crew are no parties to the contract entered into by the owners and their underwriters. In order to bind the crew the contract must be put clearly before them, and they must be in a position to realise the logical consequences of their bargain. The "Notice to Masters," which has been relied on, only deals with towage, and only gives instructions that they are to assist, or take assistance from other club vessels when necessary, but the terms on which the assistance is to be rendered are not mentioned. The effect of such an agreement as that alleged to have been entered into by the crew, is to abandon the lien

and oust the jurisdiction of the court. It is also submitted that it would be illegal under sect. 156 (1) of the Merchant Shipping Act 1894. But, putting these considerations aside, the owners had no power to bind the crew:

The Britain, 1 Wm. Robinson, 40;

The Sarah Jane, 2 Wm. Robinson, 110;

The City of Calcutta, 79 L. T. Rep. 517; 8 Asp.

Mar. Law Cas. 442.

[He was stopped by the court.]

Roche in reply.—The court undoubtedly has power to overrule an agreement if it is inadequate or inequitable:

The Phantom, 15 L. T. Rep. 596; 2 Mar. Law Cas. O. S. 442; L. Rep. 1 A. & E. 58.

In *The Enchantress* (2 L. T. Rep. 574; Lush. 93), which was a case decided by Dr. Lushington after the passing of sect. 182 of the Merchant Shipping Act 1854, it was held that agreements limiting the proportion of salvage money are to be maintained if equitable. See also

The Ganges, 22 L. T. Rep. 72; 3 Mar. Law Cas. O. S. 342; L. Rep. 2 A. & E. 370.

In *The Britain* (*ubi sup.*) and *The Sarah Jane* (*ubi sup.*) the agreements which it was attempted to set up against the salvor's claims, were made after the services had been already rendered. Here the agreement to refer to arbitration is a general one, and provided for salvage services being rendered at some future time. In *The Inchmarree* (80 L. T. Rep. 201; 8 Asp. Mar. Law Cas. 486; (1899) P. 111) the distinction between an agreement as to future and past services was made, and the amount fixed by the agreement as to future services upheld.

The PRESIDENT. — I think this case can be decided substantially on the ground upon which it has been decided in the court below—that is, a ground which really depends, in the last resort, on a question of fact. The action is brought by the master and crew of the *Fifteen* against the owner of the steam drifter *Margery*. It is not an action by the owners of the *Fifteen*, but only by the master and crew; and the circumstances in which it was brought were that the owners of those two fishing vessels appear to belong to institutions known as clubs, and the result of that is that those vessels are bound, according to the rules of those clubs, to render each other assistance on the terms that the price to be paid for such assistance shall be determined by a particular kind of arbitration, and for the moment I will assume that the owners of the vessels, and their vessels in that sense, are bound by that agreement. The question is whether the master and crew are bound; and in this case, after an arbitration had taken place as to the amount to be paid, the master and crew say they are not bound by that arbitration, and they ask to have the amount of their services determined in value by the court. The learned judge in the court below has agreed in the views they put forward. He has found, and we gather from his remarks that they are not bound by the arbitration. I do not think he meant, or that it is suggested he meant, that they were not bound by the arbitration because the arbitration is invalid, but that they were not bound by the arbitration because they were not bound by any agreement. That is the point upon which I think the case

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turns. I should be prepared to admit that the owners may be bound, when a question arises as to salvage, to go to arbitration in the way mentioned, and have the amount determined; but in this case the very simple question is: Are the master and crew, who have independent rights in the matter, bound by that agreement? That, as I said, depends upon a question of fact, which, it appears to me, we have to determine. Now, the master and crew are bound as between themselves and their owners, to a certain extent, because they entered, under their articles, into an agreement that they, putting it shortly, should have half of whatever salvage amount should be taken. The words are very clear about that. To that extent, between themselves and their owners, they are bound; but there the matter appears to me to stop. We are asked to go very much further, and asked to say that not only are they bound as between themselves and their owners, but as between themselves and the owners of any other ship they may save they are bound by an agreement made by their owners to allow the matter to go to arbitration and to take the money which the arbitrators give. That cannot be made out on any express agreement. There is none. There is no language to that effect in their articles, and no language to that effect anywhere; but it is said there is a certain notice exhibited on the ships, of which we have a copy, and which is in some way said to bind the master and crew. I am not at all prepared to say that under certain circumstances an agreement made by the owners on behalf of the crew might not bind them, just as an agreement made under certain circumstances by the master may bind the owners. It is clear that if, before the salvage service is rendered, the masters of the two ships meet together, they may make an arrangement by which, subject to the jurisdiction of this court to see whether it is equitable or not, the masters can undoubtedly bind the owners. I should not be prepared to deny that an agreement made under similar circumstances by the owners on behalf of the master and crew might bind the master and crew; but the reason for that is the necessity of the case. The service has to be rendered on the spur of the moment, and if the agreement cannot be made by the only persons who are there to make it, it cannot be made at all. Therefore *ex necessitate* an agreement so made binds; but that is a very different thing from saying that when there is no stress at all, an arrangement made by the owners binds the master and crew, without any notice to the master and crew. That proposition I am not prepared to adopt, nor is that seriously contended. What is said is, that the master had notice of these terms and had acquiesced in them. That appears to me to be a question of fact upon which the matter turns, and I am not prepared to say that there was any such acquiescence by the master of the ship which binds him, much less his crew, to the settlement of this case by arbitration in the way the owners may, perhaps, have agreed. It is quite clear that in fact the master and crew knew nothing of the terms. We have the evidence of the master himself to the effect that he had never heard of any such agreement, and I do not think it can be disputed that, as to going to arbitration, that is a matter about which this particular master and this particular crew were wholly ignorant; but it is said,

in spite of that, there was this card exhibited, and that in some way bound them. What is this card? No doubt it is called a "Notice to Masters," and it states [the learned judge then read the words of the notice]. I agree in what one of the learned counsel said, that it is possible that to an astute person it may convey the impression that disputes are to be determined by arbitration in a particular way, but further than that it does not seem to me to go. It does not say what the terms are. The very fact that it uses the word "towage," and not "salvage," appears to me to make it clear that it does not intend to give particulars of the agreement between the owners, and, as my learned brother has pointed out, there are cases of salvage in which the question of towage would not enter. Therefore, when we find the notice limited to "the settlement of towage cases," I think one is entitled to say that it hardly even gives notice that there may be an arrangement for the peculiar settlement of salvage cases. Then it goes on to say that they are bound to render assistance. That may be, but it does not say that they are bound to enter into the service upon these particular terms as regards themselves. Therefore, assuming they had this card before them, it appears to me it falls very short indeed of giving them such notice of the arrangement as would cause them to be bound by acquiescence. Indeed, the highest that acquiescence can be put is that they went to sea and continued their fishing operations, and salving operations, with this in their minds. This appears to me wholly insufficient to fix them with acquiescence in a contract of which they knew nothing. Upon this ground, therefore, I am prepared to decide the case. I am conscious that this decision leaves open many questions, some of them of very great interest—for instance, how far this court would review the decision arrived at by arbitrators of this kind, apart from any question of the validity of the arbitration by reason of incapacity on the part of the arbitrators. I am not prepared to say, at present, that this court has any such power. Whether the power of the court can be extended to deal with arbitration made in pursuance of an agreement to arbitrate by persons supposed to be *sui juris*, having knowledge of the circumstances—whether in its application to a particular case the arbitration of such a tribunal would come under the jurisdiction of this court, I, at the present moment, must decline to say. There is a further question in this case—namely, whether this particular arbitration is assailable on the ground that the arbitrators were not sufficiently independent. I entirely decline to express any opinion. It is not an easy question to decide, and it is one which I am glad to be able to avoid. Some day it may have to be argued whether, even as between owners, the agreement sufficiently avoids difficulties with regard to public policy; and there may also be a question, as regards seamen, whether it is not in contravention of the provisions of the Merchant Shipping Act. It is not necessary in this case to go into these questions, and I base my decision upon the ground that as between the master and crew of this vessel and the owners of the vessel salvaged, it is not shown that there is any agreement which ousts the jurisdiction of this court. My learned brother reminds me that something ought

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to be said about the figure at which the court below arrived. I think that stands upon very strong ground. The matter was considered by the judge below with nautical assessors, and the court arrived at a figure considerably in excess of the amount awarded by the arbitrators, but which, upon the facts of the case, does not appear to be at all in excess of what a reasonable tribunal might arrive at, so that I am not prepared to differ from it.

BARNES, J.—The learned President has dealt so fully with the case that I might content myself with saying that I agree; but, having regard to the importance of the matter, I desire to add a few words. The plaintiffs' claim is that of the master and nine of the crew of the steam drifter *Fifteen* for salvage in respect of services rendered to the drifter *Margery* off Yarmouth. It is sought to meet the claim by saying, on the part of the defendant, that the plaintiffs cannot recover on the basis of an ordinary assessment of salvage in this court, or the court below, but are bound by a decision of certain arbitrators, fixing an amount which would give to the present plaintiffs a sum of 12*l.* 10*s.* Now, it seems to me that in order to make out this defence, the defendant has to prove that the plaintiffs have agreed to submit their claims to the decision of the arbitrators who made the award. It is sought to do that in a very roundabout way. No direct agreement, no express agreement, between the salvors who are suing and the owner or master of the salvaged vessel is proved, or sought to be proved, but it is said that the *Fifteen* was insured in a mutual insurance club; that the terms of that insurance incorporated the rules of that club, which provided that steamers insured in it bound themselves to give assistance to any vessel broken down or in distress insured in that association or certain other associations; that it had been arranged that the vessels in those other associations should be bound by like conditions, and that the question of remuneration for services rendered should be determined by the committees of the associations. It is also said that the defendant ship was insured in another association, and that the policy by which she was insured in that other association incorporated the rules of that association, which had rules substantially to the same effect. Then, having both ships insured in that way, the secretary of one of the clubs was called as a witness, to say that there is a mutual arrangement between the clubs for the purpose of assessing salvage claims. So far there has been, in a roundabout way, an arrangement suggested between the owners of the ships; not a word about the master and crew. It is then said that the master and crew are fixed by this arrangement, and have become parties to it, because a notice was exhibited on board each ship. A copy of it has been furnished to the court. There the evidence really stops, because, though it is sought to say that the master and crew in some way assented to that state of things, so far as the evidence goes, the master says although he knew of this notice, he knew nothing whatever about the provision to go to arbitration, and that he never had been told anything about it and never agreed to it. The other evidence is substantially to the same effect; for instance, the engineer is called and says, "that has nothing to do with the crew." I think it is quite clear that

the master and crew never, in fact, thought that they were bound, as salvors, by what it is suggested was an intimation to them that they were so bound; so that the suggested contract put forward by the defendant seems to me to fail entirely of proof, because he does not prove that the parties suing ever agreed in any way to be bound. I think there would be great difficulty in this case in establishing such a matter even with stronger evidence than is put forward, for the reason that the master and crew are employed by their owners on the basis of certain articles. Those are the terms of their employment, and amongst them there is a stipulation, that as between owners and master and crew any salvage shall be divided in halves. That enables the crew to say: "When you have got anything you must give us half of it"; but, then, how are they bound in any way afterwards to render salvage services at all? There appears to me to be nothing to show that they are. This card only shows that the association is amalgamated with other associations for the purpose of towage services, and it states that all masters are bound to render and accept assistance when necessary to and from other vessels insured in the associations; but how bound? They never agree to be bound. They are on the ship, and the only contract they have made is to be employed by their owners upon the basis of the articles. They never agree to be bound to render or accept assistance, and unless a great deal more is proved, it seems to me they remain free agents to render services upon such terms as are usual. I think, therefore, that this case may be disposed of on those grounds as a pure question of fact, and I do not desire to enter into what seems to me a very difficult question—namely, what would be the position if it could be proved that the master and crew had agreed to go to arbitration. Then there would still be raised the question whether this court would have power to review any decision which might not meet, from any cause, the justice of the case. I do not wish to throw out any words now which should in any way lessen the jurisdiction of the court. There are other questions as to how far the provisions of the Merchant Shipping Act affect the case, and I do not wish to express an opinion on such a matter, which would require very careful consideration. Upon the merits it seems to me that we ought not to interfere with the judgment of the court below, as upon the facts there is nothing to show me that it has arrived at an erroneous conclusion.

Solicitors for the appellant, *Williamson, Hill, and Co.*, agents for *R. and R. F. Kidd*, North Shields.

Solicitors for the respondents, *Dubois and Williams*, agents for *H. Chamberlin*, Great Yarmouth.

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THE CAYO BONITO.

[ADM.]

March 25, April 10, and June 19.

(Before BARNES, J. and TRINITY MASTERS).

THE CAYO BONITO. (a)

Collision—Compulsory pilotage in London district—Ship carrying passengers—Constant trader—6 Geo. 4, c. 125, s. 59—Order in Council the 18th Feb. 1854—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 603 and 622.

The Order in Council of the 18th Feb. 1854, extending the exemptions from compulsory pilotage, contained in sect. 59 of 6 Geo. 4, c. 125, in so far as it deals with ships and vessels trading to ports between Boulogne inclusive and the Baltic, applies only to ships and vessels which are "constantly" trading between such ports.

The words "ship or vessel trading" are descriptive of the vessel, and not merely of a particular voyage, and in order to constitute a constant trader within the meaning of sect. 59 and the Order in Council, it is not necessary that a vessel should be exclusively engaged in trading to ports between Boulogne and the Baltic.

THIS was a collision action brought by the owners of the steamship *British Prince* against the owners of the steamship *Cayo Bonito*. The *British Prince*, a steamship of 7326 tons gross register, was at the time on a voyage from New York to London and Antwerp with a general cargo, cattle, horses, and cattlemen. The *Cayo Bonito*, a steamship of 3427 tons gross register, belonging to the Cuban Steamship Company, was on a voyage from London to Goazacoalcos, *via* Antwerp, Havana, and Vera Cruz, with a part cargo, and carrying one passenger. The collision occurred about 10.15 p.m. on the 8th Feb. 1902 in the Thames estuary near the Black Deep Lightship. Both vessels were, it was alleged, compulsorily in charge of pilots at the time of the collision. At the trial of the action before Barnes, J. and Trinity Masters, the learned judge came to the conclusion on the facts that the collision was solely caused by the negligence of the pilot in charge of the *Cayo Bonito* at the time, and reserved the question as to whether the employment of the pilot was compulsory or not for further information. The case is reported on the question of compulsory pilotage in the London district.

The Pilotage Acts and Orders in Council referred to in the judgment are as follows:

By sect. 1 of 5 Geo. 2, c. 20, it is provided:

From and after the twenty-fourth day of June in the year of our Lord one thousand seven hundred and thirty-two, if any person shall take upon himself the charge of any ship or vessel as pilot down the river of Thames, or through the North Channel to or by Orfordness, or round the Long Sand-head into the Downs, or down the South Channel into the Downs, or from or by Orfordness up the North Channel, or the river of Thames, or the river of Medway, other than such person as shall be licensed and authorised to act as a pilot by the said master, wardens, and assistants [of the Corporation of the Trinity House] for the time being . . . every person so offending, and being thereof lawfully convicted . . . shall for every such offence forfeit the sum of twenty pounds: Provided, that nothing in this Act contained shall extend or be construed to extend to the obliging of any master or

owner of any ship in the coal trade, or other coasting trade, to employ or make use of any pilot.

By sect. 2 of 48 Geo. 3, c. 104, it is provided:

That from and after the first day of October one thousand eight hundred and eight, it shall be lawful . . . for the Corporation of Trinity House of Deptford Stroud, and they are hereby required to appoint and license under their common seal, fit and competent persons, duly skilled, as pilots for the purpose of conducting all ships and vessels, sailing, navigating, and passing up and down or upon the rivers of Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, as well as between Orfordness and London Bridge, as from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel from the Isle of Wight up to London Bridge, which vessels shall be conducted and piloted by such pilots so appointed and licensed, by no other pilots or persons whomsoever, except pilots appointed by the Society or Fellowship of the Trinity House of Dover, Deal, and the Isle of Thanet (commonly called Cinque Port pilots) so far as such pilots are hereby authorized to pilot ships and vessels from the westward up to London Bridge, and from London Bridge downwards to the westward; that is to say, from any port or place between the Isle of Wight and the said bridge, according to the provisions in that behalf hereinafter contained, and also save and except, as well all colliers, as also all ships and vessels trading to Norway and to the Cattegat and Baltic, and likewise round the North Cape and into the White Sea, and save and except all constant traders inwards from the ports between Boulogne inclusive, and the Baltic, such ships and vessels having British registers, and coming up or going down the North Channel by Orfordness, but not otherwise; and likewise save and except all coasting vessels and all Irish traders using the navigation of the river of Thames as coasters.

The material part of sect. 2 of 52 Geo. 3, c. 39, is as follows:

Save and except as well all colliers and also all ships and vessels trading to Norway, and to the Cattegat and Baltic, and likewise round the North Cape, and into the White Sea; and save and except all constant traders inwards from the ports between Boulogne inclusive and the Baltic, such ships and vessels having British registers, and coming up the North Channel by Orfordness, and not otherwise; and likewise save and except all coasting vessels, and all Irish traders using the navigation of the river Thames as coasters.

Sect. 59 of 6 Geo. 4, c. 125, is as follows

Provided always, and be it further enacted, that, for and notwithstanding anything in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either by the North Channel but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burden of sixty tons, and having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penal-

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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ties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel.

By sect. 1 of 16 & 17 Vict. c. 129 so much of 6 Geo. 4, c. 125, as related to the Cinque Port pilots was repealed, and the Trinity House and Cinque Port pilots were amalgamated.

Sect. 21 is as follows:

And whereas it is expedient to give facilities for amending the system of pilotage . . . Be it enacted that it shall be lawful for every pilotage authority, by regulation or bye-law made with the consent of Her Majesty in Council from time to time to do all or any of the following things in relation to pilots and pilotage within their respective districts—viz.: To exempt the masters of any ships or vessels, or of any classes of ships or vessels, from being compelled to employ pilots, and to annex any terms or conditions to such exemptions, and from time to time to revoke and alter any exemptions so made, and to revise and extend any exemptions now existing by virtue of any Act of Parliament or charter, upon such terms and conditions and in such manner as such authority, with such consent as aforesaid, may think fit.

Order in Council, 18th Feb. 1854:

Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of the 59th section of the Act 6 Geo. 4, c. 125, submitted by the Corporation of Trinity House for the consideration of Her Majesty in Council, pursuant to the provisions of the 21st section of the Act 16 & 17 Vict. c. 127:

The masters of the undermentioned ships and vessels shall, subject to the provisions contained in the 59th section of the Act of Parliament, 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage—viz.: Of ships and vessels trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, when coming up by the south channels. Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south channels. Of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits, nor anchoring therein.

Sects. 353 and 379 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) are as follows:

Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall continue in force.

Sect. 379. The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district and in the Trinity House outport districts, that is to say . . . (3) Ships trading to Boulogne or to any place in Europe north of Boulogne.

The material part of the Order in Council of the 21st Dec. 1871 is as follows:—

And whereas the Trinity House of Deptford Strond, being the pilotage authority for the said districts, hath submitted for the consideration of Her Majesty in Council the following bye-law (that is to say:) That all ships trading from any port or place in Great Britain within the London District or any of the Trinity House outport districts to the port of Brest in France, or any

port or place in Europe north and east of Brest, or to the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from Brest, or from any port or place in Europe north and east of Brest, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man to any port or place in Great Britain within either of the said districts, when not carrying passengers, shall be exempted from compulsory pilotage within such districts. Now, therefore, Her Majesty . . . is pleased to declare her consent to the same.

Sects. 603 (1) and 625 of the Merchant Shipping Act 1894 (57 & 58 Vict. 60) are as follows:

Sect. 603 (1). Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force.

Sect. 625. The following ships when not carrying passengers shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts (that is to say:—) (3) Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man. (4) Ships trading from the port of Brest, or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain within the said London or Trinity House outport district.

The evidence called showed that the *Cayo Bonito* belonged to the Cuban Steamship Company, and was one of several vessels regularly engaged in two lines—one running between London, Antwerp, Cuba, and America and back, and the other between London, Antwerp, and New Orleans, calling sometimes at Bermuda. The prospectus of the company was also put in.

Aspinall, K.C. and *Dawson Miller* for the plaintiffs, the owners of the *British Prince*.

Laing, K.C. and *Bullock* for the defendants, the owners of the *Cayo Bonito*.

The arguments of counsel sufficiently appear from the judgment.

Besides the various Acts of Parliament set out above, the following cases were referred to in the course of the argument:

- The Agricola*, 2 Wm. Robinson, 10;
Reg. v. Stanton, 8 E. & B. 445;
The Earl of Auckland, 5 L. T. Rep. 558; 1 Mar. Law Cas. O. S. 117; Lush. 387; 15 Moo. P. C. C. 304;
The Wesley, Lush. 268;
The Lloyds, or Sea Queen, 9 L. T. Rep. 236; 1 Mar. Law Cas. O. S. 391; Br. & L. 359;
The Hanna, 15 L. T. Rep. 334; 2 Mar. Law Cas. O. S. 434; L. Rep. 1 A. & E. 283;
The Hankov, 40 L. T. Rep. 335; 4 Asp. Mar. Law Cas. 97; 4 P. Div. 197;
The Vesta, 46 L. T. Rep. 492; 4 Asp. Mar. Law Cas. 515; 7 P. Div. 240;
Courtney v. Cole, 57 L. T. Rep. 409; 6 Asp. Mar. Law Cas. 169; 19 Q. B. Div. 447;
The Sutherland, 57 L. T. Rep. 631; 6 Asp. Mar. Law Cas. 181; 12 P. Div. 154;
The Rutland, 76 L. T. Rep. 662; 8 Asp. Mar. Law Cas. 270; (1897) A. C. 333;
The Columbus, 80 L. T. Rep. 203; 8 Asp. Mar. Law Cas. 488.

Cur. adv. vult.

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June 19.—BARNES, J.—This was the case of a collision which took place on the 8th Feb. last between the *British Prince* and the *Cayo Bonito*, in the estuary of the Thames, near the Black Deep Light-ship, and the question of fault was heard before me some time ago. I held that the *Cayo Bonito* was in fault for the collision, but that the fault rested with the pilot of that ship, and the question of whether or not the pilot was compulsorily employed was reserved for consideration. It was argued before me a considerable time back, and then the case stood over for some further information with regard to the service on which the *Cayo Bonito* was engaged. It is only within the last few days that that information has been furnished to me. The *Cayo Bonito* was a large vessel belonging to the port of London, of 3427 tons gross register, and at the time of the collision she was on a voyage from London to Antwerp, and then from Antwerp to Goatzacoules, which I think is near Vera Cruz, Mexico. She had some cargo on board and one passenger, and it was in the course of the passage from London to Antwerp that the collision between her and the *British Prince* took place, about the place which I have mentioned. The plaintiffs contended that the employment of the pilot was not compulsory by law, but the defendants contended that it was so compulsory, and that, therefore, they ought to be acquitted from the judgment in this case. The question of compulsory pilotage in this present case is one of very considerable difficulty, and the difficulty arises from what I cannot help considering the present unsatisfactory state of the legislation which affects the question of pilotage and the exemptions from pilotage in the Thames and its estuary. If one looks through the Acts it is extremely difficult to come to any satisfactory conclusion upon them, and although I have examined them as carefully as I can, I feel that in the decision which I am about to give I cannot arrive at that conclusion with any confidence. There are two questions. One, I think, is entirely a question of law, and the other is either a simple question of fact, or possibly it may be termed a question of mixed law and fact. The legal question is, what is the true meaning of the Order in Council which the case turns upon, and the second is, when one has placed a meaning upon that order, whether this vessel is to be treated as falling within the exemption which that order provides for, having regard to the circumstances of her trading. Now, pilotage in this locality is compulsory under sect. 622 of the Merchant Shipping Act 1894, which provides that, subject to any alterations made by the Trinity House and the exemptions under this part of this Act, pilotage shall be compulsory within the London district and the Trinity House outport districts; and therefore, unless the exemptions there referred to apply to this ship her pilotage would have been compulsory. The exemptions which the plaintiffs rely upon in this case, or rather the one exemption which is material, is an exemption in the Order in Council of 1854. As this vessel had a passenger on board, the provisions of sect. 625 of the Merchant Shipping Act 1894 do not apply, because the exemptions in that section only apply when the ship is not carrying passengers; but there are two sub-clauses to that section which have a bearing upon this case, because of a construction placed upon the word "trading"

in them, which, it is contended, affects the decision in this case. Now, the exemptions conferred by sect. 625 not being applicable, the plaintiffs have to rely upon other exemptions, which, as I have already said, are exemptions in the Order in Council; and it is to be noticed that the exemptions in the Order in Council were held in the case of *The Earl of Auckland* (*ubi sup.*) to have been preserved by the Merchant Shipping Act 1854, and so it was conceded they were preserved by the Merchant Shipping Act 1894 in the same way as they had been preserved by the Act of 1854. The 603rd section of the Act of 1894 is the section which was relied upon as still continuing those exemptions. Now, the Order in Council is one which was made on the 18th Feb. 1854, and it is shortly stated, but sufficiently fully for my purpose, in Lushington's Admiralty Reports, p. 167. [His Lordship then read part of the Order in Council set out above.] The plaintiffs say that this exemption applies in this case, and that the words "ships and vessels trading" practically mean the same as ships and vessels on a voyage from the port of London to a port or ports between the ports on the Continent, mentioned in that clause, which I have named; while the defendants' contention is that the words "ships and vessels trading" mean "constant traders," because they contend that that Order in Council must be read with the 59th section of 6 Geo. 4, c. 125. In reply to that contention, in addition to the point already referred to which the plaintiffs make, they make a further point by saying that even if it is to be construed as referring to "constant traders," this vessel was, within the true meaning of such words, a constant trader from London to Antwerp, which is included in the area mentioned, and was so trading at this time. Now, the legislation is somewhat voluminous, and the Acts, I think, require a careful consideration, and are not easy to follow very accurately; at first, without bearing in mind that at one time there were two bodies connected with the pilotage of the Thames—namely, the Trinity House pilots and the Cinque Ports pilots; the latter being engaged in piloting vessels coming from the west to the Thames and Kentish ports. The first Act I think it necessary to refer to is 5 Geo. 2, c. 20, which dealt with the Trinity House pilots. [His Lordship read part of sect. 1.] That is the first exemption to which I have been referred to. The next Act is 48 Geo. 3, c. 104, s. 2. Stating its terms briefly from a marginal note, there is this provision: "From the 1st Oct. 1808 the Corporation of Trinity House of Deptford shall license fit persons as pilots to conduct all vessels within certain limits, and none others shall act, except as herein stated." There is an exception of pilots appointed by the Society or Fellowship, of Pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port pilots. [His Lordship then read sect. 2.] It is to be observed that the exemption is to constant traders inwards, from ports mentioned, such vessels having a British register, and coming up and going down the North Channel, and my impression is, from an examination of the Acts, that the words "going down" were erroneously introduced—that the intention at that time had been to exonerate ships coming inwards from the ports mentioned, to London, having British registers, and in that way, for reasons which are

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mentioned in various reports to Parliament and so forth, to favour British ships coming inwards, as against foreigners coming inwards. That Act was an Act only to be in force for four years from the passing of it, and the subject was again dealt with by the Legislature by the 52 Geo. 3, c. 39, which became a more permanent Act. It is in the 2nd section again provided that the Corporation of the Trinity House shall license fit persons as pilots within certain limits, and those limits were for all vessels and ships passing up and down or upon the Thames and Medway, &c. Then there were powers given to the Lord Warden of the Cinque Ports to license pilots for ships and vessels sailing and navigating from the westward up to the Thames and Medway—"that is to say, from Dungeness up to London Bridge and Rochester Bridge, and from the Buoy of the Brake to the westward—that is to say, from the said buoy to the west end of the Owers." Then there was this exemption: [His Lordship then read the portion of the section dealing with the exemption.] That, so far as is material, is practically the same as the Act I have referred to, except that the words "going down" are omitted in the considered Act passed in 1812. There was a report of a Committee in Parliament on the question of these Acts in 1824, I think, which made certain recommendations, but as far as I can make out the recommendations were not fully carried out. The next Act of Parliament which dealt with the subject is the one which is referred to in the Order in Council, and is an Act of 6 Geo. 4, c. 125, and sect. 59 is the one which contains the exemptions provided by the Act. [His Lordship read the section.] Now, the word "either" seems to be a mistake. The section otherwise is very much the same as the Act of 1812, providing for the freedom from pilotage of "constant traders" inwards from ports north of Boulogne, coming up by the north channel. Then came the statute of 1853, which is the 16 & 17 Vict. c. 129, which amalgamated the Trinity House pilots and the Cinque Port pilots, and by the 21st section gave power for every pilotage authority by regulation and Order in Council to do certain things. [His Lordship then read the material part of the section.] It was in pursuance of that section that the Order in Council of Feb. 1854, which I have already referred to, was made. Now, upon that state of things there are two cases to mention. The first is *Reg. v. Stanton (ubi sup.)* which decided that, "The exemption given by stat. 6 Geo. 4, c. 125, s. 59, from the necessity of employing licensed pilots to masters piloting their own ships on the voyages there specified, without the aid of an unlicensed pilot, is continued by the Merchant Shipping Act 1854, and this exemption applies as well to ships carrying as to ships not carrying passengers, and is not affected by the exemption given in sect. 379 of the same Act to ships on particular voyages not carrying passengers." That was the case of a regular trader to the Baltic, which had passengers. There was also the case of *The Earl of Auckland (ubi sup.)*, which was the case of a vessel whose ordinary occupation was carrying goods and passengers between London and Rotterdam, and had passengers on board, and which case decided, in the same way as *Reg. v. Stanton* that the exemptions given by 6 Geo. 4, c. 125, s. 59, supplemented by the Order in Council of 1854 were maintained by the Merchant Shipping

Act of 1854. Then, as I have already mentioned, the Act of 1894 kept these exemptions alive, and therefore if they are applicable to the present case those cases show those exemptions are treated as still existing, and of course I must follow those decisions. Now, in addition to the exemptions I have already referred to, there were in sect. 379 of the Merchant Shipping Act of 1854 exemptions of the following ships, when not carrying passengers, in the London district and Trinity House outport districts, amongst others: namely, ships trading to Boulogne or any place in Europe north of Boulogne. That exemption was somewhat modified by an Order in Council on the 21st Dec. 1871, which had practically the effect of extending the coast line, if I may so express it, from Boulogne to Brest, making therefore an exemption of vessels not carrying passengers, trading from London to any port between Brest and any place in the north of Europe. These exemptions, although the words were "trading to," were held in *The Wesley (ubi sup.)* to apply to vessels both ways, that is going outwards or coming in, though there seems possibly some doubt whether, on the language of the exemptions, that was correct. This class of exemption was further provided for by the 625th section of the Merchant Shipping Act of 1894, which I have already referred to. [His Lordship then read the section.] Those provisions clearly provide for the inward and outward trading, when not carrying passengers, but they are not applicable to the present case, because the ship was carrying a passenger. They are material to the discussion of the case because of the language, which is "ships trading," and certain decisions upon the meaning of "ships trading," and the argument of Mr. Aspinall, for the plaintiffs, that those decisions really concluded this case. Now, those decisions are first of all *Courtney v. Cole (ubi sup.)*. In that case "A British ship was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London. On a return voyage from the East she went, as usual, to London. She there discharged part of her cargo and her crew, and then, with the bulk of her cargo and a crew of runners, but without passengers, proceeded to Holland. Held, that she was a ship 'trading to' a place north of Boulogne, and therefore exempted from compulsory pilotage in the London district." Lord Coleridge and the late Master of the Rolls (then Smith, J.) decided the case upon the construction placed by them upon the 379th section of the Act of 1854, and they held that the vessel was, within the meaning of the words of the section, a ship which was trading to a place north of Boulogne. The judgment of Smith, J. contained this passage (57 L. T. Rep. at p. 413; 6 Asp. Mar. Law Cas. at p. 173; 19 Q. B. Div. at p. 457): "This being so, in my judgment the words in sub-sect. 3 are not to be read as meaning the constant trading to Boulogne or any place in Europe north of Boulogne, but as meaning what they say—i.e., when a ship in fact is trading to Boulogne or north thereof, and, I would add, from (and possibly to) the London district and the Trinity House outport districts, she is exempt. The argument addressed by the pilots, that in sect. 59 of 6 Geo. 4, c. 125, the word 'constant' is used, and

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that by sect. 353 of the Act of 1854 compulsory pilotage was to be enforced as theretofore, in my judgment avails nothing in the face of the fact that the word 'constant' is expressly omitted in the later section—viz., 379. I would add that, should I be wrong in the interpretation I put upon the words of sect. 379, sub-sect. 3, the findings in the case, especially those in pars. 5 and 9, show that the *Cardiganshire* was a constant trader from London to Amsterdam and back; for it seems to me impossible to hold that the words of the sub-section mean only trading to Boulogne and north thereof, which must be the pilots' contention if they are correct upon their interpretation of the sub-section as applied to the facts of this case." So it was held there that when a ship not carrying passengers was in fact trading from London to Europe north of Boulogne she was within the exemption of the 379th section of the Act of 1854, and that that was so although that was not her only trade. It is to be noticed in that case it was a ship which was a trader to Japan and the East, as part of her trading. She made the passage from London to Amsterdam and Hamburg and back as part of that trade. That case was followed by *The Rutland* (*ubi sup.*). That was the case of a ship laden with cargo, from the River Plate to Rotterdam, with cattle, for London. She had discharged the cattle in London and proceeded with the cargo to Rotterdam, and it was held that whilst the ship was proceeding from London to Rotterdam she was, although she took no cargo in in London, trading between London and Rotterdam, within the meaning of the section, and therefore exempt from compulsory pilotage in the London district. She had no passengers, and the question, of course, was whether at that time the 625th section of the Act of 1894, sub-sect. 3 was applicable. The view which I understand the House of Lords took in that case may be gathered from one short sentence in the judgment of the Lord Chancellor, when he said (76 L. T. Rep. at p. 663; 8 Asp. Mar. Law Cas. at p. 271; (1897) A. C., at p. 335): "For my own part I cannot adopt the view that you are entitled to change the participle into an adjective, and I do not think it would carry us to a right conclusion if you did. A 'vessel trading' points to the particular act of trading, which is the matter that was in the mind of the Legislature." Lord Watson said: "I can find nothing in the Act of 1894 which requires that the words of sub-sect. 3 shall be construed in any other than what I venture to term their ordinary and natural import; and, when so construed, I think they include every ship which has left the port of London and is on her way to Brest or to any of the other ports which are named in the statute, in pursuit of a commercial adventure." Now, Mr. Aspinall argued that those two cases were applicable to the present case, and that it was sufficient to bring a ship within the exemption contained in the Order in Council, if she was on the particular occasion trading from London to a port within the limits of the coast-line referred to; and that in substance the words "ships or vessels trading" should be construed in the Order in Council practically in the same way as they were construed in the 379th section of the Merchant Shipping Act of 1854, and the 625th section of the Act of 1894. There seems to me to be very

considerable difference between the considerations applicable to the one set of exemptions and the other. Possibly there is some difficulty in distinguishing the exemptions in the Order in Council and the exemptions in the Act of 1854, sect. 379, but there is clearly not so much difficulty in distinguishing between the Order in Council and the Act of 1894, s. 325, because the language of sub-sects. 3 and 4 seems to point to a particular act of trading, rather than to a description of a vessel engaged in a trade. I do not myself consider that the question before me is determined by the two decisions to which I have just referred, and I think that it is necessary to consider what is the true meaning of the Order in Council which is relied upon by the plaintiffs. Now, I think it is necessary to notice, in the first place, that it has been decided in *The Vesta* (*ubi sup.*) that "ships and vessels" in the Order in Council mean British ships, and that the reason for so treating the Order in Council is that it ought to be read with 6 Geo. 4, c. 125, s. 59, which provides that the ships and vessels referred to are all to have British registers, and therefore as the Order in Council will extend the exemptions existing under the 6 Geo. 4, c. 125, the words "ships and vessels" are not to be read as referring to all ships and vessels, but to ships and vessels having British registers; and that therefore the Order in Council is not to be read literally. Sir R. Phillimore, in giving judgment in *The Vesta* (46 L. T. Rep., at p. 496; 4 Asp. Mar. Law Cas., at p. 519; 7 P. Div., at p. 245), said: "I am of opinion that this absurdity does not arise, and that the exceptions in this Order in Council do not apply to foreign vessels, but that the words 'ships and vessels' when used in the portion of the Order in Council I have read, must mean British ships and vessels, which alone are dealt with by the material portions of the 59th section of 6 Geo. 4, c. 125, to which section the Order in Council in question, so far as it relates to exemptions, is subsidiary, and of which it is explanatory. I think, moreover, that this was the opinion to which Dr. Lushington inclined in the cases of *The Earl of Auckland* (*ubi sup.*) and of *The Hanna* (*ubi sup.*). Now, if the Order in Council is to be read in the way that Sir R. Phillimore read it, not literally, but as subsidiary to the 59th section of 6 Geo. 4, one must see what is meant by the words "ships or vessels trading." In the 59th section it is used of ships or vessels trading to Norway or the Cattegat or Baltic, on inward or outward voyages, and I cannot help thinking that "ship or vessel trading" is there descriptive of the vessel, and not merely a particular voyage with which she is for the moment concerned. Then, again, "of any constant trader"—that, I think, cannot refer to one particular occasion on which a vessel is proceeding, but to a description of the vessel; and so, also, Irish trader was to mean ships or vessels employed in the regular coasting trade of England. Therefore, I think, it seems probable that the words "ship or vessel trading" were used in the Order in Council, especially having regard to the words "to ports between Boulogne and the Baltic on their outward passages, and when coming up by the south passages," as descriptive of a class of vessel, and not simply of the particular voyage on which the vessel happened to be engaged at the moment.

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Now, having regard to these considerations, the inference which I draw from the use of the words in the Order in Council is that it refers, as I have said, to a description of vessels—one which, speaking in general terms, may be distinguished as engaged in the trade between London and the continental ports included in the coast area. The question then comes to be, whether this vessel was so engaged, or was not. That is the second question in the case, and it is necessary now to see what the facts are. The *Cayo Bonito* belonged to the Cuban Steamship Company, which had several other vessels, and evidence has been given as to the nature of the employment of these vessels and other ships which, I think, they charter from time to time. Substantially it comes to this, that the vessels were worked in two lines. The prospectus of the company was put in, and that described the company as having been formed under the above title for the purpose of developing and carrying on a more extensive scale a line of steamers between London, Antwerp, and Cuba. Then a list was put in of the ships and their advertised times of sailing from London and Antwerp to Havana, Vera Cruz, &c. I find the "fine screw steamship *Cayo Bonito*" is mentioned. Under that there is a description of the Cuban Line of steamers from London to New Orleans direct. The *Cayo Bonito* is also put down as one of the steamers serving in that line. It appears that, shortly stated, this vessel, with others, was engaged in working two lines. One may be described as a line from London to Antwerp, and then on to America and back, and the other as a line from London to New Orleans direct, with liberty to call at Bermuda. So that you have a very difficult question of fact to determine. The vessel in this case, if I recollect the evidence rightly, had made one voyage previously to this action, going from London to Antwerp, and then on to Mexico. On the voyage in question she was on the same round from London to Antwerp, and then on to Mexico, and I think I am right in stating that since the disaster she has made another voyage from London to Antwerp and Mexico, with part of the same cargo. A schedule or statement of the working of the ships of the Cuban Line has been handed in, but substantially it seems to me that you have a vessel belonging to a company which is employed, so to speak, in two lines, because although she has been on the voyages she has made—I think she is a new ship—only on this round from London to Antwerp and then to America, she is advertised, and it was stated she might be used, to go to Bermuda direct, and thus fulfil the service of both lines. Although we may analyse and examine this statement more fully, I do not think I should come to any other statement of the position than that which I have done. Possibly I might add this, that it does not appear that vessels going to Antwerp always go to Antwerp, but they appear to do so generally. That presents this matter for consideration. If the Order in Council is to refer, using a neutral term for a moment, to regular traders, is a ship so engaged a constant or regular trader between London and Antwerp, which is included in the coastal area? I think that is an exceedingly difficult question to determine, because there may be two views taken. There may be the view that the word "constant" is used in the sense of a vessel doing nothing else but go between London

and the Continent, and here the use of the word "constant" is that which is used in mathematics—namely, an inflexible, unalterable quantity, as opposed to a fluctuating, variable quantity. The other is that it is used in a business sense, of a vessel which is regularly engaged in the particular trade, but not so absolutely constantly going backwards and forwards that there is never any departure from the voyage between the Continent and London. The only light I can obtain upon this question appears to me to be that which is found in the judgment of Smith, M.R., in *Courtney v. Cole* (*ubi sup.*), where he says that, if it were necessary to find that the vessel in *Courtney v. Cole* was a constant trader, it was impossible to hold that the words of the sub-section of which he was speaking (sub-sect. 3, sect. 379, of the Act of 1854) meant only trading to Boulogne or any place in Europe north of Boulogne. His view, certainly, was that a vessel would still be a constant trader if part of her duty or business was to go from London to the Continent, though the remaining and larger and more substantial part seemed to go from this side of the Atlantic to ports in Japan and the East, and the voyage between London and Antwerp or Boulogne, or Hamburg or Amsterdam, whichever it was, is a very small portion of that larger business in which the ship is engaged. So that the view which he took of a constant trader does not simply limit the ship to going backwards and forwards between the port of London and the Continent. Therefore, if this ship were absolutely regularly engaged, so that she never did anything except go between London and Antwerp and then on to America, she would be, within the language which the late Master of the Rolls used, a constant trader, although she did not only go backwards and forwards between London and the Continent. That leaves a further matter. Does the word trading, as used, or constant trader, allow any departure from always going to a continental port after leaving London? On being taken off the regular line, which includes calling at a continental port, and going, on occasions, direct from this country to other than a continental port? In other words, is a ship, which is to come within that definition of constant trader one which must never depart from it, and never make any other voyage except that which would include going to a continental port? I have thought about this matter a good deal, and I do not feel able, having regard to the general terms of the Act, to place such a strict meaning upon it, because it seems to me it would involve this remarkable result, that, if a ship which was habitually—so habitually as never to do anything else—engaged in going from London to Antwerp, we will say, and back, were for any particular voyage taken off and run to some other port—for instance, London to Bordeaux—for a voyage, and then to be put back on to her regular trade, it would destroy her constancy, so to speak; and the ship would never, although in an ordinary business sense regularly engaged in going backwards and forwards, dare to depart, for business purposes, for fear of destroying her constancy, and thus being taken out of the exemption which otherwise she would avail herself of. I cannot help thinking that the true result to arrive at is that the use of these terms must be regarded from a business point of view, and that if it is a part of

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the regular business of a ship to proceed from this port of London to the Continent, between the limits mentioned, she is, within the meaning of the Order in Council and the section, a constant trader, and therefore exempt from the compulsion to take a pilot. That is the conclusion I have come to, and in the result I hold, therefore, that this vessel was as a matter of law and fact within the exemption, and that her pilotage was not compulsory. That leaves the defendants responsible for the collision, and therefore there will be an order of the *Cayo Bonito* alone to blame.

Solicitors for the plaintiffs, the owners of the *British Prince*, *Thomas Cooper and Co.*, agents for *Hill, Dickinson, and Co.*, Liverpool.

Solicitors for the defendants, the owners of the *Cayo Bonito*, *Hollams, Sons, Coward, and Hawksley*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 15.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

LONG EATON RECREATION GROUNDS COMPANY LIMITED v. MIDLAND RAILWAY COMPANY. (a)
APPEAL FROM THE KING'S BENCH DIVISION.

Land Clauses Act—Compensation—Land subject to restrictive covenant—No buildings to be erected other than dwelling-houses—Railway embankment—Land not taken injuriously affected—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 68.

The owners of an estate laid out part of it for building, and sold that part of it in plots. The purchasers of these plots entered into restrictive covenants with the owners of the estate, the covenants being imposed by the owners for the benefit of the land retained by them.

By one of these covenants the purchasers bound themselves not to erect any buildings on the land purchased other than private dwelling-houses of a certain specified description.

Afterwards a railway company, having notice of these covenants, and acting under their statutory powers, purchased from the purchasers the plots of land subject to the restrictive covenants. The railway company then constructed a railway embankment on the land so taken.

Held, that the railway company had committed a breach of the covenant not to erect on the land any buildings other than dwelling-houses.

Held, also, that the land retained by the owners of the estate had been injuriously affected by this breach, and that the owners were entitled to obtain compensation under sect. 68 of the Lands Clauses Consolidation Act 1845.

Judgment of Lawrance, J. affirmed.

THIS was an appeal by the defendant railway company from the judgment of Lawrance, J. at the trial of the action without a jury.

The action was brought to recover 650*l.*, being the sum at which the damage caused to the plain-

tiffs' land had been assessed by the jury at an inquisition in which the plaintiffs had claimed compensation under the Lands Clauses Consolidation Act 1845.

The circumstances under which the plaintiffs' claim arose were as follows:—

In 1884 the plaintiff company purchased land at Long Eaton, in the county of Derby.

Part of this land they laid out for building, and sold plots of land adjoining a road which they laid out. The conveyances from the plaintiff company to the purchasers of these plots contained various restrictive covenants, two of which are material in the present case.

By these covenants the purchasers covenanted (1) that they would not erect or permit to be erected upon the said pieces of land respectively any erection or building of any kind, except a fence wall not more than 2ft. high with suitable iron palisades, nearer to Springfield-avenue aforesaid than the line drawn on the said plan and marked building line; and (2) that they would not erect any buildings on the piece of land thereinbefore secondly described other than private dwelling-houses with proper conveniences thereto, and all such dwelling-houses should front to Springfield-avenue aforesaid, and should each cost not less than a certain specified sum.

The defendant railway company purchased the land from these purchasers with notice of these restrictive covenants.

They then constructed on the land a railway embankment with a permanent railway line on the top.

This embankment, as the railway company admitted, encroached beyond the building line so as to cause a breach of the first of the two covenants above mentioned.

The plaintiff company claimed to be entitled to compensation under sect. 68 of the Lands Clauses Consolidation Act 1845, on the ground that the land which they had retained possession of was injuriously affected by the construction of this embankment, and that in constructing the embankment the railway company had committed breaches of the two covenants above set out.

The amount of the compensation thus claimed was settled under sect. 68, by an inquiry held before the sheriff of Derbyshire and a jury, at the sum of 650*l.*

The plaintiffs then brought the present action against the railway company to recover this sum.

Lawrance, J. gave judgment for the plaintiffs.

The case is reported 85 L. T. Rep. 278.

The railway company appealed.

Baggallay, K.C. and C. H. Sargant (W. J. Noble with them) for the railway company.—First, there has been no breach by the railway company of the second covenant. The covenant refers only to the nature of "buildings" to be erected on the land. The embankment is not a "building." The verdict of the jury at the inquisition before the sheriff is therefore bad. The plaintiff company based their claim at the inquisition upon two breaches having been committed by the railway company, and in respect of those two alleged breaches the jury awarded one lump sum. That sum cannot be divided and allotted in respect of the two claims, and therefore, if one of the claims was bad, the verdict of the jury is wholly bad,

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

and this action, which is based on the verdict, must fail:

Beckett v. Midland Railway Company, 13 L. T. Rep. 672; 17 L. T. Rep. 499; L. Rep. 1 C. P. 241; 3 C. P. 82.

Secondly, assuming that the railway company has committed the alleged breaches, the matter is not one in respect of which the plaintiffs are entitled to compensation under sect. 68. There is no case which decides that compensation can be obtained in respect of a breach of a restrictive covenant such as these. They referred to

Baily v. De Crespigny, 19 L. T. Rep. 681; L. Rep. 4 Q. B. 180;

Renals v. Cowlishaw, 38 L. T. Rep. 503; 41 L. T. Rep. 116; 9 Ch. Div. 125; 11 Ch. Div. 866;

Kirby v. Harrogate School Board, 74 L. T. Rep. 6; (1896) 1 Ch. 437;

Re Masters and Great Western Railway Company, 84 L. T. Rep. 515; (1901) 2 K. B. 84.

Hugo Young, K.C. (W. H. Stevenson with him) for the plaintiffs.—The railway company has committed a breach of the second covenant by the construction of this embankment. The covenant is really one to prevent the erection of any permanent structure on the land other than dwelling-houses. The word "building" is quite applicable to such a construction as a railway embankment. He referred to

Stone v. Mayor, &c., of Yeovil, 36 L. T. Rep. 279; 2 C. P. Div. 99.

Even if this has not been a breach of the covenant, the railway company cannot in this action set aside the verdict of the jury in the inquisition. There was something before the jury, in respect of the first covenant which was admittedly broken, on which the jury were justified in awarding some sum as compensation to the plaintiffs. The only way to get rid of the verdict is to bring it up by *certiorari* and get it quashed:

Metropolitan Board of Works v. Howard, 5 Times L. Rep. 732.

Secondly, these breaches of restrictive covenants which were entered into for the benefit of the land retained by the plaintiffs have reduced the market value of that land, which has been therefore injuriously affected so as to entitle the plaintiffs to compensation under sect. 68. No reason has been suggested why this should not be so, as on principle it ought to be. In several cases judges have expressed their opinions that breaches of such restrictive covenants as these are the proper subject for compensation. In addition to the cases already cited they referred to

Re London, Tilbury, and Southend Railway Company and the Trustees of Gover's Walk Schools, 62 L. T. Rep. 306; 24 Q. B. Div. 326;

Manchester, Sheffield, and Lincolnshire Railway Company v. Anderson, 78 L. T. Rep. 821; (1898) 2 Ch. 394.

Sargant replied.

COLLINS, M.R.—This is an appeal against a decision of Lawrance, J., who held that the plaintiffs were entitled to recover the sum of 650*l.*, being the amount of the compensation, which had been assessed under sect. 68 of the Lands Clauses Act 1845, in respect of their land having been injuriously affected by a railway embankment made by the defendants. The question arises in this way: Some years ago the plaintiffs became

the owners of a considerable plot of land, a great part of which they are at present using for the purposes of recreation grounds. Part of the land which they had originally acquired they took steps to lay out for building purposes, and they sold plots to various persons, taking from the buyers restrictive covenants as to the manner in which the plots were to be used. The restrictions, so far as they are material to the present case, are contained in two covenants, one of which has reference to a building line laid down in the plans, the other having reference to the nature of the buildings to be erected behind the building line. The defendant railway company afterwards acquired land from the purchasers of these plots, and on the land so acquired they have constructed a railway embankment of the ordinary kind with a railway on the top of it. Now, it is admitted by the defendants that what is called the toe of this embankment encroaches beyond the building line so that a breach has been committed of the first of the covenants I have referred to. But then the point is taken—and this applies to the other covenant also—that this breach of covenant is not a matter for compensation under sect. 68 of the Lands Clauses Act 1845, on the ground that it cannot be said that by this breach of covenant the lands of the plaintiff company have been injuriously affected. That is the main point in this case—namely, whether a breach of these covenants is the proper subject-matter for a claim under sect. 68 for injuriously affecting the plaintiffs' land. As to the other covenant, which refers to the nature of the buildings to be erected behind the building line, the defendants say that there has been no breach by them, and they further say that if the plaintiffs' claim in respect of one of these two alleged breaches of covenant is bad, then the plaintiffs cannot succeed in this action because the sum of 650*l.* which was assessed as the amount of compensation is a lump sum covering the damage caused by the two alleged breaches, and not distinguishing how much is due in respect of each breach. I will deal with that question first. It seems to me that the contention rests upon a misconception. The authority which was relied upon in support of the contention was *Beckett v. Midland Railway Company* (*ubi sup.*). But in that case the action was brought upon an award of an arbitrator—a thing which, both in its nature and in its results, is very different from an inquisition before the sheriff and a jury. It is true that in that case the award embraced in the compensation a subject-matter which was not ground for compensation at all. But the court was dealing with an award, and, for the special reasons applicable to an award, it held that, as the good was inseparable from the bad, the whole award was bad, and the action on it must fail. But a series of decisions has been cited before us, in each of which the action was brought, not upon an award, but upon an inquisition. There it appeared that there was unquestionably a claim which could not be a legal ground for compensation, but it also appeared that other claims were made which were the proper subject-matter of compensation, and were so treated by the jury. It was urged, and admitted by the other side, that it was not possible on the face of the verdict to distinguish how much the jury had given for each claim, if,

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indeed, they had given anything for more than one claim. Yet it was held that the point could not be taken at the hearing of an action upon the verdict of the jury. It was too late to take it then. The point ought to have been raised earlier by an application to quash the inquisition. That has been held to be the law in a series of cases of which *Metropolitan Board of Works v. Howard* (*ubi sup.*) in the House of Lords is the chief. In that case Lord Herschell said that the only question that that House had jurisdiction to entertain was whether there was jurisdiction in the sheriff and jury to entertain the claim to compensation and to award some damages in respect of it; if there were such jurisdiction, and if any evidence was before the jury which warranted the award of any damages, then, in an action such as that, the plaintiff must recover, however excessive the amount of damages. Then there are other decisions, as far back as *Mortimer v. South Wales Railway Company* (1 E. & E. 375), which itself rests upon an earlier case, *Corrigal v. London and Blackwall Railway Company* (5 M. & G. 219). Therefore, as it seems to me, if one of these two claims is capable of being supported in point of law, it does not matter that the plaintiffs put forward another claim which cannot be so supported. But there are reasons why in my opinion I do not think that the suggested difficulty arises in this case. In my judgment, with regard to both the claims, facts were proved before the jury which were capable in point of law of affording ground for compensation for injuriously affecting under sect. 68. The point is whether a breach of a restrictive covenant can be ground for compensation to the owner of the land for whose benefit the restriction was imposed. That, of course, raises the preliminary question whether the restrictions in the present case are such, and were imposed under such circumstances as to make these restrictions for the benefit of the land retained by the plaintiffs. Now, I agree that in cases of this kind you must be able to infer that the restriction has been imposed for the benefit of certain lands retained. Otherwise there would be a difficulty in saying that it runs with the land. In the present case the action is brought by the actual covenantees, not by any assignees from them. The action, it is true, is against the assignees of the covenantors, but, when you look at the circumstances and at the terms of the conveyance itself, it is quite obvious that the intention of all parties was to protect the remaining land, which was retained by the vendors with the view of eventually turning it into building land, to be used for the same purposes as the plots which were sold. It seems to me to be an obvious inference that these covenants as to the particular class of building which alone were to be allowed on the land sold were for the benefit of the land retained. It is not necessary that that should be stated in terms in the instrument; it is quite sufficient if that inference can be drawn with reasonable certainty from all the surrounding facts. Looking at the first covenant from that point of view, we find that the embankment projects along the whole length of the building line, and it cannot be denied that this constitutes a breach of the covenant. As to the other covenant, it is said that no breach has been committed because a railway embankment is not a building within the meaning of the covenant.

[His Lordship read the covenant.] The object of that covenant is to secure that nothing but private dwelling-houses which shall face Springfield-avenue shall be built on that land, and it seems to me that to build a railway embankment is a breach of what was intended to be provided for by the covenant. It was argued that the word "building" in that collocation cannot be properly applied to this embankment. I see nothing to negative the inclusion of this embankment in the word "building." The covenant is in a negative form. What it really provides for is that if anything shall be erected on the land sold it must be a private dwelling-house facing the road. I think the covenant was intended to exclude, and does exclude, the construction on the land of anything in the nature of a railway embankment. I do not see any inconsistency in using the word "building" with respect to a railway embankment. "Building" is not necessarily limited to bricks and mortar, or to houses. The "building" of a railway is a well-known phrase, and, as far as my experience goes, it is a term of art. It is just as applicable to an embankment as to a railway. It is obvious that the intention of the parties would be defeated by the building of this embankment instead of private dwelling-houses. Therefore it seems to me that we have to deal with breaches of both these restrictive covenants; the breach of the first covenant, which is admitted, and the breach of the second covenant, which was contested. Now, the real point is whether these breaches of these restrictive covenants are the subject of compensation under the Lands Clauses Act 1845. Looking at the matter as a question of principle, apart from authority, I should ask, first of all, why should they not be? Sect. 68 provides that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction," certain proceedings are to be taken. A great distinction has been drawn, in questions arising out of this section, between injury to the person who is the owner of the particular piece of land and damage to the actual value of the piece of land itself. If the injury in respect of which the owner tries to obtain compensation is only incident to the particular purpose for which he is occupying the land, it has been held that that matter is to be excluded from being a matter for compensation under the section. But if the market value of the land for any reasonable purpose is affected, then the land is affected. If, therefore, the value of a given piece of land has been enhanced, whether by a covenant or an easement attached to it, or in any other way, and a railway company subtracts a portion of that value by the erection of its railway, that is an injurious affecting of the land. Of course it is not denied, with regard to easements, lights, and other rights of that kind incident to the land, that to take either of them away by building a railway would itself be an injurious affecting of the land. The general discomfort that the particular land shares with all other land not actually taken by the railway company is something that the owners have to put up with; but wherever you find a special diminution by the subtraction of any actual

right belonging or appertaining to the particular piece of land, that is, as in common sense it ought to be, an injurious affecting. That matter was much discussed in *Beckett v. Midland Railway Company* (*ubi sup.*). In that case Willes, J. pointed out that, while a mere annoyance which the owner of a particular piece of land has to suffer in common with everybody else who lives near a railway is not the subject-matter of compensation, yet a special subtraction of any right incident to the land is. He gives, as an instance, a piece of land approached by a road which formerly was a broad one, but which by the works of the railway company has been narrowed into a very small one. In that case the land would be injuriously affected by having only a narrow and difficult approach instead of a wide and easy one. Now, that being so, why is not the withdrawal of the benefit of a restriction which has been imposed on the adjoining land for the benefit of the piece in question a subject-matter for compensation? The jury in this case have found that the market value of the land, as land, and apart from the special use to which it has been applied, is injuriously affected by the withdrawal of the benefit of the restrictions. No reason has been suggested why that is not the subject-matter of compensation, but it is said that there are no authorities to be found in support of the contention of the plaintiffs. On principle, apart from authority, it seems to me that this would be a subject-matter for compensation, and the burden would be upon those who say that no compensation can be given for such a matter as this by which the market value is admittedly affected. In *Kirby v. Harrogate School Board* (*ubi sup.*) I think that all the judges were of opinion that this would be the subject-matter of compensation, though it was not absolutely necessary for them to decide the point. The headnote of that in the Law Reports runs as follows: "Where a school board acquire land, whether by agreement or compulsion, for the purposes of the Elementary Education Act 1870, and purchase with notice of a restrictive covenant to which the land was subject in the hands of the vendor, the covenantee cannot maintain an action against the school board for breach of covenant; his only remedy is compensation under sect. 68 of the Lands Clauses Consolidation Act 1845." Lindley, L.J. near the end of his judgment said: "It follows that the school board are perfectly right in contending that an action for an injunction or damages is out of the question. If the plaintiffs can make out that they are injuriously affected, they will be entitled to compensation under sect. 68 of the Lands Clauses Consolidation Act 1845. They are not in the position of a person who is in the enjoyment of some easement; but they have a right—a right conferred upon them by that covenant. What is the value in money is another matter." In the present case there is no question as to that, because its value has been assessed. Lindley, L.J. continued: "It is quite possible that in asking for compensation, and in putting into force the machinery for obtaining it, their damages may be assessed at *nil*; but, if they can make out that they are damaged, they are entitled to compensation under sect. 68. That was North, J.'s view, and that is my view." North, J. had expressed his view thus: "I cannot see any difference between the one case and the other by

reason of the manner in which the right has been acquired. Nor can I see any difference between a right to light or any other right in respect of the land which may be affected by the buildings that may be erected on it. In my opinion the principle which applies to an easement applies equally to the right which is created by a restrictive covenant." That is a very clear statement. Then Kay, L.J. uses language which bears the same interpretation. He says: "For the purpose of my present judgment I will assume that there has been a breach of covenant, and that it was such a breach as that, if sect. 68 of the Lands Clauses Act did not apply to the case, it would enable the plaintiffs to obtain an injunction. That they have incurred or will incur by what is being done one farthing's worth of damages, I cannot understand. However, assume that, and assume that it is a case in which the court would treat these covenants, or one of these covenants, as having been infringed, and that they would be entitled to an injunction, in my opinion the language of sect. 68 applies." Smith, L.J. also in his judgment speaks to the same effect. Therefore it seems to me that we have there something more than a mere expression of opinion. We have a reasoned view, which is part of the train of reasoning by which the learned judges in that case arrived at their decision. The opinion of North, J., and also of Lindley, L.J., was expressed without any qualification, and, though the other Lords Justices did not express their opinion quite so emphatically, yet they agreed with what had been said. But the matter does not stand there. The point was considered in other cases. One was the case of *Re Masters and Great Western Railway Company* (*ubi sup.*). There the right in question was not a negative right. It was a right under a covenant in the lease of a mine by which the lessee was entitled under certain conditions to sink new pits in land of the lessor, the surface of which was not demised. The railway company acquired under the Lands Clauses Act part of the lessor's land which was subject to this right of the lessee. It was held that the lessee was entitled to obtain compensation under sect. 68 by reason of his land—that is to say, his mine—being injuriously affected by the loss of the power of exercising his right of opening new pits in the land taken by the company. He was entitled to obtain compensation for the diminution of his affirmative right to come on to his lessor's land and sink pits. It seems to me to make no difference, as regards obtaining compensation, whether the right be an affirmative one like that or a negative one that a particular piece of land shall be kept in a certain condition for the benefit of the adjoining land. Whether the right be affirmative or negative, the question is whether it is for the benefit of land of the claimant, and whether it affected the value of the land. A reduction in the value of the land would be the subject-matter of compensation. I do not think I need go through the cases more specifically, but perhaps I ought to refer to another decision of the Court of Appeal in the case of *Manchester, Sheffield, and Lincolnshire Railway Company v. Anderson* (*ubi sup.*). It is true that in that case the house which was said to have been injuriously affected by a breach of the covenant for quiet enjoyment was also to some extent structurally injured. But I think that the grounds upon which Lindley, M.R. treated the rights as

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existing, are very material to the question now under discussion. He said: "When we consider the remedy, I fail to see the answer to the contention of the railway company. They say: 'You cannot bring an action against us on the covenant or otherwise for anything we are doing lawfully under our statutory authority.' It is said that then the covenant is of no use to the defendant; but it is of very considerable use to him, for it may give him rights of compensation which otherwise he might not have." That is to say, if you have a right under a covenant binding another person to do, or not to do, something that may enhance the benefit of your land, the withdrawal of that right is the subject-matter of compensation under the Lands Clauses Act. Lindley, M.R. continued: "He may be able to prove, having regard to his covenant, that his land is injuriously affected where he could not prove it if he had no such covenant. Suppose, for instance, that this is a house less than twenty years old, and suppose the railway company had not bought the reversion and that they made an excavation which let the house down, it is possible that letting it down would be no actionable wrong. But that could not possibly be the case where the company are bound by a covenant of this kind, because, whether the house was new or old, the assignee of the reversion could not lawfully let it down except under their statutory powers. The covenant, therefore, is by no means inoperative; it binds the company just as it would bind anyone else." Those words do not refer to the precise thing—a restrictive covenant—which we have to consider in the case now before us, but in principle they are very applicable. For the reasons, therefore, that principle is in favour of it, that there is no authority against it, and that such authorities as there are are entirely in its favour, I am clearly of opinion that the breach of the restrictive covenants in this case are the proper subject-matter for a claim for compensation under sect. 68. I should add that one shadow of an authority bearing the other way was cited to us. Reliance was placed upon some observations of Hannen, J. in delivering the judgment of the Court of Queen's Bench in *Baily v. De Crespigny* (*ubi sup.*). The actual decision in that case is entirely beside the point now under discussion. The observations relied upon were made by the learned judge only in reference to the point he was deciding, and he certainly had not before him for decision—nor does he seem to have addressed his mind to it at all—the question whether the claimant might have got compensation if he had started by claiming it. The passage relied upon occurs at the end of the judgment. It is this: "The solution of the case appears to be that the plaintiff is one of a numerous class of persons injured by the construction of a railway, for whom the Legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station with the appurtenances, including water-closets and urinals. These are heads of damage for which railway companies are not in ordinary circumstances bound to give compensation, but for

which the defendant would be liable in an action on his covenant." That explains the judgment. The learned judge was dealing with the general loss of amenities, which gives no special rights to persons under a covenant. In that case the defendant had covenanted with the plaintiff not to build upon the land. The railway company then took the land compulsorily from the defendant and built upon it. The action was brought, not against the railway company, but against the covenantor for breach of covenant. The only question for the decision of the court was whether the covenantor, having had to part with the land under the railway company's compulsory powers, had been guilty of a breach of his covenant not to build on the land by reason of the buildings erected by the railway company. In the dicta referred to, Hannen, J. merely pointed out that the plaintiff was only a person who had to suffer the general inconveniences which people have to suffer when they find the amenities of their land injured by a railway. The plaintiff had suffered no legal wrong, and was not entitled to compensation. For these reasons I think that the appeal ought to be dismissed. I should add that I entirely agree with what appears to me the admirable judgment of my brother Lawrence.

MATHEW, L.J.—I am of the same opinion. The first objection that was made does not seem to me to be tenable either in fact or in law. It was said that in consequence of the form of the claim which was made at the inquisition before the sheriff and jury, the jury may have awarded compensation in respect of something that was not the proper subject of compensation, and therefore, it was argued, the judgment pronounced in the inquisition was wholly bad, and must be treated as null and void. On referring to what actually took place at the inquisition, it is clear that the matter was dealt with on the reasonable footing that the question was whether or not the embankment caused a depreciation in the value of the property. No distinction was drawn with regard to the extent of the covenant. The embankment was the thing complained of, and was the subject of the assessment of compensation. A suggestion was made that there had been some miscarriage as to what was laid before the jury which ought to have the effect of putting an end to the inquisition altogether. But the authorities that have been referred to abundantly show that, when once the subject of compensation has been put before the jury, the sum awarded by the jury is binding between the parties to the inquisition. If the railway company felt itself in any way aggrieved by the verdict of the jury, the proper mode of redress would have been to bring up the inquisition by *certiorari* and to get it set aside. It will not do, when an action is brought to enforce the verdict of the jury, to say that there was some irregularity in the proceedings before the sheriff which renders the inquisition bad. That point being disposed of, it is hardly necessary for me to add anything to what has been already said by the Master of the Rolls in his very full and exhaustive judgment. But the point was taken that the erection of this embankment was not a breach of the covenant not to erect any buildings on the land other than private dwelling-houses. The covenant was made in respect of an estate, part of which had been laid out at considerable

expense for building, and which it was desired to protect. It was argued that the embankment was not a "building" within the meaning of the covenant. But the object of the covenant is to prevent the land from being used for any other purpose than for the erection of private dwelling-houses; and in that respect the covenant has been broken. Then the point was taken that, assuming the covenant had been broken, the breach was not the subject of compensation under sect. 68 of the Lands Clauses Act. It is said that there is no case to be found justifying the conclusion that such a subject-matter is within the terms of sect. 68. But, though there has been no precise decision on this point, yet a number of cases have been cited in which over and over again high authorities have intimated that a restrictive covenant of this kind is the subject of compensation under the Lands Clauses Act. It is difficult to see why it should not be so. This is, as is described in one of the cases, clearly a negative covenant adding to the monetary value of the estate. As against the railway company the covenant is entirely apart from and in addition to the rights of the public—rights which are taken away when the statutory powers are obtained. Statutory powers are never intended to affect a covenant of this sort, which is part of the value of the estate. For these reasons I agree that the appeal must be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion, and, but for the general importance of one point in this case, I should be content not to add a word to the judgments that have been delivered. The real and important question here is whether a person entitled to the benefit of a restrictive covenant of this kind can claim compensation on the ground of his land being injuriously affected when land subject to the burden of the restrictive covenant is compulsorily taken by a railway company. I confess I was surprised to hear that such a question was open to argument. When one comes to consider what is the meaning and effect of a restrictive covenant of this nature, it is difficult to conceive a case which more clearly comes within the spirit, and I should have thought the letter also, of sect. 68. What is the meaning of a restrictive covenant? I think Sir George Jessel described it as an equitable burden on the purchased property in favour of the vendor. Of course the burden only affects the value of the property in the hands of the covenantor and persons taking with notice, but, so long as those facts are continued, there is an equitable burden on the purchased property in favour of the vendors. When a railway company comes and relieves the property from that burden, it undoubtedly, in my opinion, deprives the vendor's property of a benefit which was reserved to it by the original instrument of conveyance. But then, said Mr. Sargant in his very able argument, it is not enough to show that a covenant of this kind may be made for value; it must be shown for whose benefit it was entered into—who was the person who could claim the benefit of it. He endeavoured to persuade us that it is one of those cases which have undoubtedly given rise to great difficulty, as to who is the assignee entitled to the benefit of the section, without any reference whatever to a case like this, where the plaintiffs are themselves the covenantees, there being no assignment at

all. However that may be, I think it is quite clear that, in considering the question who is entitled to the benefits of the covenant, you must look at the conveyance itself, and at all the surrounding circumstances. On looking at the conveyance I see that the entire property, including the recreation ground and this piece of land, was conveyed to the plaintiff company in 1884, and this conveyance is covenanted to be produced to the purchaser under the conveyance I have before me. The conveyance itself contains a plan showing the recreation ground and Springfield-avenue. The conveyance I have before me shows that it was part of the bargain between the vendors and the purchasers that the vendors should retain the part of Springfield-avenue which was next to the recreation ground and mutual covenants should be entered into for the making and maintaining of the road. It seems to me the absolutely inevitable result from the conveyance itself and all the surrounding circumstances that these covenants were entered into for the benefit and protection of such portion of the property conveyed to the plaintiffs in 1884 as had not been disposed of at that time, and in particular for the benefit of the recreation ground which was immediately on the other side of Springfield-avenue. If you once get to that point, it seems to me to follow necessarily that there is that which would have been an injury, a legal cause of action, but for the Act of Parliament. Then comes the Act of Parliament and the inquisition held under it before the sheriff and a jury to ascertain the damage actually sustained. I agree that the construction of this railway embankment is a breach of the covenant not to erect on the land any buildings but private dwelling-houses. The embankment is a thing elaborate in its construction, and permanent in its nature. It must necessarily prevent the erection of dwelling-houses on the land such as are contemplated by the covenant. For all these reasons, in addition to those which have been given by the Master of the Rolls, I think that the judgment of Lawrence, J. was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *J. H. Lee and Watts*, for *Whittingham and Williams*, Nottingham.
Solicitors for the defendants, *Beale and Co.*

Wednesday, June 11.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.).

FRANCIS MORTON AND CO. v. WOODWARD. (a)
APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Review of weekly payment—Application by employers—Date from which weekly payment may be altered—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), sched. 1, par. 12.

Employers who were making weekly payments as compensation under the Workmen's Compensation Act 1897 to an injured workman, filed an application for a review of such weekly payment

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

on the ground that the workman's incapacity to work had diminished.

Held, that the County Court judge had jurisdiction to inquire at what date since the filing of the application the workman's incapacity had diminished, and to make an award accordingly.

THIS was an appeal by the plaintiffs from an order made by the judge of the Liverpool County Court, under the Workmen's Compensation Act 1897, upon an application by them to review the weekly payments they were making as compensation to the defendant, a workman who had been injured by accident in the course of his employment by them.

On the 14th May 1901 the workman, who was a rivetter, met with an accident while rivetting boilers by which he lost the sight of one eye.

On the 28th Aug. his employers agreed to pay him 18s. 3d. a week, being the amount of half his weekly earnings, as compensation under the Workmen's Compensation Act 1897; and a memorandum of this agreement was registered under par. 8 of sched. 2 of the Act.

On the 2nd Sept. a Dr. Stephenson examined the workman on behalf of the employers, and certified that in his opinion the workman's incapacity to work had ceased.

On the 12th Nov. the employers filed an application under par. 12 of sched. 1 for a review of the weekly payment on the ground that the workman's incapacity had ceased. Up to this date they had paid him the agreed weekly payments, but on filing their application for a review, they stopped these payments.

On the 13th Dec. the application came on for hearing.

The certificate of Dr. Stephenson was produced and tendered as evidence, but the workman stated that he had not been previously informed of the contents of the certificate, and that he was not satisfied with it.

Dr. Stephenson was called and gave evidence, but the County Court judge said that the evidence before him was insufficient, and thereupon, under par. 11 of sched. 1, referred to a Dr. Shears, a medical referee, the question: "Whether the said John William Woodward has now fully recovered from the effects of the accident, and is quite fit for work and able to follow his employment?"

To this reference the judge appended the certificate of Dr. Stephenson, given on the 2nd Sept.

On the 2nd Jan. 1902 Dr. Shears made the following report:

John William Woodward's remaining right eye has good sight, and is free from disease. In my opinion a one-eyed man runs a slight additional risk to this eye in a dangerous occupation such as that of a boiler maker; if, however, the parties concerned have decided to incur this slight risk, I see no reason why J. W. Woodward should not at once return to his former occupation. I am of opinion that for some weeks J. W. Woodward will not be restored to his full earning capacity, and for the following reason: Owing to the loss of one eye he will have difficulty in correctly judging of the distance of objects. This would particularly apply to the striking of a rivet with a hammer; but with practice this awkwardness will disappear, and he will learn to correctly judge of distances with his one eye. As a one-eyed man he would probably experience more difficulty in obtaining work from new employers.

On the 11th April the case came on again for hearing, and the County Court made an award

as follows: "I find that the respondent, John William Woodward, has been since the 2nd Sept., and now is, able to earn the same amount of wages as he had earned previously to the application for arbitration herein, and I order that the weekly payment of 18s. 3d., payable to the respondent under the agreement of the 28th Aug. 1901 . . . be diminished to the weekly sum of one penny as and from the 16th April instant; but this award is made without prejudice to the rights and remedies of the respondent under the said agreement for the arrears of the weekly payments up to the 16th April instant inclusive."

From this award the employers appealed.

Ruegg, K.C. and Leslie F. Scott for the employers.

Banks, K.C. and W. Greaves Lord for the workman.

COLLINS, M.R.—In this case the workman was a rivetter, and in the course of his employment he met with an accident which resulted in the loss of the sight of one eye. His employers came to an agreement with him by which they agreed to pay him a weekly sum as compensation, and a memorandum of this agreement was registered under the Act. Then a time came when the employers contended that the workman was fully restored to his capacity for earning wages. The workman disputed that. In Nov. 1901 the employers filed an application in the County Court, under par. 12 of the first schedule to the Workmen's Compensation Act 1897, for a review of the agreed weekly payment. The application was heard in December, when it appeared that in the previous September the workman had submitted to a medical examination at the instance of the employers, but that the result of the examination had not been communicated to him. When the doctor's certificate was read at the hearing of the employer's application the workman expressed dissatisfaction with it. Thereupon the County Court judge, acting under the provisions of the Act, submitted the matter to a medical referee to report upon. The terms of the reference were that the medical referee should report "whether the said John William Woodward has now fully recovered from the effects of the accident, and is quite fit for work and able to follow his employment." The judge appended to this reference the certificate that had been given by the doctor after the medical examination in September. On the 2nd Jan. 1902 the medical referee made a certificate, in which he pointed out certain lingering incapacities, or drawbacks to full capacity, from which the workman continued to suffer with regard to the work which he had formerly been accustomed to do. In April the County Court judge resumed the hearing of the employer's application, and he then made the award against which the employers have now appealed. The County Court judge found as a fact that the workman had not been incapacitated since the medical examination in Sept. 1901 up to the date of the hearing of the employers' application; and, while he saved intact the rights of the parties as to the obligation of the employers to pay compensation, he merely reduced the compensation to be paid after April 1902 to a nominal sum. The County Court judge seems really to have been of opinion that he had no jurisdiction to deal with the question at what date

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the workman's incapacity ceased before the date of the hearing of the application. In that opinion I think the learned judge was wrong. When the application was made by the employers the dispute was whether the workman in consequence of any incapacity from his injury was then entitled to the agreed compensation. The delay in the hearing did not affect the employers' right to have that question decided, though the delay may have made it a more difficult question to decide. The certificate of the medical referee was not necessarily conclusive as to the condition of the workman at the previous date. The scheme of the Act is that compensation is to be given during the period of a workman's incapacity to earn his usual wages. The essential thing to find out in this case was the workman's capacity at the time when the dispute between him and his employers was formulated. It was formulated when the application was made in the County Court. It seems to me that the learned judge did not address himself to find out that. The evidence given at the first hearing cannot, according to his own record, be taken as conclusive. If it is not conclusive, how are we to know at what date the incapacity ceased? He has himself said that the medical evidence was insufficient. It was, however, the only evidence on which he could find at what date the incapacity had ended. Therefore, it seems to me that neither side is right, and the question still remains to be decided at what date the workman's incapacity ceased. The case must, therefore, be sent back to the County Court judge. The learned judge was not precluded by the delay in the hearing of the application from deciding what was the condition of the workman when the dispute was formulated, and making his award accordingly. The appeal must therefore be allowed.

MATHEW, L.J.—I am of the same opinion. The delay that took place in the hearing ought not to prejudice either side, and, according to the decision of the learned County Court judge, it does prejudice the employers, as they are treated as liable up to the date of the final decision. The question for the court was whether the workman's incapacity had ceased at the time when the employers initiated proceedings in November. The question referred by the learned judge to the medical referee was not the same as that which the learned judge had himself to dispose of. The question referred to the referee was only what was then the condition of the workman. He reported that the man's incapacity had been diminished, but had not been entirely got rid of. The question still remained for the County Court judge to determine at what date the incapacity had been so much diminished that the amount of the compensation ought to be reduced. The workman was called and was asked whether he was capable of working, and objection was made that on that point the certificate of the medical referee was conclusive. It was not conclusive on the point which the learned judge had to consider. That being so, he was wrong in holding that he had no jurisdiction to decide the point. I agree that the case must go back to him to say at what date the incapacity ceased.

COZENS-HARDY, L.J.—I agree. The question for the County Court judge was whether at the

date of the initiation of the proceedings the workman's incapacity to work had ceased. On that question he was bound to hear evidence. The report of the medical referee was only as to the workman's condition on the 2nd Jan. 1902. That may throw light, no doubt, on his condition at the earlier date; but I see nothing in the Act to make it the sole admissible evidence as to the condition of the man at an antecedent date or even at the subsequent date when the matter comes on for decision. All that I need now decide is that the learned County Court judge had jurisdiction, if he thought fit, to review the payment to the workman as from the date of the employers' application.

Appeal allowed.

Solicitors for the employers, *William Hurd and Son, for Oliver, Jones, Billson and Co., Liverpool*.
Solicitors for the workman, *Helder, Roberts and Co., for H. F. Neale, Liverpool*.

Wednesday, May 14.

(Before WILLIAMS, ROMER, and MATHEW, L.JJ.).
HERTFORDSHIRE COUNTY COUNCIL v. BARNET
RURAL DISTRICT COUNCIL. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Local Government—Highways—Bridges—Surveyor of Highways—Agreement between surveyor of highways and county council for building bridge—Power to bind successors—District council becoming highway authority—Liability under agreement—Highways and Bridges Act 1891 (54 & 55 Vict. c. 63), s. 3.

The surveyor of highways for a parish was appointed on the 19th April 1898 for one year. On the 24th Sept. 1898 he made an agreement with the county council, under sect. 3 of the Highways and Bridges Act 1891, for the building of a bridge in the parish by the county council, and thereby agreed to contribute towards the expenses two sums of 100l., payable on the 31st Dec. 1898 and the 31st Dec. 1899 respectively.

On the 1st April 1899 the rural district council became the highway authority for the parish, under sect. 25 of the Local Government Act 1894, and they refused to pay the sum of 100l., which became due under the agreement on the 31st Dec. 1899, upon the ground that the surveyor of highways could not bind his successors.

Held (affirming the judgment of Lawrance, J.), that the surveyor of highways had power, under sect. 3 of the Highways and Bridges Act 1891, to make this contract so as to bind his successors, and that the liability thereunder passed to the rural district council.

THIS was an appeal by the defendants from the judgment of Lawrance, J., at the trial of the action without a jury.

The plaintiffs brought this action to recover the sum of 100l. due under an agreement made between the plaintiffs and one Henry Lovejoy.

On the 19th April 1898 Lovejoy was appointed surveyor of highways for the parish of Totteridge, in the rural district of Barnet, for the period of one year.

By a deed dated the 24th Sept. 1898, and made

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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between the plaintiffs of the one part, and Henry Lovejoy, as such surveyor of highways for the said parish of Totteridge, on behalf of himself and his successors, as highway authority in and for the said parish (hereinafter called "the highway authority"), of the other part, after reciting that the parties thereto were desirous of constructing a bridge for the purpose of carrying the highway, leading from the town of Barnet to the Totteridge main road near the Totteridge church, over the stream or ford known as Totteridge Ford at the point situate within the parish of Totteridge where the stream or ford crossed the highway, and that it had been arranged that the parties thereto should enter into the agreement hereinafter contained for or in relation to the construction of such bridge, and for determining the proportions in which the expenses to be incurred for the purpose aforesaid should be defrayed by the parties respectively, and that it was estimated that the expenses would amount to the sum of 600*l.* or thereabouts, in exercise of the powers conferred on them respectively by sect. 3 of the Highways and Bridges Act 1891, and of all other powers (if any) enabling them in that behalf, the parties to the deed mutually agreed and declared as follows :

(1) That a bridge should be constructed for the purpose of carrying the said highway over the said stream or ford at the point aforesaid, and that all such works as the county surveyor for the time being of the said county of Hertford should deem necessary or proper for the purposes aforesaid should be executed by the plaintiffs as soon as might be under the directions of the said county surveyor.

(2) That the expenses to be incurred in the execution of the said works should be borne, as to the sum of 200*l.* part thereof, by the highway authority, and as to the residue thereof (not exceeding 400*l.*) by the plaintiffs;

(3) That the said sum of 200*l.* should be paid to the plaintiffs by the said highway authority out of such moneys as such authority should from time to time be authorised to apply for the purpose aforesaid, and that such authority should take all proper steps for raising the said sum and should pay the same to the plaintiffs by two equal instalments of 100*l.* each, of which the first should be so paid on the 31st Dec. 1898 and the second should be so paid on the 31st Dec. 1899.

(4) That all disbursements required to be made for the purposes of the said works should be made by the plaintiffs as occasion should require out of the moneys so received by the plaintiffs from the said highway authority or payable by the plaintiffs under the agreement, and that the said works and the superintendence thereof and the making of all contracts and the doing of all things in connection therewith should be under the sole control of the plaintiffs and the said county surveyor.

(5) That as soon as the said bridge should have been erected and completed to the satisfaction of the county surveyor, and all moneys payable to the plaintiffs by the said highway authority under the agreement should have been paid, the said bridge should be taken over by the county council as a county bridge and should thereafter be maintained and repaired by the county council.

(6) And that nothing in the agreement should be construed as imposing any liability on Henry Lovejoy to pay any sum out of any moneys other than moneys coming to his hands as highway authority for the said parish of Totteridge, and that his liability under the said agreement should be deemed to be and should enure as a liability of the highway authority for the time being having jurisdiction in and for the said parish.

On the 31st Oct. 1898 the works in connection with the bridge were commenced, and were thenceforth continued by the plaintiffs, and all the expenses of the works were paid by the plaintiffs from time to time.

On the 2nd Jan. 1899 the first instalment of 100*l.* provided for by the agreement was paid to the plaintiffs by Lovejoy, as such surveyor of highways.

On the 1st April 1899 the defendants, pursuant to the provisions of sect. 25 of the Local Government Act 1894, became the highway authority for the parish of Totteridge.

The erection of the bridge was completed, and all the works in connection therewith were finished about the 25th Oct. 1899, and all the expenses thereof were paid by the plaintiffs.

On the 31st Dec. 1899 the second instalment of 100*l.* became due under the agreement, but the defendants refused to pay upon the ground that Lovejoy, as surveyor of highways, had no power to make any contract extending beyond his year of office.

The Highways and Bridges Act 1891 (54 & 55 Vict. c. 63) provides :

Sect. 3. The council of any administrative county, and any highway authority or authorities, and the council of any adjoining county, may from time to time make and carry into effect agreements with each other for or in relation to the construction, reconstruction, alteration, or improvement, or the freeing from tolls, of any main road or other highway, or of any bridge (including the approaches thereto), wholly or partly situate within the jurisdiction of any one or more of the party or parties to the agreement. All expenses incurred by any such county council or highway authority, in pursuance of this section, shall be defrayed as part of the expenses incurred in relation to the maintenance, repair, improvement or enlargement of bridges, main roads, or other highways by such council or highway authority, in such proportions as shall be determined by any such agreement as aforesaid, and any powers of borrowing, applicable to the raising of any fund for the payment of any such expenses as aforesaid, shall be applicable accordingly. Provided that if a highway board think it just that any parish or parishes specially benefited by any construction, reconstruction, alteration, or improvement under this section should bear the expense thereof, or any part of such expense, they may, with the approval of the county council of the county within which their highway district is situate, and with the assent of the inhabitants of such parish or parishes in vestry assembled, charge such expense, or such part thereof as they may think just, exclusively in such parish or parishes.

The Local Government Act 1894 (56 & 57 Vict. c. 73) provides :

Sect. 25 (1). As from the appointed day there shall be transferred to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority in the district, and of any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the rural sanitary authority and highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under sections one hundred and forty-four to one hundred and forty-eight of the Public Health Act 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority. Provided that the council of any county may by order postpone within their county or any part thereof the operation of this section, as far as it relates to highways, for a term not

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exceeding three years from the appointed day, or such further period as the Local Government Board may on the application of such council allow.

The action was tried before Lawrance, J., without a jury, on the 17th May 1901.

Danckwerts, K.C. and *R. D. Muir*, for the plaintiffs.

Macmorran, K.C. and *Alexander Glen* for the defendants.

LAWRANCE, J.—In this action the question is whether in the circumstances of this case, and under the agreement which was made on the 24th Sept. 1898 between the Hertfordshire County Council and Mr. Lovejoy, the surveyor of highways at that time for the parish of Totteridge, for the building of a bridge, Mr. Lovejoy was in a position to impose upon his successors the liability for 100l., part of the expenses, which was not to be paid according to the agreement until after his term of office would have expired. The facts were as follows: Mr. Lovejoy was appointed the surveyor of highways for Totteridge on the 19th April 1898, and his year of office would expire on the 19th April 1899. The agreement between him and the county council was made on the 24th Sept. 1898. On the 1st April 1899, which in the circumstances of this case was "the appointed day" under sect. 25 of the Local Government Act 1894, the Barnet District Council became the highway authority for the district. The question is whether, under sect. 25 of the Act of 1894, the district council took over this liability as one of the liabilities which they were called upon to discharge. In my opinion, they did take over this liability. At that time Mr. Lovejoy was undoubtedly the highway authority, and in my judgment this was a liability of the highway authority which passed to the district council. I think that the district council are responsible for the carrying out of the agreement, and therefore there will be judgment for the plaintiffs.

Judgment for the plaintiffs.

The defendants appealed.

Macmorran, K.C. and *Alexander Glen* for the appellants.—The judgment of the learned judge was wrong, for this was a liability which the surveyor of highways had no power to impose upon his successors. The surveyor of highways is not a corporation, and has no power to make any contracts or to incur any liabilities which will extend beyond his term of office so as to bind his successors:

Frodingham Iron and Steel Company v. Bowser, 71 L. T. Rep. 433; (1894) 2 Q. B. 791.

He must defray all the expenses which he incurs out of the funds which are raised by him during his term of office. If he incurs liabilities which he cannot meet out of those funds, his successor may reimburse to him the deficiency, under sect. 5 of the Highway Act 1882 (45 & 46 Vict. c. 27). That section provides the only protection for a surveyor of highways who incurs liabilities which he cannot meet out of the rates levied by him and the other moneys which he may receive during his term of office; and it shows that he cannot impose any liabilities upon his successor. The only power under which a parish can contribute to highway expenses incurred by another authority is that contained in sect. 49 of the Highway Act 1864 (27 & 28 Vict. c. 101), which does not apply

to a case of this kind. The effect and substance of this transaction was the same as the borrowing of money for a present capital expenditure upon improvements so as to throw the liability upon future ratepayers. Any highway authority or other local authority must obtain the sanction of the Local Government Board before it can borrow money, and the contention of the plaintiffs in effect is that a surveyor of highways, as highway authority, can do that which no other local authority can do—that is, raise a loan and impose liability upon future ratepayers without obtaining that sanction which all other local authorities must obtain. This contract, so far as it sought to bind his successors, was *ultra vires* of the surveyor of highways and invalid. Sect. 3 of the Highways and Bridges Act 1891 does not confer upon a surveyor of highways any power to incur liabilities of a character which he could not otherwise incur; it relates only to the subject-matter of a contract which he may make.

Danckwerts, K.C., *R. D. Muir*, and *T. B. Colquhoun Dill*, for the respondents, were not called upon to argue.

WILLIAMS, L.J.—In my opinion this appeal must fail. The argument advanced on behalf of the appellants really amounts to this: While it cannot be denied that the words of sect. 3 of the Highways and Bridges Act 1891 are such that, if construed in their natural and plain sense, they do give to the surveyor of highways, as the highway authority, power to enter into such an agreement as this; yet it is said that, if we construe this section according to its plain meaning, we shall be imputing to the Legislature that by this section they passed a law which is not entirely consistent with previous legislation, and with the legal history of this matter. That is not, in my opinion, a sufficient reason for not giving to this section the plain meaning of the words used. It is not a sufficient reason to compel or justify us in refusing to give to this section that which appears to be the manifest meaning of the Legislature. It may be that the Legislature, when they passed this section, did not contemplate that they were giving to a surveyor of highways a larger authority than that which was given to what may be called the superior authorities. Even if that were so, it would not justify us in not giving its plain meaning to this section. That being so, and there being no dispute that, under sect. 25 of the Local Government Act 1894, the duties and liabilities of the surveyor of highways passed to the district council, I think that the decision of Lawrance, J. was right, and that this appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. I think that we ought not to narrow the meaning of sect. 3 of the Highways and Bridges Act 1891 as contended by the appellants. The power of the surveyor of highways, as the highway authority, to make an agreement as to the construction of a bridge, under sect. 3, is clearly not limited to cases where the work of constructing the bridge will not last longer than his term of office, or to cases where he pays in advance if the work will continue beyond his term of office. I do not see why he should not agree that payment should be made in the ordinary way as the work proceeds. The opposite construction of sect. 3 would really often make it impossible for a surveyor of high-

ways to make any proper contract for work of this kind. Sect. 3 gives the surveyor of highways power to make such an agreement at any time during his term of office, and not merely an agreement which will be fulfilled during his term of office. I agree that the power given by sect. 3 must be exercised reasonably, and that a surveyor of highways might enter into an agreement which upon the face of it would be an abuse of the power given by sect. 3. That is not so in the case of this agreement. This bridge took more than a year to build, and the agreement was to pay a part of the expenses by two yearly payments. That was a reasonable and proper agreement, and was within the powers conferred by sect. 3. I agree, therefore, that this appeal fails and must be dismissed.

MATHEW, L.J.—I am of the same opinion. With reference to certain particular charges and expenses, the surveyor of highways has only a limited power, and can only incur expenses which are defrayed during his year of office. It is contended that we ought to construe sect. 3 of the Highways and Bridges Act 1891 as subject to that limitation. This is an exceptional kind of contract—it is an agreement in relation to the construction of a bridge, the completion of which is likely to extend beyond the year. I do not think that it would be right to construe this Act of Parliament by reference to the ordinary limited powers of a surveyor of highways. Under sect. 3 a surveyor of highways can make any reasonable contract, and in relation to the building of a bridge it is reasonable to make a contract for payment extending over two years.

Appeal dismissed.

Solicitors for the appellants, *Byfield and Son*.
Solicitors for the respondents, *J. N. Mason and Co.*, for *C. E. Longmore*, Hertford.

Friday, June 6.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

ARMITAGE v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—"Arising out of the employment"—Wrongful act of fellow workman—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 1 (1).

The plaintiff was employed in the works of the defendants with a number of other boys. One of the boys while "larking" pushed another boy into a pit, who then in anger threw at him a piece of iron which was lying in the pit. The iron missed the boy at whom it was thrown, but hit the plaintiff, who was properly engaged in his work, and seriously injured him.

Held (allowing the appeal), that the accident did not arise "out of" the employment, and that the plaintiff was not entitled to compensation under the Workmen's Compensation Act 1897.

THIS was an appeal by the defendants from the award of the County Court judge at Manchester

in proceedings for compensation under the Workmen's Compensation Act 1897.

The plaintiff was an apprentice in the employment of the defendants in an employment to which the Workmen's Compensation Act applied.

The plaintiff was at work at the defendants' carriage works, where a number of other boys were employed. Harrop, one of these boys, while "larking," pushed Smith, another boy, into a pit, and Smith in anger threw a piece of iron, which was lying in the pit, at Harrop. The piece of iron missed Harrop, but hit the plaintiff, injuring his eye so seriously that it had to be removed.

When this accident happened the plaintiff was properly engaged in doing his work.

The plaintiff claimed compensation under the Workmen's Compensation Act, but the defendants denied liability, upon the ground that the injury by accident did not arise "out of" the employment, within the meaning of sect. 1 (1) of the Act.

The County Court judge found as a fact that there was an accident to the plaintiff, and that the accident arose out of and in the course of his employment, and he made an award in favour of the plaintiff.

The defendants appealed.

C. A. Russell, K.C. and *Spencer Hogg* for the appellants.—The decision of the County Court judge was wrong. It was not a mere question of fact for the judge whether this accident arose "out of" the employment, and he must have misdirected himself in finding that it did so arise. It cannot be said that this accident arose "out of" the employment. This accident was caused by the wilfully wrongful act of another workman in the same employment, which had no relation whatever to the employment, and was not within the scope of the employment. It was not, therefore, one of the risks incident to the employment, and cannot be said to be an accident arising "out of" the employment. An employer is not liable under the Act to pay compensation in respect of every injury by accident which may happen to a workman while he is employed. The accident must arise "out of" the employment, and that means that it must be one of the risks which is incident to the employment. If the accident arises from the act of another workman done within the scope of the employment, it arises "out of" the employment; but, if it arises from an act done by another workman entirely outside of the employment, then it does not arise "out of" the employment. This question has been carefully considered in a similar case in Scotland, and it was held, by a majority of the judges, that an accident caused to a workman by the "horse-play" of his fellow workmen did not arise "out of" the employment, and that the injured workman was not entitled to compensation under the Act:

Falconer v. London and Glasgow Engineering, &c., Company, 3 Ct. of Sess. Cas. 564, 5th series.

A. Powell, K.C. and *McCleary* for the respondent.—The learned County Court judge was entitled to find that this was an "injury by accident arising out of and in the course of the employment." The principles of the common law do not apply to cases under the Workmen's Compensation Act. That Act gives a right to com-

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

pensation for all injuries by accident which the workman suffers during his employment, the only exception being where it is caused by his own "serious and wilful misconduct." It is conceded that this was an "accident," and that it arose "in the course of" the employment; but it is said that it did not arise "out of" the employment. This accident did arise "out of" the employment. It is immaterial whether it arose from the act of another workman within the scope of the employment or not. Where a number of boys are employed together it is a risk incident to the employment that things will be thrown about and injury caused thereby. An accident arising in that way is one of the risks of the employment, and is an accident which is likely to happen.

Russell, K.C. replied.

COLLINS, L.J.—In this case the learned County Court judge has made his award in favour of the plaintiff. The question which we have to decide is whether the learned County Court judge arrived at his decision by misdirecting himself. If he has decided a mere question of fact, his finding is conclusive. The circumstances of this case are these: The plaintiff, a boy employed by the defendants, while engaged upon his work, received a blow in the eye from a piece of iron, which had been thrown by another boy called Harrop at a boy called Smith, but had missed Smith and hit the plaintiff. The County Court judge held that the injury was caused by accident arising "out of and in the course of the employment." The question now is whether the accident under these circumstances could properly be held, as a matter of law, to have arisen out of the employment. It seems to me that it cannot. An act done by someone who happens to be in the same employment, which has no relation to that employment, but was a wrongful act and was intended to be a wrongful act against another person in the same employment, is not, in my opinion, within the scope of the employment as part of the risks of the employment. The Act does not provide an insurance against everything that may happen to the workman while he is employed. The injury must be caused by accident arising "out of the employment." I think that the test suggested by Mr. Russell as a guide—that is, to see whether the act which caused the injury and was done by a person in the same employment was done entirely outside of his employment or not—is a very useful test. Does the Act intend to protect a workman in the case of accidents arising from acts done by persons in the same employment, although they have no relation to the employment and may have been done to satisfy a grudge or from anger? It seems to me that in such a case the accident would not arise "out of and in the course of the employment." It would not be incident to the employment at all. It would be entirely outside the scope of the employment of the doer of the act and of the injured workman. This kind of case has been carefully considered in Scotland in *Falconer v. London and Glasgow Engineering Company* (3 Ct. of Sess. Cas. 564, 5th series), and the judgment even of the dissenting judge in that case seems to be consistent with our decision in this case. It seems to me, as a matter of law, that we cannot say that the injury caused by a missile thrown by another workman entirely outside of the scope of his

employment was caused by an accident which arose out of the employment. I think, therefore, that the decision of the learned County Court judge was wrong by reason of a misdirection of himself, and that this appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. I think that particular attention must be paid to the language of sect. 1 (1) of the Act, which provides that the employer shall be liable to pay compensation if injury by "accident arising out of and in the course of the employment" is caused to a workman. The test given by the Legislature is, therefore, whether the accident has arisen "out of and in the course of the employment." The accident must arise not merely in the course of, but also "out of," the employment. Did the accident in the present case arise out of the employment? It arose from an act done by another workman entirely outside of the employment of the man who did the act and of the injured man. It seems to me that we should alter the language of the section and in effect leave out the words "out of" if we were to accept the contention of the workman in this case. The accident in this case did arise "in the course of" the employment, but it certainly did not arise "out of" the employment. I agree, therefore, that this appeal must be allowed.

COZENS-HARDY, L.J.—I agree. The argument on behalf of the plaintiff involves the omission of the words "out of" in sect. 1 (1) of the Act. It seems to me that those words "out of" must relate to acts done within the scope of the employment by another workman, when the accident arises from the act of another workman. In the present case there was a mere wrongful and tortious act of one workman committed against another workman, which had nothing whatever to do with the employment. I agree that this appeal must succeed.

Appeal allowed.

Solicitors for the appellants, *Woodcock, Ryland, and Parker*, for *Moorhouse*, Manchester.

Solicitors for the respondent, *Chester, Broome, and Griffiths*, for *Chapman and Brooks*, Manchester.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 21, 1900; May 27, 1902.

(Before KEKEWICH, J.)

Re LEGH'S SETTLED ESTATE. (a)

Settled estate—Mansion-house—Dry rot—Rebuilding—Salvage—Settled Land Act 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. 4.

A tenant for life of settled estate is entitled to repayment out of capital of instalments paid to a corporation in respect of the costs and expenses incurred by him in laying out, sewerage, paving, and flagging new streets on the estate, so far as such instalments represent capital, but he is not entitled to interest.

Where the court is satisfied that the rebuilding of a mansion-house was necessary, the tenant for life is entitled to repayment to him by the trustees of one-half of the annual rental, but is not entitled to any further sum by way of salvage.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

THIS was an originating summons taken out by Col. Henry Martin Cornwall Legh, the tenant for life of certain settled estates in the counties of Chester and Lancaster, asking that the trustees of the settlement might be directed to apply out of capital moneys in their hands (being the proceeds of sale of part of the settled land) the sum of (a) 1173*l.* 1*s.* for instalments paid or payable to the corporation of Manchester in respect of the costs and expenses incurred by him in laying out, sewerage, paving, and flagging new streets at Openshaw, laid out upon, and constructed for the purpose of improving and developing the same as a building estate; (b) the sum of 1260*l.* or such further or other sum as might be found necessary for taking down, rebuilding, and reconstructing such external and internal walls, and other portions of High Legh Hall, the principal mansion-house on the settled estates as might be found necessary to be taken down and rebuilt or reconstructed.

The settled estates stood limited to the use of Col. H. M. C. Legh and his assigns for life without impeachment of waste, with remainder to his first and every other son in tail male, with remainder to the respondent Hubert Cornwall Legh and his assigns for life without impeachment of waste, with remainder to his first and every other son in tail male, with remainder to the respondent Sydney Cornwall Legh in tail male.

The applicant and the respondent Hubert Cornwall Legh had been married for many years, but neither of them had children.

The respondents, the trustees of the settlement, had a power of sale over the settled lands, and the proceeds of sale were directed to be laid out and invested by the trustees in the purchase of other freehold lands to be held on the same limitations.

The applicant in his affidavit stated that it was the custom of the Corporation of Manchester, after approving plans of proposed new streets, to sewer, pave, and flag the same and charge the expenses thereof upon the owner in accordance with the provisions of the Public Health Act 1875 and the Manchester General Improvement Act 1851 (14 & 15 Vict. c. 119); the money to be repaid to the corporation by instalments within a period of five years, the balance unpaid bearing interest at 5 per cent. per annum.

The sum of 1173*l.* 1*s.* claimed by the summons was incurred in the years 1892, 1893, and 1894, and 805*l.* 17*s.* 2*d.* had been advanced by the applicant, and 368*l.* 1*s.* 10*d.* remained due to the corporation.

At the time the works were executed there were no capital moneys in the hands of the trustees, and no scheme was approved by them.

The applicant also stated that the mansion-house, which was built in 1786, had become so infested with dry rot that in order to prevent the house from becoming absolutely ruinous it had been found necessary not only to remove and burn all the external and internal woodwork affected by the dry rot, including floors, joists, roofing, and window frames, but also to take down a portion of the outside walls and fabric and rebuild the same.

The surveyor stated in his affidavit that 1260*l.* was the estimated cost of removing and rebuilding the parts of the mansion-house affected

by the dry rot; but he was not able to give a final estimate until the portions of the mansion-house known to be affected had been removed.

The summons came on for hearing on the 21st July 1900.

Mulligan, K.C. and R. J. A. Morrison for the applicant.—The expenses incurred in sewerage, paving, and flagging the new streets come within sect. 25 (xvii.) of the Settled Land Act 1882:

Birmingham Corporation v. Baker, 17 Ch. Div. 782.

Capital moneys can be applied in discharging these expenses: (sect. 21 (ii.) of the Settled Land Act 1882). There has been a substantial rebuilding of the mansion-house: (sect. 13 (iv.) of the Settled Land Act 1890). *Re De Teissier's Settled Estates* (68 L. T. Rep. 275; (1893) 1 Ch. 153) does not apply:

Re Lord Gerard's Settled Estate, 69 L. T. Rep. 393; (1893) 3 Ch. 252;

Re Walker's Settled Estate, 70 L. T. Rep. 259; (1894) 1 Ch. 189.

Leonard F. Potts for the trustees.—The tenant for life is not entitled to repayment of the instalments paid to the Corporation of Manchester:

Re Dalison's Settled Estate, (1892) 3 Ch. 522.

In any case the applicant is not entitled to be repaid interest.

R. J. A. Morrison for the remaindermen.

KEKEWICH, J.—I sanction repayment by the trustees to the tenant for life of so much of the instalments under claim (a) of the first paragraph of the summons as represents payments of capital; and I authorise the trustees to pay off the remaining sums due to the corporation of Manchester to the extent of capital only. I do not allow interest in either case. The rest of the summons must stand over generally, as I think it better not to make an order until the completion of the necessary work. There will be liberty to restore.

May 27, 1902.—The summons as amended asked that (b) the sum of 17,109*l.* 7*s.* 3*d.* might be applied out of capital moneys in the hands of the trustees, for the taking down, rebuilding, and reconstruction of the mansion-house, and that the sums of 140*l.* and (d) 269*l.* 5*s.* 5*d.* spent in providing a water supply to High Legh Hall and the Home Farm respectively might be repaid to the tenant for life out of capital moneys. E. J. Muspratt, surveyor, in his affidavit, stated that the damage caused by dry rot had proved to be very considerable, affecting almost the whole of the house, and had necessitated extensive rebuilding. The dry rot fungus was found to be very extensive on the cellars and ground floor levels owing to the want of ventilation. The earth was found to be infected under the house, and it was necessary to excavate the earth to a depth varying from 1ft. to 3ft. The earth was then concreted over and the sleeper walls were rebuilt in honey-combed brickwork and thorough ventilation provided. The beams were replaced by steel joists, and the floor joists and floors removed. In the surveyor's opinion, unless the work of rebuilding and reconstruction had been carried out the whole house would in a few years have become ruinous and uninhabitable. The works executed amounted to a complete rebuilding and reconstruction of the parts affected, which constituted by far the larger portion of the mansion-house, and were

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necessary to prevent the house becoming ruinous and certain additions and improvements to the mansion-house were executed at a cost of 1962*l.* 16*s.* 3*d.*, which amount was included in the sum of 17,109*l.* 7*s.* 3*d.* claimed by the summons. The execution of the works was approved by the trustees. The capital moneys in the hands of the trustees amounted to 18,343*l.* 11*s.* 3*d.*, and the annual rental of the settled estates to 22,153*l.* 13*s.* 1*d.*

Mulligan, K.C. and R. J. A. Morrison for the applicant.—The mansion-house has practically been rebuilt, and one-half of the annual rental can be applied in such rebuilding, sect. 13 (4) of the Settled Land Act 1890. [KEKEWICH, J.—I think the tenant for life is entitled to one-half of the annual rental to pay for the rebuilding.] The court can allow the total expenditure of 17,109*l.* 7*s.* 3*d.* if satisfied that it is beneficial to the estate:

Drake v. Trefusis, 33 L. T. Rep. 85; L. Rep. 10 Ch. App. 364.

This is a case of salvage; the house has been saved from inevitable destruction:

Re Hawker's Settled Estate, 76 L. T. Rep. 286;

Re Montagu; Derbishire v. Montagu, 76 L. T. Rep. 485; (1897) 2 Ch. 8;

Re Willis; Willis v. Willis, 85 L. T. Rep. 436; (1902) 1 Ch. 15.

Leonard F. Potts for the trustees.

R. J. A. Morrison for the remaindermen.

KEKEWICH, J.—This is an entirely new point, and deserves attention. The mansion-house on this settled estate, which is one of considerable magnitude, was affected with dry rot; and, as invariably happens, it was impossible to ascertain for some time how far the dry rot had extended, and as, according to my experience it also always happens, when it was possible to ascertain the extent, it was found to be much larger than was at any preceding time anticipated. The result has been that the mansion-house has been entirely rebuilt. Of course that is not to be left entirely out of sight. Some additions have been made, and, of course, modern improvements introduced. There has been a new mansion-house, and it consists of work which is known in shipping cases as "new for old." An allowance is always made in estimating the work on a ship for the fact that new work is substituted for old, and to the extent of what you have new, the repair of a ship is to that extent very much better than what you had before. And so it must be with this mansion-house. It has been rebuilt really throughout. Now, supposing the Settled Land Act 1890 had not been passed, a difficulty might have arisen, how it was possible to get any money out of capital towards recouping the expenditure in rebuilding the house. Except to recognise it as a difficulty, I need say no more, because the Act of 1890 has enabled the court to sanction as improvements under the Act of 1882 the rebuilding of a principal mansion-house on the settled land. Also it is immaterial to consider in this case the details of the rebuilding, or how far this partial rebuilding is equivalent to rebuilding. It is difficult to lay down the line in most cases, and it is much more difficult to lay down a rule of general application, but, I repeat, there has been here of necessity, and

that is important, a rebuilding of the mansion-house. Therefore, if the Act contains simply the provisions which I have mentioned, I should sanction the sum which has been expended in that rebuilding being paid out of the capital moneys in the hands of the trustees. But the Act so provides that the sum to be applied under this sub-sect. 4 shall not exceed one-half of the annual rental of the settled land. Now, the annual rental of the settled land, which is, of course, the gross rental, is sworn to be 22,153*l.* Half of that—not exactly half, but with sufficient precision—would be 11,076*l.* I am satisfied from the evidence that more than 11,076*l.* has been expended, and therefore I can at once sanction that total sum without going into minute figures. But then the evidence shows that over 17,000*l.* has been expended. The exact sum is, 17,518*l.* 12*s.* 8*d.* less 140*l.* which is included in the total and can be had; so that there is 17,000*l.* odd, and if I can only allow 11,076*l.*, the result will be that the tenant for life will have to contribute out of income something like 6000*l.* of his own moneys. Now, it is argued on behalf of the tenant for life, and with much plausibility, that, if I cannot give him the whole sum under the Act of 1890, I can give him the rest—that is, the difference between what I can allow and the total expenditure—under the head of salvage. Now, the court has gone very far in some cases in allowing money to be spent with the view of salvage, which really means preservation—that is to say, preventing the thing in question from becoming nothing, being destroyed; and I am asked under that head to sanction this expenditure—that is to say, the difference between the 11,000*l.* and the 17,000*l.* I do not see my way to do that. The courts have again and again been exceedingly careful in applying the doctrine of salvage. Judges have applied it where they thought it ought fairly to be applied, and I have myself applied it several times where I thought it ought fairly to be applied, but they have all, including myself, taken care to say that the doctrine of salvage must be looked after with scrupulous care, and it seems to me to extend the application of the doctrine to a case of this kind would be carrying it further than it had ever been carried before, and carrying it to a very dangerous extent. I repeat, I see much plausibility in the view put forward by this tenant for life, and one's sympathies, if one may as a judge say so, are entirely with him. It is very hard that he should have to rebuild the mansion-house out of his own income, but I have already pointed out that it cannot be helped. But, of course, the house which is now being erected, is a different house from that which stood there before. I think one is entitled to take judicial cognisance of such things apart from the affidavits, and I have no doubt it is a very much improved mansion-house, a modern made mansion-house, much more convenient, and much more valuable, if it were possible to contemplate a sale of such a property, much more useful for letting, if you like to contemplate that such a place would be let, and it is impossible to my mind for any man, for a judge, or any other person, to say, so much of this money has been expended in salvage, and so much has been expended in improvements. I am only repeating what I have already said, but what the tenant for life wants me to do is to allow him as

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much as I can under the Act of 1890, and then to allow him the rest as salvage. Would it be possible for me to allow the whole of this as salvage? I say certainly not. If the tenant for life was appealing to me now under the head of salvage alone, one would have to go with extreme care and see how much has really been expended in preserving the mansion-house, that is to say, in taking care that there is at the present time, and shall be for those who succeed, such a mansion-house as there existed before the present applicant succeeded as tenant for life. It would be impossible for me to do that. It would be still impossible for me to find out how much more than 11,000*l.*, if anything, has been expended in salving the property. I think I should be making a precedent quite as strange, and going far beyond that which the court has ever yet done, if I were to say that a tenant for life could have part as the cost of rebuilding under the Act of 1890, and part as salvage. I say so particularly, because it seems to me that it is impossible to discriminate between what has been spent as salvage and what has not. Therefore the order I must make is this: "The court being of opinion that sums in excess of 11,076*l.*, being one-half of the annual rental of the settled estates, have been expended in the rebuilding of the principal mansion-house, on such estates, authorises the application of such sums by the trustees out of capital moneys in their hands; and I can also authorise the expenditure of the 140*l.*, which I have already mentioned, which is included in the 17,000*l.*, for the tank and other works there, and (d) 269*l.* 5*s.* 5*d.* for the construction of tanks or reservoir pipes in connection with the estate itself on the farm." I have written down the words which I have read because I think it is desirable to restrict the sanction of the court to the rebuilding of the principal mansion-house. I observe that the amendment of the summons has introduced some words about other consequential works which I do not find in the Act, and which I think ought not to appear in any order of the court. The costs as between solicitor and client will be paid out of the capital moneys.

Solicitors: *Philpot and Morrell*, for *Potts, Potts, and Gardner*, Chester.

May 27 and 31.

(Before BYRNE, J.)

JARED v. CLEMENTS. (a)

Vendor and purchaser—Equitable mortgage—Memorandum and deposit of title-deeds—Sale by mortgagor—Notice—Forged receipt on memorandum—Purchaser with legal estate and possession of title-deeds—Priority.

*J. T., the purchaser of two leasehold houses, applied to his solicitor, C. P., to find him 450*l.* to complete his purchase. The plaintiff, another client of C. P., found the money, and J. T. signed a memorandum of deposit in favour of the plaintiff for the money so advanced and charged the houses comprised in the title-deeds deposited by way of equitable mortgage with the repayment of the loan with interest. The title-deeds remained with C. P. as plaintiff's solicitor. Subsequently*

J. T. contracted to sell the two houses to the defendant, C. P. acting as his solicitor in the matter of the sale. The abstract of title did not disclose the equitable mortgage; but, on searching, the defendant's solicitors discovered its existence and required the same to be discharged. The purchase was completed, and an assignment of the property by the vendor to the defendant passing the legal estate was executed, and at the same time the memorandum of deposit with what purported to be a receipt by the plaintiff for all moneys due on the security was handed to the defendant's solicitor together with the title-deeds. The signature to the receipt was not that of the plaintiff, but a forgery committed by C. P.

Held, that the purchaser having the legal estate and possession of the title-deeds was not entitled to hold the property free from the mortgage, and that the equitable mortgagee was not deprived of his priority.

THE question for decision in this case was, which of two innocent parties, a purchaser and an equitable mortgagee, was to suffer by the fraud of a solicitor named Charles Parr.

The facts so far as material were as follows:

In Jan. 1897 one Joseph Taylor purchased two leasehold houses, and asked his solicitor, Charles Parr, to find him 450*l.* to complete his purchase.

At Parr's request the plaintiff found the money and the purchase was completed, and the houses were duly assigned to Taylor.

On the 15th Jan. 1897 Taylor signed a memorandum of deposit in favour of the plaintiff for the 450*l.* so advanced, and charged the houses comprised in the title-deeds deposited by way of equitable mortgage by way of security to the plaintiff, with the repayment of the sum of 450*l.* with interest thereon at 5*l.* per cent. per annum.

Charles Parr, acting as the plaintiff's solicitor, kept these title-deeds in his custody.

A receiving order in bankruptcy was made against Taylor in Sept. 1898, and rescinded in Jan. 1899.

In July 1899 Taylor contracted to sell these two houses to the defendant for 630*l.*, and again employed Parr as his solicitor in the matter of this sale. The abstract of title as delivered to the defendant did not disclose the equitable mortgage of Jan. 1897, but, on searching the file in bankruptcy to satisfy themselves that the receiving order had been discharged, the purchaser's solicitors discovered the existence of the equitable mortgage in favour of the plaintiff, and they thereupon wrote requiring it to be discharged. To this Parr replied that he was prepared to hand over the memorandum of deposit with a receipt endorsed on completion. This answer being considered satisfactory, on the 10th Aug. 1899 the purchase was completed, and an assignment of the property by the vendor to the defendant passing the legal estate was executed, and at the same time the memorandum of deposit, with what purported to be a receipt signed by the plaintiff for all money due on the security, was handed over to the defendant's solicitor, together with all the title deeds relating to the property. This receipt was dated the 10th Aug. 1897. The signature on this receipt was not that of the plaintiff, who knew nothing about the transaction, but was a forgery committed by Charles Parr. Interest on

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

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this mortgage was regularly paid to the plaintiff by Parr, first as Taylor's solicitor and afterwards from Jan. 1897 till the year 1901 when he absconded, out of his own pocket. No portion of the 450*l.* had been paid to the plaintiff.

The plaintiff commenced this action to establish the priority of his charge against the defendant.

The action was tried with witnesses, and the court found that the plaintiff had been guilty of no negligence or misconduct in allowing the title deeds to remain in the custody of his solicitor.

Norton, K.C. and Methold for the plaintiff.—The defendant purchased with express notice of this equitable mortgage, and, owing to the forged receipt, this mortgage as a fact was not discharged, therefore the mortgagee has priority over the purchaser. The title deeds were properly left by the plaintiff in the custody of his solicitor, and he was guilty of no negligence or misconduct in leaving those deeds with his solicitor. They referred to

Fisher on Mortgages, 5th edit., p. 19, par. 36.

Rowden, K.C. and W. H. Cozens-Hardy for the defendant.—No precautions were omitted by the purchaser, and it was believed that this mortgage had been discharged. The purchaser was deceived by a forged receipt. The defendant obtained the legal estate, and has had possession of all the title deeds, and this is sufficient to protect him against the plaintiff's claim :

Ratcliffe v. Barnard, 24 L. T. Rep. 215; L. Rep. 6 Ch. 652;

Bailey v. Barnes, 69 L. T. Rep. 542; (1894) 1 Ch. 25;

Hewitt v. Loosemore, 9 Hare, 449.

The answer made to the inquiry about this equitable mortgage by Parr was a reasonable one, and we were not bound to make further inquiries when the memorandum with the receipt enclosed was produced :

Jones v. Williams, 24 Beav. 47;

Gainsborough v. Watcombe Terra Cotta Company, 53 L. T. Rep. 116.

This case is different to the case where a legal estate is acquired to cure a defective title :

Pilcher v. Rawlins, 25 L. T. Rep. 921; L. Rep. 7 Ch. 259.

Norton, K.C. in reply.—The defendant purchased with notice of an incumbrance, which is, as a fact, still subsisting. The cases dealing with the protection afforded by the legal estate do not apply to a case like the present. There appears to be no reported case directly in point.

Cur. adv. vult.

May 31.—*BYRNE, J.*—The defendant having contracted with one, Taylor, for the purchase of certain leasehold property, her solicitors were furnished with an abstract of title which did not disclose an existing equitable incumbrance created by memorandum, and deposited with title-deeds in favour of the plaintiff. Upon searching the file in bankruptcy to satisfy themselves that a receiving order which had been made against the vendor had been discharged (as in fact it had been), the purchaser's solicitors got notice of the existence of the incumbrance in favour of the plaintiff, and they thereupon wrote to the vendor's solicitor as follows: "Dear Sir,—3 and 4, Mornington-villas. We have to-day made the usual searches; but we thought it necessary to inspect

the bankruptcy proceedings to see that the receiving order that had been made had been discharged. We see that in these proceedings it was stated that Nos. 3 and 4, Mornington-villas were subject to a mortgage for 450*l.* Please let us have an abstract of this mortgage and the discharge of it." A telephonic communication then passed, the effect of which is given in the next letter, and on the 5th Aug. 1899 a reply was sent: "Dear Sir, —Re 3 and 4, Mornington-villas, I am in receipt of yours of yesterday, and, as I informed you on the telephone this morning, the mortgage you refer to is a mere memorandum of deposit of deeds, and I shall be prepared to hand you the same with receipt indorsed on completion. I trust you will be able to arrange for completion one day during next week as I want to get away by the 14th." The defendants' solicitors were satisfied with this, and completion took place in due course on the 10th Aug. 1899, when an assignment of the property by the vendor to the defendant passing the legal estate was duly delivered. At the same time the memorandum of deposit with what purported to be an added receipt, dated the same 10th Aug. 1899, in due form for all moneys due on the security, signed by the plaintiff, was handed over to the defendant's solicitors together with the title deeds relating to the property. In fact, the signature to the receipt was not that of the mortgagee who knew nothing about the transaction, but was a forgery committed by the solicitor acting for the vendor, the mortgagor. The memorandum of deposit and title deeds were in the hands of Charles Parr the solicitor, having been left with him for safe custody by the plaintiff; but I cannot find that he had any authority, either express or implied, to deal in any way with these documents. No reasonable precaution was neglected by the purchaser; nor was the plaintiff, the mortgagee, guilty of any negligence or misconduct. Under these circumstances, the question arises whether the defendant, having the legal estate and possession of the title deeds, is entitled to hold the property free from the mortgage, or whether the plaintiff as equitable mortgagee can uphold his security. I think that the contention of the plaintiff must prevail. There was a subsisting charge in his favour, of which the defendant had notice prior to the payment of the purchase-money. Having this notice, it was for the defendant or his solicitors on his behalf to be satisfied that the incumbrance was discharged before parting with the money. The defendant's solicitors were satisfied with what appeared to be, but was not in fact, sufficient evidence, and I am unable to say that the fraud practised upon them by the vendor's solicitor enabled the defendant to stand in the same position as if he had never had notice of the charge. If the arrangement had been that the equitable mortgagee should join in the assignment to the defendant, and he had not joined but some person had fraudulently personated him and forged his name at the completion, the point would have appeared, I think, clear, but the principle seems to me the same. The case is a hard one upon the defendant, and not the less so because if less diligence had been shown by the gentleman who actually made the search in bankruptcy, the mortgage would probably never have been disclosed and the purchaser could then have claimed to be a purchaser for value without notice; but, on the

other hand, a decision against the plaintiff would have been equally hard upon him, as he would have been deprived of his security without any default on his part by the fraud for which I feel bound to hold the defendant must suffer instead. A point was taken that the memorandum of deposit did not operate as a charge, because the property included in it was not described, but inasmuch as the mortgagor and mortgagee as well as the purchaser all knew and acted upon the footing that the property intended to be dealt with by the memorandum was, as in fact it was, that to which the deposited deeds related, and as the deposit alone would have created an effectual charge, I do not think that this objection is well founded or can affect the result.

Solicitors: *Watson, Dyer, and Rydon; Shepheards and Walters.*

Thursday, May 1.

(Before FARWELL, J.)

Re DAVIS; GRIFFITH v. DAVIS. (a)

Donatio mortis causa.—*Delivery of a cheque accompanied by a written request that a third party shall pay same to donee after decease of donor—Gift declared invalid.*

An invalid lady with the help of a friend sent three cheques, each for the sum of 100l., made out to three different persons, to another friend of hers with a letter couched in the following terms: "Miss Davis wishes me to send you the three inclosed cheques for you to keep for her, and in case of her death, and then see the said persons have the money, &c." Miss D. died upon the following day.

Upon an originating summons taken out by the executor to ascertain whether he was justified in paying the three sums of 100l.:

Held, that there had been no valid donatio mortis causa, and that the executor was not at liberty to honour the cheques.

ORIGINATING SUMMONS to determine (*inter alia*) whether the plaintiff as executor of Mary Ann Davis, who died on the 15th March 1900, was at liberty to pay the amount of three cheques for 100l. each, drawn by the testatrix in favour of William Davis (since deceased) and the defendants Eliza Davis and Florence Elizabeth Davis respectively, and delivered by her on the day preceding the date of her death to one W. Sandoe.

On the 14th March 1900 H. E. Hollis sent the cheques in question to Mr. Sandoe, together with the following letter:

Miss Davis wishes me to send you the three inclosed cheques for you to keep for her, and in case of her death, and then see the said persons have the money. She seems so to worry about them that we think it better to send to you at once; but we do hope her life may yet be spared, though she certainly is very seriously ill. I am beyond grieved (*sic*) to see her so changed in so short a time, and with her many complaints feel it will be hard for her to get over it.

By her will, dated the 7th Jan. 1899, the deceased had bequeathed to William Davis (*inter alia*) the sum of 100l.; and she had also bequeathed to Eliza Davis the sum of 150l. then due from Eliza Davis to the testatrix.

On the testatrix's death the cheques were delivered by Mr. Sandoe to the several payees, who presented the same for payment; but, in consequence of the bank having notice of the testatrix's death, the cheques were not paid.

The executors of William Davis and the defendants Eliza Davis and Florence Elizabeth Davis claimed payment of the amounts of the cheques.

The defendant Eliza was the widow of the testatrix's late brother George Davis named in her will, and the defendant Florence Elizabeth Davis was the widow of William Davis.

Ford for the summons.

Bramwell Davis, K.C. and Gatey for one of the donees.—Although it is clear that the mere gift of a cheque is not *per se* a *donatio mortis causa*, the delivery of a cheque with a letter, as in this case, amounts to a direction to a person having money of the testatrix, to hand it over to persons named. He referred to

Rolls v. Pearce, 36 L. T. Rep. 438; 5 Ch. Div. 730;

Tate v. Hibbert, 4 Bro. C. C., 286;

Veal v. Veal, 27 Beav. 303.

Hewitt for the two other donees.

Ford in reply.

FARWELL, J.—I cannot come to the conclusion that the delivery of any one of the three cheques in the manner described amounted to a *donatio mortis causa*. The facts of the case are simple. The day before her death the testatrix instructed a Miss Eliza Hollis to write the following letter to Mr. Sandoe. [His Lordship here read the letter above set out, and continued:] She also instructed Miss Hollis to forward the three cheques. Inasmuch as a cheque cannot be the subject of a good *donatio mortis causa*, it is clear that sending it in the manner above described is not a gift on trust, and it is also clear that there was no immediate *donatio*. I adopt the reasoning of Cotton, L.J. in the case of *Re Hughes* (59 L. T. Rep. 586; 36 W. R. 821). In that case, a man having made his will in 1880, by which he gave the income of his property to his wife, fell ill in 1887, and, being in anticipation of death, signed the following document: "I give all my insurance money that is coming to me to my wife B. for her own use, as well as 200l. in the bank. This is my wish. Signed A. Witness C." This document was placed with the will and remained there until the death of the testator. It was argued (*inter alia*) that this amounted to a valid *donatio mortis causa*. Cotton, L.J. in the course of his judgment said: "It has been argued that the gift, or so-called gift, may operate as a *donatio mortis causa*; but, in my opinion, this argument cannot succeed. If a chattel or a deposit note be handed over by a person in contemplation of death, so as to confer a complete title on the donee, there may be a good *donatio mortis causa*. But the subject of this alleged gift was not property the title to which, or the evidence of title to which, passes by delivery, to which property alone, speaking generally, the doctrine of *donatio mortis causa* applies." I apply that judgment to the present case by saying that a cheque is not the proper subject-matter of a *donatio mortis causa*. The testatrix merely attempted to make a will by means of an unattested document.

Solicitors: *C. J. Brayshaw; C. T. Courtney-Lewis*, for *W. Langley Smith*, Gloucester.

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Re CHENOWETH; WARD v. DWELLEY.

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Wednesday, June 25.

(Before FARWELL, J.)

Re CHENOWETH; WARD v. DWELLEY. (a)

*Gavelkind—Custom of—Male heirs—Degrees of remoteness.**The custom of gavelkind is the common law of the land in Kent, and lands held thereunder descend to male heirs in all degrees of remoteness.*

ADJOURNED SUMMONS.

By his will dated the 27th Nov. 1899 the testator after making certain pecuniary bequests devised and bequeathed all his real and personal estate unto and to the use of F. H. Ward, his heirs, executors, and administrators, upon trust to sell and thereout pay his funeral and testamentary expenses and the legacies, and hold the residue "upon trust for such of my nephews and nieces, children of William Harris Dwelley, living at my death as being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, and if more than one in equal shares." And he appointed F. H. Ward sole executor thereof.

The testator shortly afterwards died, and the will was duly proved on the 8th May 1900 by F. H. Ward.

It was subsequently ascertained that William Harris Dwelley was a bachelor, and this summons was taken out by the executor asking whether the gift was in these circumstances void for uncertainty, and, if so, whether the testator's heir-at-law or heir or heirs according to the custom of gavelkind (the real estate being in Kent) and the next of kin were respectively entitled thereto.

By an order made on the 16th May 1901 it was declared that there was an intestacy of the testator's residuary estate, and inquiries were ordered as to who was the heir-at-law and who were the heir or heirs according to the custom of gavelkind living at the time of the testator's death respectively.

In pursuance of these inquiries the master found himself unable to determine who were the heirs in gavelkind, and, as only liberty to apply was given by the order, it was necessary that the opinion of the judge should be taken before the certificate was completed. Accordingly the summons to proceed upon the inquiries was adjourned into court. The master had found that there was not sufficient evidence that the property had been disgavelled, and therefore held that the land must be presumed to be gavelkind land.

The testator left no children or nephews or nieces, his only living male relatives at the time of his death being two first cousins and the children of a deceased first cousin.

The question which arose, therefore, upon the summons was whether the rule of the partibility of gavelkind land among all the nearest male relatives extended beyond brothers and their issue to the issue of uncles, or whether the issue of brothers of the deceased having failed, the common law rule of descent was applicable.

H. L. Lewis, for the summons, stated the facts.

Jenkins, K.C. and H. Greenwood for the heir-at-law.—The presumption is always in favour of the

common law, and the contrary must be proved. Though a custom may extend to brothers and sisters, it does not consequently extend further :

Muggleton v. Barnett, 2 H. & N. 653 ;

Hook v. Hook, 1 H. & M. 43.

On the whole, we submit the authorities are in our favour. You have otherwise to find here four stirpes, and they each take according to the custom :

Bac. Abr. 641.

[*Upjohn*, K.C.—That is contrary to what he says under gavelkind.]

1 Coke 840a, sect. 210, and note of Mr. F. Har- greaves, sect. 225.

We admit that the authority of Robinson on Gavelkind is against us, and that other writers share the opinions there stated. See

Robinson on Gavelkind, 3rd edit. (1822), 116n ;

Chitty on Descents, 183.

[FARWELL, J.—In *Cole v. Wade*, referred to in Mr. Wilson's note on Robinson, p. 117, it was held in 1657 that one instance of a custom was enough.] Elton, in his edition of Robinson, says that second cousins and those once removed were accepted as co-heirs. But there is no reported case really in point, and your lordship has to choose between the opinions of experts.

Upjohn, K.C. and *Stainer* for the heirs in gavelkind.—We say (1) that apart from statute the authorities are conclusive in our favour; (2) inasmuch as the custom is not against common law or common right there is not that presumption on which the heir-at-law relies. It is a different case from a manorial custom by exception from the common law; (3) if this case comes within those cited, then there is ample evidence of the existence of instances where heirs have taken beyond those in the degrees here. There are two statutes which bear on the case, 17 Ed. 2, c. 16, *De Prerogativa Regis*, and 31 Hen. 8, c. 3, the *disgavelling Act*. Those Acts show that the custom of descent *entre les males* is universal. The following authorities are also in point :

2 Ed. 3, Yearbook, fo. 12, No. 5 ;

3 Ed. 3, Yearbook, pl. 38 ;

5 Ed. 3, Yearbook, fo. 64 ;

8 Ed. 3, Yearbook, p. 42 ;

26 Hen. 8, Yearbook, p. 4, No. 19.

Elton, at p. 19 of his edition of Robinson, sets out quotations from Glanville and Bracton, and distinguishes between tenancy by knight service and common socage. The latter was the common tenure before the Conquest :

Doe d. Long v. Laming, 2 Burr. 1100. See also

Brooke's Abr. 186 ;

3rd Report of the Real Property Commissioners, p. 9 ;

Co. Litt. 140a ;

1 Roll. Abr. 623, A 2 ;

Lambard's *Perambulation of Kent*, 483 ;

Somner on Gavelkind, p. 53 ;

Bac. Abr. 54 ;

Watkins on Descents, 3rd edit., 113.

Jenkins in reply.—You must show in gavelkind what the custom is. The cases turn on descriptive words showing the gavelkind tenure; but the question here is, who is the heir? And the court is asked to decide whether the custom gives the land to male heirs generally. The statutes which have been referred to were passed

(a) Reported by A. W. CHASTER, Esq., Barrister-at-Law.

for an altogether different purpose. The rule no doubt applies within certain degrees of consanguinity, but otherwise it is not strictly true. *Gooding v. Gooding*, referred to in Mr. Wilson's note on Robinson, p. 117, is in our favour. *Hook v. Hook* (*ubi sup.*) shows how that case ought to be approached. If it were the old common law, that was customary and the custom must be ascertained now. The men of Kent were confirmed in their privileges in the time of Edward I.

FARWELL, J.—The question I have to determine is whether the customary descent in gavelkind stops at the relationship of brothers and their issue, or whether it extends to all branches and degrees of relationship however remote. In my opinion, this is really a question of law, and not, as Mr. Jenkins has said, a question of fact. I regard it in this light: Gavelkind is put in Mr. Elton's edition of Robinson on Gavelkind thus at p. 28: "It is plain that the continuance of this custom in Kent stood in no need of any confirmation from the Conqueror, since it was in his time the common law of the kingdom"; and in the third edition of Robinson, at p. 50, thus: "From the judicial knowledge of our custom it follows that if heirs in gavelkind bring an action ancestral and declare on the custom, it cannot be traversed that there is no such custom of gavelkind, for it is the common law where it is used; and it is of record and known at the common law, and therefore twelve men shall not make trial of it." The materiality of that appears to be this: In the case of an ordinary custom as the custom of a manor, that is a contravention of the common law. The custom has to be proved and depends on the user of it which is proved. I entirely accept Mr. Jenkins's proposition taken from the judgment of Crompton, J. in *Muggleton v. Barnett* (*ubi sup.*) that "the authorities seem to me to establish the rule that proof of a custom of descent, contrary to the course of the common law, prevailing in a nearer degree of consanguinity is no proof of such custom extending to a more remote degree." That appears to be irrelevant as an authority as to what is in fact a portion of the law of the land, because in Kent gavelkind, as Robinson says, is the common law of the land. Now, in order to ascertain what is the common law where there are no decisions, it is always the practice of the court to refer to the opinions of persons who are deceased and were considered learned in that department of the law. The common law of England is itself unwritten, and was of general custom in its origin. In order to ascertain what it is when there are no decisions to guide the court one must have regard to the wisdom of our ancestors as to what was their view of the law. It is to me reasonably plain on the authorities cited, assuming it to be a question of law and not of fact, that the opinions of the great majority, if not of all the persons learned in the law which have been cited, are in favour of the generality and partibility of gavelkind lands among all descendants. To begin with the report of the Real Property Commissioners—these reports are extremely valuable on a question of law, although I have my doubts as to their admissibility on a question of fact. They are the essence of the expression of opinion of learned persons who were summoned to assist the commissioners in their inquiry. In the third report,

at p. 8—Gavelkind—I find this: "This custom prevails with respect to socage lands over almost the whole of the county of Kent, and, in a qualified manner, over copyhold lands in various parts of the kingdom. It is attended with many serious practical inconveniences which do not admit of an effectual cure except by its abolition. The principal peculiarities which distinguish socage land subject to the custom of gavelkind from free and common socage are (1) That the land descends to all males in equal degree in equal shares." This perfectly general statement is not confined in its sense to brothers, for it says "all males," and is consistent both with the old authorities cited to me and also with the Acts of Parliament. To my mind the disgavelling Act of 32 Hen 8 is particularly important, because the Legislature thought it there necessary not merely to disgavel, but to go on and declare that the common law should apply to the land so disgavelled. If the custom were similar to a manorial custom contrary to the common law when abrogated, the old common law would revive. That is not the case with gavelkind lands, and in fact that is pointed out in the treatise of Lambard's *Perambulation of Kent*, p. 536, in the edition of 1596: "Yea, so inseparable is this custome from the land in which it obtaineth, that a contrarie discent (continued in the case of the Crowne it selfe) cannot hinder, but that (after such time as the lande shall resort againe to a common person) the former inveterate custome shall governe it. As for the purpose. Landes of Gavelkynde nature come to the Queenes handes by purchase or by eschete as holden of her manor of A. which she purchased. Now, after her death all her sonnes shall inherite and divide them; but if they come to her by forfeiture in treason or by gifte in Parleament so that her Grace is seized of them in *Jure coronæ*, then her eldest sonne only (which shall be King after her) shall enjoye them." The custom of gavelkind, therefore, appears to me not against the common law, as stated in some curious cases in the Year-books, but to be, in fact, the common law of the land in Kent. In Chitty on Descents, p. 186, there is this statement: "From the cases in the Year-books (2 Edw. 3, 12; 3 Edw. 3, 42) it seems clear that gavelkind lands are *departible enter males* generally; and it may be concluded that the general partible and divisible quality of lands of gavelkind tenure is, as it is frequently termed, 'the common law of Kent,' and this being the case the custom must of necessity extend to collaterals." The statement in Brooke's Abridgment is to the same effect, and so are the Year-books which have been referred to and the statute 17 Ed. 2, De Prerogativa. In fact, so far as I can see there is no authority except the two conveyancers, to which I shall refer presently contrary to the proposition that the custom of gavelkind in Kent is really the common law of the land in Kent, and not a custom contrary to the common law of England. That being so, I have recourse to the various opinions of the learned persons who have been referred to—Cruise, Joshua Williams, Watkins (I pass over Davidson), and those I have read of Chitty and Robinson. There is considerable authority as to this point. There is the statement in p. 89 of Elton's edition of Robinson thus: "The descent of lands in Kentish gavelkind has long been settled as being among all the sons or

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their representatives, and in default among all the daughters or their representatives, and so in the case of the males and females in other degrees. The rule is stated as follows in the statute *De Prerogativa Regis*, 17 Ed. 2, c. 16. In Kent in gavelkind all the heirs male shall divide the inheritance, and women in the same way; but women shall not share with the men." Mr. Elton was very learned in matters of this nature, and he being unfortunately dead, his opinion is properly cited, and the court would attach great weight to it. He expresses no sort of doubt as to the generality of the proposition. He states again on p. 93: "The extension of the Kentish custom to collaterals in every degree is proved partly by the generality of the language of the ancient records, which usually state that the lands are 'partible among the males,' as in the statute *De Prerogativa Regis* (7 Edw. 2, c. 16), and in the Year-books (3 Edw. 3, 38, pl. 12 and 26; Hen. 8, 4, pl. 19), and partly by the modern practice and the common reputation in the county that the custom extends to the most remote collateral degree." Without going over all the cases again, it is sufficient to say that there is an overwhelming body of authority, so far as the question of law is concerned, in favour of the generality of the divisibility of lands in gavelkind. Now, I do not understand that the conveyancers, whose opinions are cited in *Gooding v. Gooding*, referred to in Chitty, p. 183, are really intended to be concluded opinions on the point. The opinion of Mr. Butler appears to me to a certain extent to be contrary to mine. Mr. Preston is contrary to that, and has a great name. Mr. Butler regarded it—and with all deference, to him I feel I cannot agree—as a question for a jury. If I am right that the question is one of law, it is not for a jury at all, but for the judge as to how far the custom of gavelkind does extend. Now I will deal with the matter as a question of fact. Assuming that it is a question of fact, I have authority in the cases referred to in *Muggleton v. Burnett* (*ubi sup.*)—namely, *Doe v. Mason* (3 Wils. 63)—that one instance in case of a custom of a manor of admission of the youngest nephew was sufficient evidence of the custom of the manor that the youngest nephew should succeed in the particular case. The case of *Cole v. Wade* is one as to which the counsel in the case have taken considerable trouble, and the statement of Mr. Elton as to that case appears to be inaccurate. Mr. Wilson also in a note has another statement that the second cousins and those once removed were accepted as co-heirs. That is one instance, supposing we are looking at it as a question of fact, that has been verified by counsel. So again in the case in lunacy of *Re Fullagar*, cited by Elton at p. 93, he says: "On a reference to ascertain who were his heirs in gavelkind, the master reported that several descendants of six sons of

the lunatic's two aunts were his co-heirs in gavelkind, and the report was confirmed." There again if it were a question of fact, the rule has been extended beyond the degrees in the present case. Again we have the conclusion arrived at in Mr. Wilson's note in Robinson, at p. 117: "The editor has been favoured with the briefs in the late case of *Doe dem. Gooding v. Gooding*, which was an ejectment brought by the son of the youngest son of an uncle of the deceased against the eldest son of the uncle, the defendant being the heir at common law and the lessor of the plaintiff claiming as co-heir in gavelkind. It appears that many attorneys of great experience in the county were ready to prove that according to the general reputation the custom extends through all the branches of inheritance; and various instances were collected of the customary partition between the descendants of uncles and great-uncles. It may not be improper to mention two or three of these instances. On a trial at Nisi Prius in the year 1790, Thomas, Sarah, Richard, and Boys Pilcher, descendants of three sons of Stephen Pilcher, who was a great-uncle of John Eaton the intestate, recovered as co-heirs of Eaton. In the case of *Cole v. Wade* in Chancery the master reported that John Beard was the heir-at-law of John Cole, Esq., the intestate; and that John Cole who was a second cousin, and John Beard, Samuel Cole, and John Cole, who were second cousins once removed of the deceased, were his co-heirs in gavelkind; this report was confirmed, and it is understood that partition was made accordingly. In the case of Samuel Fullagar, against whom, in the year 1812, a commission of lunacy issued, on a reference to ascertain who were his heirs in gavelkind; the master reported that several descendants of six sons of the lunatic's two aunts were his co-heirs in gavelkind. This report was confirmed; and after the decease of the lunatic the several parties so reported to be his co-heirs in gavelkind joined in conveying to a purchaser apportioning the purchase money according to the report. This evidence would be sufficient to support customs which are against common right: (*Doe v. Sisson*, 12 East. 62). The case of *Doe v. Gooding* was abandoned by the defendant." If then I have regard to the case as a question of fact and not of law, then it appears to me that there is sufficient evidence to enable me to decide in accordance with the view expressed by those learned in the law who are authorities on the subject. I find, therefore, that the custom of gavelkind does extend to all degrees of remoteness. And therefore I answer the question in that way. I should have mentioned that I attach great weight to Mr. Hargreaves's note which was retained by Mr. Butler after the decision in *Gooding v. Gooding*.

Solicitors: Calkin, Lewis, and Stokes.

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